Neutral Citation [2013] IEHC 95

**THE HIGH COURT**

**[2011 No. 512 J.R.]**

**BETWEEN/**

**SZ (PAKISTAN)**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND LAW REFORM, ATTORNEY GENERAL AND IRELAND (No.2)**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Hogan delivered on the 1st March, 2013**

1. This judgment is supplementary to the judgment which I delivered in these judicial review proceedings on 31st January, 2012. In that judgment I had refused the applicant leave to challenge the validity of a subsidiary protection decision which had been taken by the Minister for Justice and Equality on a different variety of grounds. I had, however, left over two issues for determination by me at a later date pending the decision of the High Court in *Sivsivadze v. Minister for Justice, Equality and Law Reform* [2012] IEHC 244 and that of the Court of Justice in Case C-277/11 *MM v. Minister for Justice, Equality and Law Reform*. As it happens, Kearns P. subsequently delivered his decision in *Sivsivadze* on 21st June, 2012, and the Court of Justice delivered its judgment in *MM* on 22nd November, 2012.

2. I will presently explain the potential significance of these two decisions and their relevance (if any) for the present case. It should be noted, however, that the applicant also seeks to amend his statement of grounds to include a number of issues which were not heretofore pleaded. Counsel for the respondent, Mr. Donnelly, understandably objects to this belated endeavour on the part of the applicant and insists that I have no jurisdiction to do so at this point.

**The background facts**

3. Before considering these questions it is, however, first necessary to narrate again the background facts which are relevant to this application. The applicant is a Pakistani national and a Shia Muslim who arrived here in December 2005, whereupon he applied for asylum. He is married and his wife and three children continue to reside in Pakistan. He had applied for leave to apply for judicial review to challenge both the Minister's decision to refuse to grant him subsidiary protection and the making of a deportation order against him. An important consideration is that the applicant has not, however, challenged the validity of a decision of the Refugee Appeals Tribunal dated 15th September, 2008, as rejected his application for asylum.

4. On the 14th November, 2011, I granted the applicant a stay on the deportation order pending the outcome of the leave application and I delivered the principal judgment on that leave application on 31st January, 2012.

5. The applicant says that he worked for Shia voluntary groups in Lahore in the period from 1994-2001. Every year a commemorative ceremony was held for a particular deceased imam, but in 2001 one of the organisers was killed. The applicant's brothers and a friend wanted to avenge this death and to that end killed a member of Sipah e Sahaba. I should interpose here to observe that Sipah e Sahaba is a radical Sunni organisation which has been banned by the Pakistani authorities. The attitude of Sipah e Sahaba towards the Shia may be gauged by the fact that one of its objectives is to have the Shia treated as non-Muslims.

6. It is contended that this killing was witnessed and that the applicant came to be associated with these events. The applicant claims that on the evening of the attack he was shot in the leg by activists associated with Sipah e Sahaba, but that he managed to escape. The applicant was arrested by the police about one month later about this killing. He maintains that he was tortured and mistreated during this interview and that he needs on-going treatment for slipped disks and spinal injuries as a result. Ultimately, however, the police came to realise that he was not involved in this incident and he was released.

7. After these incidents the applicant moved to Karachi with his family where they stayed three months with his aunt. After a further stay in Multan for six months, his wife and family moved back to Lahore, while the applicant returned to Karachi.

8. The applicant returned to Lahore in June, 2005 following assurances that he would not be harmed. However, following threats issued in anticipation of the annual commemoration for the deceased in October 2005, the applicant escaped to Kuwait before ultimately making his way to Ireland with the assistance of an agent.

9. The applicant's fear is based on the threat posed to by Sipah e Sahaba and a sister organisation, Lashkar e Jhangvi. He contends that there is no effective police protection and that, in any event, his previous experience with the Pakistani police was a very unpleasant one, so that he is unwilling to resort to them.

10. The applicant's asylum claim was ultimately rejected in 2008. The Tribunal member accepted the threat posed to members of the Pakistani Shia community by Sipah e Sahaba. His claim was nonetheless rejected, essentially on the basis that the applicant was able to successfully move about elsewhere in Pakistan and that even though he was not in hiding, he had come to no harm for a period of some four years. This decision was never challenged.

11. The Minister rejected his subsequent application for subsidiary protection on 5th April 2011. While the applicant's credibility was not disputed, the Minister nevertheless concluded that he was not satisfied that:-

> "The applicant had demonstrated that he is without protection in Pakistan and I do not think that there are any substantial grounds for believing that the applicant would be at risk of serious harm by death penalty or execution, torture or inhuman or degrading treatment in Pakistan if he is returned there."

12. Here it may be observed that the decision on the subsidiary protection application is itself a somewhat unusual one in that unlike

perhaps a majority of such cases, the Minister did not rely on adverse credibility findings which had been made by the Refugee Appeals Tribunal in the course of the asylum application. In essence, therefore, both the Tribunal and the Minister accepted the applicant's account of events in Pakistan as substantially accurate. These applications were, however, refused because it was further found (in the case of the Tribunal) that Mr. Z. could either move about in Pakistan without coming to any harm or (or in the case of the Minister's decision with regard to subsidiary protection) because of the existence of adequate police protection.

13. So far as the deportation decision is concerned, the file prepared by the Minister's officials considered the case in some detail. Having set out country of origin information in some detail, the conclusion was reached that the prohibition on *refoulement* contained in s. 5 of the Refugee Act 1996, would not be breached, mainly because there was a functioning police force in Pakistan and it was found that State protection would be available to the applicant. The officials also noted that it was in the interests of the common good that the integrity of the asylum and immigration systems be preserved. While, perhaps, not expressly articulated, the unspoken premise of the Irish asylum and immigration system is that persons who fall in their application for asylum will, generally speaking, be deported absent special circumstances suggesting the contrary. This, in essence, the reason why the Minister made the decision to deport the applicant, as the accompanying note in hand on the deportation decision file from Mr. Michael Flynn, the Assistant Principal, makes clear.

14. In my judgment delivered in January 2012, I first rejected the challenges made to the validity of the subsidiary protection decision and to the deportation decision. Having left over a final adjudication on the indefinite deportation issue and the issue raised in MM concerning the proper construction of Article 4(1) of Directive 2004/83/EC, we may next consider these issues.

**The constitutionality of s. 3(1) of the 1999 Act**

15. As I noted in *U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 492, a deportation order made under s. 3(1) of the Immigration Act 1999 has, in principle, lifelong effects, subject only to the mitigating effects of the revocation power contained in s. 3(11). The applicant now seeks to challenge the constitutionality of this provision and, if necessary, seeks a declaration of incompatibility pursuant to s. 5(2) of the European Convention of Human Rights Act 2003.

16. It is clear from two relatively recent judgments of the European Court of Human Rights in *Emre v. Switzerland* (*No1*)(2008) and *Emre v. Switzerland* (*No.2*) (2011) that life long expulsion orders of this kind will be subjected to a particularly rigorous examination for compliance with the right to family life in Article 8: see, *e.g.*, para. 85 *of Emre (No.1*). In that case a Turkish national who arrived in Switzerland when he was aged 6 in 1980 was subjected to an expulsion order following conviction for a range of serious offences including theft, firearms offences and assault. The Court had earlier noted (at para. 79) that the applicant had completed his education and spent the best part of his life in Switzerland and had resided with his parents and brothers who possessed Swiss nationality. The Court continued (at para. 80):-

> "In comparison with these elements, which, despite his wrongful conduct, demonstrates the necessary integration with Switzerland, the social, cultural and family ties which he maintains with Turkey seem very slender."

17. The Court ultimately proceeded to hold that the imposition of a life long expulsion order in that case was a breach of Article 8 in that it did not strike a fair balance between the interests of family life on the one hand and effective immigration control on the other.

18. Following that judgment, Mr. Emre applied to the Swiss Federal Court in July, 2009 seeking revision of its original judgment. On this occasion, the Federal Court limited his exclusion from Swiss territory to ten years. In September 2009 Mr. Emre married a German national and obtained a German residence permit. He then applied unsuccessfully to have the deportation order lifted so that he could settle in Switzerland. Mr. Emre then made a further application to Strasbourg.

19. In its most recent judgment delivered on 11th October, 2011, the European Court held that the Swiss courts had violated Article 8(2) by imposing a ten year. This was "a considerable period in an individual's life" which "could not be said to have been necessary in a democratic society".

20. There are nevertheless important differences between the decisions in Emre and the present case. First, the applicant's family remain in Pakistan, so he simply lacks the necessary standing to challenge the constitutionality of the life long exclusion order on the ground that it involves the forcible separation of families on a potentially permanent basis. After all, that was the gist of the claim in *Sivsivadze* where the husband was deported to Georgia, leaving a wife and young children remaining in Ireland. By contrast, in the present case as the applicant's family remain in Pakistan, were the applicant to be returned to that jurisdiction, he will in fact be re-united with his family.

21. Second, it is plain that the applicant in *Emre* had lived virtually all his life in Switzerland, so that his ties with that country were particularly strong: see, *e.g.*, paras. 79-80 of the judgment in *Emre (No.1).* By contrast, while the applicant has resided here since 2005, he arrived here as an adult. Moreover, his residency entitlement (such as it has been) is particularly tenuous, given that his asylum application was rejected in September, 2008.

22. Third, the constitutional challenge was, in any event, ultimately rejected by Kearns P. in *Sivsivadze.* While I am conscious that this judgment is under appeal to the Supreme Court, it remains the law unless and until the Supreme Court were to decide otherwise: cf. here the comments of Clark J. in *JCM (Democratic Republic of Congo) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 485.

23. For all of these reasons, I consider that leave should be refused in respect of this ground.

**Article 4(1) of the 2004 Directive and the decision in MM**

24. In *MM v. Minister for Justice, Equality and Law Reform (No.1)* I referred one specific question to the Court of Justice concerning the interpretation of Article 4(1) of the Qualification Directive to the Court of Justice pursuant to Article 267 TFEU. In essence the question was whether the Minister was obliged to supply a draft negative subsidiary decision to an applicant for comments prior to its adoption.

25. In its decision delivered on 22nd November the Court of Justice unambiguously rejected this contention. It must now be accepted that there is no such obligation and Mr. Z.'s argument on this issue must accordingly fail.

26. It is true that in its judgment the Court of Justice also took the opportunity to address broader issues concerning the right to a hearing in the context of subsidiary protection applications and gave further guidance to this Court in that process. The Court of Justice furthermore stressed that in the context of the bi-furcated system of international protection operated by this State, it is important to bear in mind that applications for subsidiary protection must be evaluated separately and independently from any earlier

adjudication in respect of the applicant's asylum claim.

27. These themes were further examined in my own judgment in *MM v. Minister for Justice and Equality (No.3)* [2013] IEHC 9 which was delivered in the aftermath of the judgment of the Court of Justice. In that case I concluded that the effect of the decision of the Court of Justice was that the Minister could not simply rely on adverse credibility findings made in the course of the asylum claim when adjudicating on the subsidiary protection application.

28. As it happens, in that case the Minister invoked adverse credibility findings which had been made by the Refugee Appeals Tribunal in the course of concluding that there was no real reason to believe that the applicant would come to serious harm were he to be returned to Rwanda:

> "In these circumstances, in the light of the guidance given by the Court of Justice on the reference, I must hold that the Minister failed to afford the applicant an effective hearing at subsidiary protection stage, *precisely* because he relied *completely* on the adverse credibility findings which had been made by the Tribunal in respect of the contention that Mr. M. would come to harm if he were returned to Rwanda by reason of his involvement in the office of military prosecutor and because he made no *independent and separate adjudication* on these claims.
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> In order for the hearing before the Minister to be effective in the sense understood by the Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment."

29. While accepting that the decision of the Court of Justice in *MM* is likely to have significant implications for the law and practice generally governing subsidiary protections, this, however, is not true so far as the present case is concerned, precisely because there were, in fact, no adverse credibility findings made by the Refugee Appeal Tribunal. Indeed, the assessment of the applicant's file carried out on behalf of the Minister expressly stated that no credibility issues arose.

30. This was rather a case where the applicant's account was considered to be substantially credible, but where positive conclusions were reached - in respect of both the asylum and the subsidiary protection applications – concerning the availability of police protection in Pakistan. In other words, the Minister – tacitly, at least – acknowledged the veracity of the applicant's account, but concluded that he was nonetheless not at real risk of suffering serious harm if he were now to be returned to Pakistan by reason of the adequacy of police protection, the steps which have been taken by the Pakistani authorities to curb the activities of Sipah e Sahaba and the fact that the adherents of this group no longer pose a significant threat.

31. These conclusions have not been directly impeached in the present proceedings. One way or another, however, it is clear that the decision in *MM* has no direct bearing on the applicant's case, precisely because there was, in fact, an independent and self contained assessment of this subsidiary protection application which – unusual though this may be in practice – placed no reliance on the Tribunal's findings. In these circumstances, I would accordingly refuse to grant the applicant leave on this issue.

**Effective remedy**

32. As already noted, Mr. Z now seeks to extend the original statement of grounds to include a new ground relating to Article 39 of Council Directive 2005/85 EC ("the Procedures Directive"), which was not heretofore pleaded. The amended ground is in the following terms:-

> "The Minister's reliance upon the determinations made by the Refugee Applications Commissioner and the Refugee Appeals Tribunal of the applicant's asylum application was unlawful in that the remedy required to be afforded by Article 39 of Council Directive 2005/85 EC was not provided by the Refugee Appeals Tribunal in its own right, nor by a combination of the Refugee Appeals Tribunal in the High Court in that:
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> (1) The High Court does not provide an appeal on the merits;
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> (2) The applicant is, as a matter of general practice, not afforded free legal assistance before the High Court;
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> (3) The applicant is, as a matter of general practice, required to wait several years before his High Court case is heard."

There are several objections to this course of action. While it is said that this application to amend now arises directly from issues canvassed by the Court of Justice in its judgment in Case C-2175/11 *HID* which was delivered on 31st January 2013, it may be recalled that the order for reference in that case had been made as far back as April 2011, several months before these present proceedings commenced in June 2011. Nor can it be said that the judgment of the Court of Justice raises entirely new issues not previously encompassed in the original order of reference. Even assuming that I had a jurisdiction to entertain this application to amend, I am not convinced that any cogent reason has been advanced as to why this application is only being made *now* upon *these* grounds.

33. The jurisdictional objections to this proposed course of action are also considerable. It is true that no perfected order arising from my decision of 31st January 2012. But the effect of my earlier decision cannot seriously be in doubt: I dismissed the application for judicial review, save that I adjourned two issues pending the decisions in *Sivsivadze* and *MM*. Following the delivery of these two judgments, the matter was re-entered before me for further argument on those two grounds only.

34. Subject to reserving those two issues, I consider that in effect I have otherwise disposed of the case and that I am now *functus officio*. In my judgment, therefore, the question as this presented is in reality indistinguishable from that which arose *in MAU v. Minister for Justice* [2011] 1 I.R. 749, [2011] IEHC 95. In that case I had first ruled in judicial review proceedings brought to challenge the validity of a deportation order (*MAU v. Minister for Justice* [2010] IEHC 492) that, having regard to the wording of s. 3(1) of the Immigration Act 1999 a deportation order had, in principle, lifelong effect, subject only to the right of the Minister to mitigate the effect of this by revoking the order in question under s. 3(11) of the 1999 Act.

35. At that point and subsequent to the delivery of the first judgment – but before the Court's order could be perfected - the applicants then sought to amend their grounding statement to enable them to challenge the constitutionality of s. 3(1). While I

accepted that the order remained to be perfected and some ancillary matters (such as costs) remained to be decided, I nevertheless concluded that I had no jurisdiction to entertain this application for the following reasons ([2011] 1 I.R. 749, 753-754):

> "In my view, however, these proceedings are no longer current before me. I accept that the order still remains to be perfected and, as we have noted, the issues of costs and a certificate remain outstanding. But the proceedings so far as they concern the validity of the deportation order have been disposed of by this Court and they cannot be said to be current in any real or meaningful sense. It follows, therefore, that I have no jurisdiction to permit an amendment at this juncture which would bear on the validity of the deportation order given that I am *functus officio* on that very issue. It is true that, in the event that the appropriate certificate for leave to appeal was given and there was an appeal to the Supreme Court, that Court would have a jurisdiction to amend the pleadings, but this power would derive from Ord. 58, r.2 and not from Ord. 28, r.1.
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> In any event, it is clear from the Supreme Court's decision in *Cox v. Electricity Supply Board (No.2)* [1943] I.R. 231 that an amendment at this juncture is not permissible where it would it would lead to an entirely new cause of action and possibly a different judgment from that already delivered. Here the plaintiff was originally granted a declaration that the manner in which he had dismissed from his employment was unlawful. He later applied to amend the pleadings post-judgment so as to include a claim for damages. The Supreme Court, reversing the decision of Gavan Duffy J., held that such an amendment was not permissible. Murnaghan J. rejected the argument ([1943] I.R. 231 at 236) that the power of amendment was this extensive:-
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> > "But I do not think that any of the authorities go to the length of suggesting that when an action has proceeded to trial and judgment has been given, it is open to the Court to allow an amendment of the pleadings which, while the original judgment stands, may introduce a new cause of action and possibly lead to a different judgment."
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> These comments are particularly apposite so far as the present case is concerned. The original judgment upheld the validity of the deportation order. The proposed amendment of the pleadings would effectively introduce a new cause of action (*i.e.,* namely, the constitutionality of s. 3(1) of the 1999 Act) which, if it succeeded, would lead to a new judgment on the validity of the deportation order. In these circumstances, it would appear that I am, in any event, bound by the Supreme Court's decision in Cox and thus cannot permit an amendment of the kind now sought to be permitted."

36. The situation in the present case is actually no different. It is true that the order of the Court remains to be perfected, but, in reality, that is a pure formality given that the nature and effect of the January 2012 decision is not in doubt. Insofar as the case remained undisposed of, it was simply for the purpose of determining two remaining issues which awaited other specified legal developments. Now that these issues have been determined, the case has been fully resolved, subject only to ancillary issues such as costs.

37. The net effect of all this is that the applicant must be refused leave. Yet if the amendment were to be permitted, it would effectively be to admit a new cause of action post-judgment and, in the aftermath of the effective resolution of the case, such an amendment might then possibly lead to a different judgment. As I pointed out in *MAU*, this course of action would simply to be squarely prohibited by the Supreme Court's decision in *Cox v. Electricity Supply Board* [1943] I.R. 231.

38. It is true that this case-law must be re-evaluated in the light of the Supreme Court's decision in *Re McInerney Homes Ltd*. [2011] IESC 31. That case concerned an examinership proposal which had been opposed as prejudicial to their interests by creditor banks and Clarke J. originally found against the petitioning companies on this very ground. It then came to light that these bank loans were about to be taken over the National Asset Management Agency and it was contended that this very fact now wholly undermined the factual premises from which the High Court had proceeded.

39. In the light of these new facts, Clarke J. then re-opened the original hearing on the basis that this was an exceptional case with the limited rehearing confined to the question of the potential impact of the acquisition of the creditor bank loans by NAMA. In the Supreme Court O'Donnell J. held that Clarke J. was justified in taking this approach:

> "Once the trial judge observed that he himself had assumed that there was no longer any prospect of NAMA acquiring the loans, and that that assumption was based upon the somewhat artificial way in which the banks had approached the matter, then, in my view, he was entitled, and indeed arguably obliged, to reopen the matter. If indeed it was the case that the NAMA acquisition of the loans of Bank of Ireland and Anglo was imminent, then it could be said that the hearing, and indeed the judgment, had proceeded almost on a basis of common mistake and that justice required that the matter should be reconsidered."

As it happens, the decision in *McInerney* also raised the question of whether a judicial adjudication should be re-opened in a separate and different context to that of the NAMA loans issue. The examinership had proceeded on the basis that one potential investor (Oaktree) was willing to invest €25m and no more. Clarke J. had finally adjudicated on this basis in arriving at his conclusion that certain creditors would be unfairly prejudiced. After that judgment had been pronounced, the investor indicated that it was then prepared to make a significantly increased offer, but Clarke J. would not permit this to be done. In the Supreme Court, O'Donnell J. held that he was correct in taking this approach:

> "It is enough that the offer emerged after a final judgment, but before a final order, and indeed after the Court had permitted the reopening of a limited issue. It is only in exceptional circumstances where justice requires that course that the Court should reopen proceedings after the delivery of judgment and before the formal order is made. This, in my view, is not an exceptional situation. Indeed, if it were permitted, it could become a regular event. Nor in my view would the reopening of the proceedings serve the wider interests of justice, or indeed of the legislative scheme.
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> …….Here Oaktree was steadfast in its assertion that €25 million represented its final and last offer. For perhaps good tactical reasons it did not indicate that there were any circumstances in which it might improve that offer. This was perhaps understandable since the dynamic of negotiation makes it much more likely that a person who indicates a willingness to take some step will often be forced to do so. However having taken the course of asserting that this was its last offer, Oaktree cannot complain if it was taken at its word by all the other parties, including the Court."

40. It may be true that *McInerney Homes* approaches this question of a post-judgment application to re-open the decision as a matter of discretion rather than one of jurisdiction in the strict sense. But it is nonetheless clear that any question of re-opening a judgment following its delivery requires compelling and unusual circumstances. Thus, it is plain from *McInerney Homes* that where the

court proceeds on critical factual assumptions which have not been dispelled by the parties, any subsequent judgment may be re-opened if its transpires that these factual assumptions are simply wrong and are critical to the decision in question.

41. Unusual cases of this kind aside, however, *McInerney Homes* is in fact an authority for the proposition that the Court cannot lightly and without grave reason re-open a final judgment. In the present case, subject to the two specified matters which stood adjourned for stated purposes, there was a final judgment. The present application to amend the statement of grounds is in effect an application to re-open the original decision by means of canvassing fresh issues which were never previously raised.

42. For my part, I cannot see that any substantial reasons have been advanced justifying this exceptional course of action. In other words, even assuming that I had a jurisdiction to re-open the matter, I would decline to do so absent such compelling reasons.

**Conclusions**
43. For the reasons just advanced, I will refuse leave insofar as the applicant seeks to challenge the validity of the subsidiary protection decision. Furthermore, having regard to the considerations just mentioned, I find myself obliged to refuse Mr. Z. leave to amend his pleadings in the wake of the January 2012 decision.