THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 535

Record No. 2021/ 881 JR

BETWEEN:

F.P.

APPLICANT

AND

INTERNATIONAL PRTOECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

Judgment of Mr Justice Cian Ferriter this 28th day of July 2022

Introduction

1. In these proceedings, the applicant seeks an order of *certiorari* quashing the decision of the first respondent ("the Tribunal") of 5th September 2021 recommending that the applicant should be granted neither refugee status nor subsidiary protection ("the decision"). The essential basis upon which the applicant seeks relief is his claim that the Tribunal acted in breach of fair procedures in not indicating prior to the decision that it was of the view that an oral hearing of the appeal was not necessary in the interests of justice (the appeal being one governed by the "accelerated appeal procedure" set out in s.43(b) of the International Protection Act 2015 ("s.43")) and in proceeding to determine the substantive appeal without having invited or received submissions from the applicant in respect of the substantive appeal.

Background

2. The salient background to the matter is as follows. The applicant is an Albanian national who arrived in Ireland from Albania on 26th September 2019 and who sought international protection here on the basis that he feared persecution if returned to Albania by reason of a "blood feud" which his family had become embroiled in as a result of debt incurred arising from borrowings taken out by his father. The applicant alleged that as a result of threats received by his father, he and his brother were sent to their uncle's house where they themselves were then threatened. After some two years in effective

hiding in a different part of Albania, the applicant claims that he and his brother returned home after which he says he was badly assaulted. This incident resulted in he and his brother leaving Albania. The applicant ended up in Ireland on 26th September 2019 having travelled via Turkey and Italy.

3. The applicant's first instance application for international protection was rejected by the International Protection Office ("the IPO") on 28th July 2020 on the basis that the IPO did not accept the credibility of his story.

4. The IPO's report recommended that the applicant be granted neither a declaration of international protection nor recognition of subsidiary protection. The report included a finding that the applicant's country of origin, Albania, is a safe country of origin within the meaning of s.72 of the 2015 Act as Albania had been designated by the Minister as a safe country of origin by the International Protection Act 2015 (Safe Countries of Origin) Order 2018. As a result of this finding, the accelerated appeal procedures provisions of s.43 applied to the applicant's appeal. S.43 provides in relevant part as follows:

> *"(b) notwithstanding the provisions of section 42, the Tribunal, unless it considers it is not in the interests of justice to do so, shall make its decision in relation to the appeal without holding an oral hearing."*

5. S.42 provides, in material part, that the Tribunal shall hold an oral hearing for the purpose of an appeal to the Tribunal from the IPO where an appellant has requested this in his or her notice of appeal or where the Tribunal is of the opinion that it is in the interests of justice to do so.

6. The applicant was not legally represented during the IPO process. The applicant wished to appeal the IPO decision. He went about getting legal aid and, ultimately, was assigned a solicitor (SMD solicitors in Cork) to assist with his appeal. His solicitor prepared a notice of appeal to the Tribunal and sent the notice of appeal to the Tribunal by letter of 16th September 2020 requesting an extension of time for lodging the appeal, explaining that the applicant did not speak English, was away from his place of residence in Cork when the IPO decision was delivered and had applied for legal aid once he understood the importance of the decision having had a friend translate the decision. In this letter, his solicitors explained that they had been instructed on 2nd September 2020 and needed to arrange for an interpreter. The email address specified in the letter paper of the applicant's solicitors was info@smdsolicitors.ie.

7. In the standard form notice of appeal, in the section headed "Part 7: oral hearing (if applicable)", the applicant ticked "yes" to the question "*do you wish to have an oral hearing in connection with your appeal*?". A note in this part of the appeal document states: "*you may not be entitled to an oral hearing if the international protection officer has made any finding referred to in section 39(4) as part of the recommendation in your application (accelerated appeals)*." (Pursuant to s.39(4) of the 2015 Act, where an IPO report includes a recommendation of the IPO that the applicant should be given neither a refugee declaration nor a subsidiary protection declaration, the report may also include a finding that the applicant's country of origin is a safe country of origin).

8. The next immediate part of the appeal form, part 8, is headed "*accelerated appeals (if applicable)*". This section of the appeal form invites the appellant to "*set out any reasons why you consider it in the interests of justice that a hearing be held in your appeal.*" The applicant inserted "*n/a*" in this section. The note immediately under that question and answer states: "*if the international protection officer has made any finding referred to in section 39(4) as part of the recommendation in your application, your appeal is subject to certain accelerated appeal procedures set out in section 43 of the International Protection Act 2015*".

9. The Tribunal replied to the applicant's solicitor's letter of 16th September 2020 by email dated 21st September 2020 to the email address specified in the 16th September 2020 letter i.e. info@smdsolicitors.ie. The replying email was headed "*Accelerated appeal - designated safe country of origin*".

10. The first paragraph of the email stated: "*I wish to acknowledge receipt of a notice of appeal for your above-named client on 17/09/2020 to the International Protection Appeals Tribunal. This appeal is now accepted*."

11. The email went on to state:

> *"As you will be aware, section 43 of the International Protection Act, 2015 (the Act) provides for an accelerated appeal procedure where the Report prepared by the International Protection Officer under section 39 of the Act contains any of the findings referred to in section 39(4).*

In this case, the report contains a finding that the applicant's country of origin is a safe country of origin under section 39(4)(e). Accordingly, in accordance with s.43(b) of the Act, the tribunal will make its decision without holding an oral hearing unless it considers it is not in the interests of justice to do so.

The Tribunal has noted your client's request for an oral hearing. This will be brought to the attention of the Tribunal member to your client's appeal is assigned."

12. The applicant's solicitor, Susan Doyle, has averred that she did not receive this email and that the next she heard from the Tribunal, following submission of her letter of 16th September 2020 seeking an extension of time for lodging the appeal and enclosing the notice of appeal, was on 7th September 2021 when she received the Tribunal's decision.

13. Ms. Doyle averred that "*I did not know that my client, the applicant's appeal was taking place at all, or that the appeal was being determined by the first respondent [the Tribunal] on the papers only.… I was shocked when I received the decision. I phoned the first respondent to clarify what has happened, as I had not received any correspondence from the first respondent since I had requested the extension of time within which to bring an appeal*". She went on to aver that she had no awareness that the applicant's appeal hearing was to be conducted on the papers only and that she "*had no opportunity to provide legal representation to my client for his appeal conducted by [the Tribunal] and could not make submissions on his behalf, as I did not know that the hearing was being conducted on the papers only, or that the extension of time within which to bring an appeal had been granted." She further states that she "had no opportunity to make submissions or participate in any way in the applicant's appeal determination*."

14. In a supplemental affidavit, Ms. Doyle averred that she "*checked my office's email inbox and deleted messages several times, and I cannot find the email sent by the first respondent on the 21st September 2020. Even if I had received this email the email simply confirms receipt of the notice of appeal, and the appeal was now accepted. Importantly, no decision was made or referred to in this email about whether or not the applicant would be afforded a hearing in person*." She went on to contend that the reference in the Tribunal's email of 21st September 2020 to the Tribunal noting her client's request for an oral hearing and that this "will be brought to the attention of the Tribunal member to whom the client's appeal is assigned" implied to her that "*a decision would be made and communicated with the applicant and myself about whether or not the hearing was going on in person or on the papers only. Otherwise, there would be no*

reality to myself or the applicant having any knowledge about the appeal process going on, at all".

15. Ms. Doyle then averred that "*it is standard practice that [the Tribunal] would communicate with applicants prior to making a decision if the hearing should proceed on the papers only, that the applicants may make submissions on why an oral hearing is required*." She complained that she had no opportunity to make representations to the Tribunal about why the hearing should be had in person or to email written submissions to the Tribunal "*as I did not know the hearing was going, at all, whether in person or in the papers only*." She made the point that written submissions were all the more important with "papers only" appeals is as it is the only opportunity which she would have had to make legal submissions on behalf of the applicant.

16. The decision on its front-page states "papers only consideration". The decision references the background to the matter and the applicant's notice of appeal. The decision then states (at paragraph 9) as follows:

> "*The Appellant in the Notice of Appeal elected to have his appeal application dealt with by way of a full oral hearing. The tribunal refers to the provisions of s.43(b) of the 2015 Act which provides that where the IPO in its report further to s.39 of the 2015 Act makes a finding that the appellant's country of origin is a safe country of origin under s.39(4)(e) of the 2015 Act, the Tribunal can proceed to make a determination on the Appellant's appeal having regard to the papers only unless the Tribunal considers it is not in the interests of justice to do so. The Tribunal has considered whether under the circumstances the Tribunal can proceed to make a determination herein on the Appellant's appeal on an examination of the papers only. The Tribunal finds that it can proceed to make a determination herein on the appellant's appeal.*"

17. The decision goes on to find that the applicant's case was not credible and affirms the recommendation of the IPO that the applicant would be given neither a refugee declaration nor a grant of subsidiary protection.

18. The respondents in their replying affidavit evidence exhibited "*An Administrative Practice Note in respect of Appeals Before the International Protection Appeals Tribunal*" published on 31st July 2020 ("the Practice Note"). The Practice Note states that appeals under the accelerated appeals procedure:

"shall take place without an oral hearing unless the Tribunal Member to whom the case has been assigned considers that an oral haring is necessary in the interests of justice." (see page 6)

19. In addition, the Practice Note goes on to state as follows:

"If the appeal is to proceed without an oral hearing, the documentation and index should be submitted with the Notice of Appeal. While the Tribunal may seek further information in appeals of this type, an appellant should not take for granted that there will in fact be any communication between the Tribunal and an appellant from the time the Notice of Appeal is lodged until the decision is made." (see page 10 under paragraph entitled "Submission of material / documentation to the Tribunal")

20. In light of the averment of the applicant's solicitor as to the alleged "standard practice" of the Tribunal to communicate with applicants prior to making a decision as to whether, in an accelerated appeal context, a hearing would be held orally or on the papers only, I gave leave to the respondents at the hearing of this matter (on 23rd June 2022) to put in any evidence they might wish to rely on in answer to that averment. In a replying affidavit of 30th June 2022, the Chairperson of the International Protection Appeals Tribunal, Hilkka Becker, averred as follows:

"I can confirm that no such 'standard practice' exists. It is clear from the statutory Notice of Appeal itself, which is contained in Schedule 1 of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No. 116 of 2017) that an appellant "may not be entitled to an oral hearing if the International Protection Officer has made any finding referred to in section 39(4) as part of their recommendation in [an] application (accelerated appeals)*". In cases to which section 43(b) of the International Protection Act 2015 applies, all appellants are sent a letter from the Tribunal setting out that the Tribunal will make its decision without holding an oral hearing unless it considers it is not in the interests of justice to do so. Furthermore, where the Notice of Appeal includes a request for an oral hearing, the appellant is informed via his or her legal representative that "the Tribunal has noted [the] request for an oral hearing. This will be brought to the attention of the Tribunal member to whom your client's appeal is assigned". It is a matter for each individual Tribunal Member, who are independent in their decision making, 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."*

21. In an affidavit in response to the above, the applicant's solicitor referenced examples of communications received by her firm from the Tribunal concerning requests for oral hearings in s.43 cases. She stated that she had frequently received decisions from the Tribunal in favour of holding an oral hearing which would inform her as legal representative of the fact that the Tribunal had decided to hold an oral hearing and would provide time for the lodging of submissions and additional documentation prior to that oral hearing. She averred that in cases where an oral hearing had been requested but refused, she had received letters in which the Tribunal stated it had considered submissions in respect of s.43(b), had decided it was not satisfied the interests of justice required an oral hearing of the appeal and then invited further submissions prior to the Tribunal determining the appeal on the papers.

The parties' positions

22. The applicant's essential case is that the Tribunal should have informed the applicant of its decision (or intended decision) not to hold an oral hearing in respect of his appeal in advance of issuing its decision on his substantive appeal, to allow him make submissions on the substantive appeal; in failing to do so, the Tribunal acted in breach of fair procedures with the result that the decision was arrived at in breach of the applicant's rights and should therefore be quashed.

23. The applicant submits that he would have had a good basis to contend for an oral hearing in this matter as the IPO had rejected his case on credibility grounds and it would accordingly have been in the interests of justice, within the meaning of s.43(b), to hold an oral hearing of the appeal in order to allow the applicant's credibility be fairly assessed. The applicant relied in this regard on my decision in *SK v IPAT* [2021] IEHC 781 ("SK"). He also relied on the Supreme Court decision in *Zalewski v Workplace Relations Commission* [2021] IESC 24 ("*Zalewski*") which he contended confirmed that it is not appropriate for a Tribunal to proceed to a final decision without having heard from the appellant in the process. The applicant further relied on authorities on the application of the *audi alterem partem* principle in a refugee appeal hearing context such as *H v IPAT* [2019] IEHC 98 and *Idiakheua v Minister for Justice, Equality and Law Reform* [2005] IEHC 150 which emphasise the importance of an applicant being afforded an opportunity to address an appeals tribunal on matters relevant to the tribunal's determination prior to such determination.

24. The respondents' position is that the onus is on an appellant to advance his appeal before the Tribunal and that there is no onus on the Tribunal to positively follow-up with an

appellant to invite submissions from him in circumstances where an appellant is on notice, in an accelerated appeal procedure context under s.43, that the default position is that an appeal will proceed on a "papers only" basis.

25. The respondents, to quote from their written submissions, submitted "*it is extraordinary that the Applicant is now seeking to complain before this Court that he was prejudiced by the fact that he did not receive an advance decision as to whether an oral hearing would be taking place in respect of his substantive appeal. The express provisions of Section 43 itself and the contents of the Practice Note make it clear that the default position is that no oral hearing will take place (unless the interests of justice require same) and that he should not expect any further communication from the Tribunal*."

Discussion

26. In light of the applicant's submissions, it is important to be clear on what I decided in *SK*. *SK* was a case where, on the particular facts, the applicant had sought an oral hearing before the Tribunal in a s.43 context where the IPO at first instance had rejected the credibility of his claims that he had suffered persecution on account of his sexuality as a gay man in Georgia. On the facts of that case, the Tribunal wrote to the applicant, on receipt of his request for an oral hearing, stating its view that it was not in the interests of justice to hold an oral hearing. The applicant then submitted detailed written submissions as to why the Tribunal would be wrong to maintain that position and why it was in the interests of justice to have an oral hearing. The Tribunal then issued a decision deciding it would not permit an oral hearing. I held that the Tribunal acted unlawfully, on the facts, in arriving at that decision in circumstances where it did not properly engage with the essential case advanced by the applicant as to why there should be an oral hearing.

27. In the course of my judgment in *SK* I addressed (at paragraph 30) the types of matters which might be taken into account by IPAT when considering an application for an oral hearing in the context of a sexual orientation/gender identity case. I did not in that case consider, let alone determine, whether an appellant under the accelerated appeal procedure provided for in s.43 was *entitled* to a decision in advance of the substantive appeal determination as to whether or not an oral hearing would be conducted. Further, I did not address the question as to whether there was an onus on the Tribunal dealing with a s.43(b) appeal to communicate its thinking as regards whether or not there should be an oral hearing in advance of its substantive determination of the appeal. I did not consider the contents of the Practice Note, or of the standard appeal form, or the implications of same for an appellant's expectations of the shape and structure of the accelerated appeal process on any given set of facts.

28. Accordingly, and for the avoidance of any doubt, *SK* is 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 interests of justice that there should be an oral hearing of the appeal and the second stage involving, depending on the decision reached at the first stage, either a papers-only determination (with an appropriate opportunity for the appellant to lodge written submissions and any additional documentation before that determination) or an oral hearing (with appropriate opportunity for the appellant to lodge written submissions and any additional documentation before that hearing).

29. The passages from the Practice Note quoted earlier in this judgment make it clear that an appellant should not assume that there will be any further communication from the Tribunal following receipt of a notice of appeal in cases where, such as here, the accelerated appeal procedure applies. This seems to me to be in keeping with the terms of s.43 itself which clearly contemplate (in contradistinction to s.42) that, in a safe country of origin appeal context, the default position is that an appeal will be determined on the papers only.

30. While s.43 provides for the Tribunal making its decision in an accelerated appeal without holding an oral hearing unless it considers it not in the interests of justice to do so, the appellant is clearly not a passive participant in the process. The standard notice of appeal requires the appellant to indicate whether they are seeking an oral hearing and, if so, on what basis. The applicant ticked the box on his appeal notice for an oral hearing but did not set out any grounds for that position either in the notice of appeal, in his solicitor's accompanying letter or in any follow-up submissions.

31. The onus is fundamentally on an appellant to prosecute his or her appeal. If, on a given set of facts, an appellant pursuant to s.43(b) advances grounds and submissions in support of an oral hearing i.e. for the Tribunal not adopting the default position in such appeals and calls on the Tribunal to make a decision on that issue in advance of the ultimate determination of the appeal, it may be that fair procedures would require a decision on that issue in advance of the substantive appeal determination. Such an assessment would have to be fact sensitive and the parameters of what may be required as a matter of fair procedures in such a case will have to await consideration in an appropriate case. For present purposes, I believe it suffices to say that 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 governed by s.43(b), that the Tribunal is under an onus to determine the oral hearing issue first and to actively invite submissions from an

appellant on that question, in advance of proceeding to a final determination on the appeal.

32. The striking feature of this case is that there was simply no follow-up at all by the applicant or his solicitor following his solicitor's request to the Tribunal on 16th September 2020 to permit an extension of time to lodge the appeal i.e. for late acceptance of his appeal. On the facts, the Tribunal was entitled to proceed on the basis that the applicant's solicitors had received its replying communication of 21st September 2020. Certainly, there is no evidence to suggest that the Tribunal was aware of the non-receipt by the applicant's solicitor of this email. I do not believe that the applicant can seek to fix the Tribunal with such consequences as may have flowed from the fact that neither the applicant nor his solicitor followed up at any point in the 12 months after the 16th September 2020 letter to establish whether the appeal had been accepted. It was undoubtedly unfortunate on the facts of this case that the applicant's solicitor did not get to see the Tribunal's email of 21st September 2020 at the time it was sent. It may be that if that email had been seen at that time that counsel would have advised the applicant's solicitor to lodge follow-up submissions specifically in support of the request for an oral hearing in advance of any determination of the appeal itself. However, the fact that the Tribunal's email of 21st September 2020 was not seen by the applicant's solicitor, did not, in my view, absolve the applicant from seeking to actively prosecute his application for a late appeal, and, thereafter his appeal if that application was granted. One can reasonably infer that the applicant was in fact content to "let sleeping dogs lie". Having adopted that approach I do not believe that the applicant can now complain that the process was unfair in a legal sense when the process proceeded on the basis advertised in the Tribunal's Practice Note referred to earlier.

33. On the basis of the contents of the Practice Note and, indeed, the terms of s.43, an appellant is on clear notice of the fact that the default position will be that an appeal of this type will be dealt with on the papers. The applicant here had advanced no reasons or grounds at all either in his notice of appeal or the accompanying solicitor's letter as to why it was in the interests of justice that his appeal should be dealt with, contrary to the statutory default position, by an oral hearing. I see no basis in the circumstances for any finding that the Tribunal acted otherwise than in accordance with law. If the applicant wished to ascertain whether his late appeal had been accepted for determination, he or his solicitor could have written at any point to do so. If he wished thereafter to advance submissions as to why his appeal should be dealt with orally or, if not, what his submissions were in respect of the substantive appeal, he could likewise have done so. Instead, the applicant remained silent on all these matters. He does not explain why no reminder letter was sent to the Tribunal, why he did not follow up matters with his solicitor or why he did not otherwise take any steps to establish whether his application for a late appeal had been accepted or to otherwise advance his appeal.

34. As regards the question of the practice of IPAT as regards advance notification of decisions on requests to hold oral appeals under s.43(b), on the basis of the evidence before the Court, it appears to be the case that there is no standard practice in relation to Tribunal members conveying a decision in s.43(b) appeals as to whether or not there will be an oral hearing prior to proceeding to a determination of the substantive appeal, albeit that it does appear that where oral hearings are requested, some Tribunal members take the approach of issuing a decision on such requests in advance of determining the substantive appeal and invite further submissions prior to the determination of the substantive appeal (whether on a papers-only or oral hearing basis) in such instances.

35. One can see how this latter approach is helpful for appellants and their legal representatives in circumstances where a case has been made to the Tribunal as to why an oral hearing will be necessary in the interests of justice, but where the Tribunal does not accept that submission. What distinguishes that type of scenario from the facts of the case before me is that other than ticking the box on the appeal form no positive case at all was made to the Tribunal by the applicant as to why it was said to be in the interests of justice for an oral hearing to be held and no request was made to the Tribunal for a decision on the oral hearing question in advance of a decision on the substantive appeal. In the circumstances, it is perfectly understandable why the Tribunal did not see the need to issue a separate decision on the question of an oral hearing in advance of the determination of the appeal itself.

36. I would further observe that the fact that a Tribunal Member may, in some cases (such as *SK*), issue a separate decision on a request to hold an oral hearing does not mean that the Tribunal is under an obligation to do so in every case. It is certainly not an approach specified or required under s.43(b). A two-stage process, as a matter of the wording of the section, is only *necessary* if the decision maker accedes to a request for an oral hearing, in which case the appellant will then be notified of the holding of an oral hearing. It would appear from the Practice Note that in that eventuality an opportunity will then be permitted to lodge written submissions in advance of the oral hearing. As noted earlier, whether as a matter of fair procedures *entitlement* there should be a prior decision on a request for an oral hearing, where the request is the subject of specific submissions and accompanied by a request that a decision on that issue should issue before the determination of the appeal, is a question that will have to await resolution in an appropriate case.

37. For completeness, I should note that *Zalewski* dealt with a very different scenario, namely, a situation where an adjudication officer of the WRC issued a decision in a contested case without having heard any evidence in circumstances where the applicant understood that the hearing had been adjourned to allow for oral evidence to be heard on

the adjourned date and where the decision was arrived at prior to that adjourned date. *Zalewski* is of no assistance to the applicant on the facts here.

38. It follows from the analysis I have set out above that, in my view, there was no breach of the applicant's right to fair procedures in this case.

Conclusion

39. For the reasons outlined above, I refuse the relief sought.