**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2011 No. 699 J.R.]**

**BETWEEN**

**S.O.**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY,**

**REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND**

**ATTORNEY GENERAL**

**RESPONDENTS**

(No. 1)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015**

1. The applicant claims to have experienced persecution in her country of origin, Nigeria, commencing when her husband died on 10th July, 2009.

2. She arrived in the State on 24th October, 2010, but did not apply for asylum until 7th April, 2011.

3. The Refugee Applications Commissioner made a recommendation to refuse her application for asylum on 30th June, 2011, a decision which she received on 19th July, 2011.

4. In rejecting the application, the Refugee Applications Commissioner included findings under s. 13(6) of the Refugee Act 1996, based, not on a finding of a minimal basis for her claim, but rather on the ground that she has not made the application as soon as reasonably practicable. The effect of that finding is that the applicant will be deprived of an oral hearing of her appeal to the Refugee Appeals Tribunal. That fact makes it legitimate and appropriate for the applicant to seek judicial review of the Commissioner's decision at this stage, rather than following the more usual route of appealing to the Refugee Appeals Tribunal before seeking judicial review (see *B.N.N. v. Refugee Applications Commissioner* [2009] 1 I.R. 719 (Hedigan J.)).

5. In the course of the hearing of the application, Mr. Paul O'Shea B.L. for the applicant made a submission to me that there was a particular unfairness impacting upon his client, who was a person who had simply delayed in making an asylum application, and was therefore subject to s. 13(6)(c) of the Act, as opposed to a person whose claim was manifestly unfounded and therefore within the Supreme Court decision in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135, being a claim with no or minimal basis, which could be the subject of a finding under s. 13(6)(a).

6. Furthermore, it was submitted that it was unfair that such a person would be required to prosecute an appeal before the Tribunal on the papers in circumstances where the Tribunal had no jurisdiction to revisit the s. 13(6) findings and to direct that there should be an oral hearing of its own motion. In short, the Tribunal is hamstrung from providing what he contends are appropriate fair procedures for his client, because of a prior determination by another body, the Commissioner.

7. In the course of exchanges with him in connection with the foregoing submission, I asked Mr. O'Shea in effect whether the consequence of his submission that Tribunal was unable to direct an oral hearing even if it considered that such a hearing was required in the interest of justice was something which arose out of the legislation, and if so whether his complaint was with that legislation, as opposed to simply the Commissioner's decision. Upon reflecting on that question, Mr. O'Shea sought to apply to amend his proceedings in order to take issue with the legislation as a matter of EU and constitutional law. It is that application to amend which I address in the present judgment.

8. Mr. Oisin Quinn, S.C., who appears (with Mr. Nap Keeling B.L.) for the respondents, opposes the application to amend on various grounds. However, he has expressly and very fairly accepted that the court asking Mr. O'Shea whether the logical consequence of his complaint is, in effect, to take issue with the legislation, is not any form of prejudgment on the part of the court as to whether an amendment should be made, still less whether any complaint in relation to the validity of the legislation has substance.

9. This is an important point. The teasing out of the logical consequences of a proposition is a core element of any reasoning process or intellectual inquiry. Anything the court says in the course of a hearing must be construed as a question and not as the expression of a view. A court is perfectly entitled to ask a party if the logical consequence of proposition X is proposition Y, or even if a party wishes to advance a further or alternative proposition Z. A court is also entitled to suggest to a party that the particular argument it is making is not encompassed by, or alternatively not fully particularised in, pleadings. In the course of a leave application, for example, this may frequently take the form of a dialogue between bench and bar as to what the appropriate wording is to encompass the complaint actually being made. As frequently as not, this involves a reduction or deletion of surplus grounds (see the issues raised in my judgment in *O'Mahony Developments Ltd. v. An Bord Pleanala* [2015] IEHC 757 at para. 51), but just as legitimately it may involve raising a question as to whether the applicant wishes to add to the grounds if they do not already fully capture the point being made, or its logical consequences, or even some further point which is latent in the facts and matters pleaded. Such a question is not an encouragement, and should not be taken as an encouragement, to that party to advance further propositions, still less to seek an amendment to his or her pleadings for that purpose. That is a matter for decision and application by the party concerned.

10. It is well established that if there are points latent in a case that neither party has identified, it is fully within the legitimate scope

of the judicial power to draw attention to such points. For example, in *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2) that Hogan J. had, of his own motion, taken a point as to the validity of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 in terms of EU law. However, I would be inclined to the view that in general it is preferable that if any particular point is to be advanced in a case, it should be advanced by decision of one or other of the parties themselves. The most the court should generally do is to draw attention to the point and leave it to one or more of the parties to take it or not (apart, possibly, from unavoidable points which cannot be shirked even if the parties do not wish to explore them, such as, for example, what the statute applicable to the case actually means). If, following an engagement with the court, a party decides that there is some point that they wish to advance or some application (including an application to amend) that they wish to make, that is also entirely legitimate. The court is both capable of addressing, and entitled to address, any such point or application on its merits notwithstanding that it arose out of an engagement with the court in the first instance. The raising or teasing out of questions by the court with counsel should be taken as neither encouragement nor a pre-judgment, but as part of the legitimate intellectual inquiry in which the court is engaged. Indeed if such engagement results in the scaling back or abandonment of certain grounds, which often it will, and about which respondents are rarely heard to complain, respondents must take the rough with the smooth if on occasion an applicant decides, following such engagement, to apply in the other direction for an amendment to add an additional point. As obvious as it is, engagement with the court as to the proper drafting of the pleadings is not a one-way ratchet system to the advantage of one side or the other.

11. In his submission on the amendment application, Mr. Quinn makes a number of points arising from the Supreme Court decision in *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570, which I have examined recently in *B.W. v Refugee Appeals Tribunal (No. 1)* [2015] IEHC 725.

12. In *B.W. (No. 1)*, I identified the three elements necessary to support an application to amend, namely arguability, explanation and lack of irremediable prejudice. Mr. O'Shea has addressed these elements in a conspicuously logical and relevant manner in his submissions.

**Arguability**

13. As to arguability, Mr. Quinn has submitted that for a variety of reasons the objections made to s. 13(6) are not arguable. He submits that Mr. O'Shea does not have *locus standi* to challenge s. 13(6). However the applicant has been subjected to the process outlined in s. 13(6) and classically therefore must have standing to challenge it at least in broad principle. Whether she has been sufficiently damnified by the section cannot fully be determined at this stage. Mr. Quinn also relies on the fact that the Commissioner's decision found that there was a lack of nexus to the refugee convention, as well as lack of credibility, and that this separate ground deprives her objection to a papers-only appeal of any meaning. The fundamental flaw with this objection, as Mr. O'Shea points out, is that it is open to the Tribunal to reverse that finding on appeal. I cannot pre-judge or anticipate this process, still less assume that Mr. O'Shea will be unsuccessful in the event of such an appeal. There is clearly therefore a benefit to be had for Mr. O'Shea in setting aside the s. 13(6) finding and consequentially in challenging the section, if necessary and appropriate.

14. Mr. Quinn also submits that the amendment is not arguable because the Act is capable of being construed in a constitutional manner. However, this is to confuse the issues of arguability (or substantial grounds in the present context), with the ultimate determination of the proceedings. I have not as yet made any decision on the non-constitutional issues in the present case. When I come to those to consider those issues, it may be that the constitutional and EU law challenge will not arise. Indeed that is probably the aspect of the present application in which gave me the greatest pause for thought. The alternative approach is that taken by Clarke J. in *Simmonds v Ennis Town Council* [2012] IEHC 282, when he allowed a plaintiff to amend proceedings to include a challenge to the validity of bye-laws in circumstances where he had already, at that point, dismissed all of the reliefs being sought up to that stage by the plaintiff. If this is a legitimate approach, which it clearly is, the court must also be entitled to allow an applicant to amend to include a relief as to the validity of legislation at a point in time prior to deciding on the non-constitutional reliefs. However in the management of the litigation following this judgment, I can take into account the possibility that some or all of the issues now being sought to be added may not ultimately need to be decided, in order to minimise any difficulties for the parties in this regard.

15. It is also the case that in V.Z., the Supreme Court upheld a process of papers-only appeals for manifestly unfounded decisions, and Birmingham J. in *M.O.O.S. v. Refugee Applications Commissioner* [2008] IEHC 399 upheld s. 13(6)(d) in relation to cases where an application had been lodged in another member state. However, the point being argued by Mr. O'Shea in the present case was not advanced in either of those two decisions.

16. Furthermore, the court's assessment of arguability or substantial grounds at this stage of giving leave or allowing an amendment can only be a provisional one because, on a fuller examination, a court must retain the entitlement to come to the conclusion that the point was not, after all, arguable. In judging the matter, as I must, on the basis of the weight of the argument as it appears to me at this point, I consider that Mr. O'Shea has satisfied the test of arguability to level of substantial grounds.

**Explanation**

17. The next requirement of *B.W. (No. 1)* is an explanation for the amendments. Mr. O'Shea has fully provided this in his written submissions, and in any event I have also referred to it above. At an earlier listing of this case for mention, Mr. Keeling expressly accepted on behalf of the respondents' that an explanation relating to oversight by lawyers is not something that would necessarily have to be put on affidavit (a point I specifically made in *B.W. (No. 1)*), and accepted that Mr. O'Shea could set out his explanation, as he did, by way of written submissions.

18. In the light of that concession it is simply not open to Mr. Quinn to make the objection, as he attempted to do, that Mr. O'Shea's "explanation" was not set out on affidavit. Mr. Quinn was in any event not present at the hearing during which Mr. O'Shea originally sought the amendment. If he had been, he would have appreciated that an affidavit would not have added anything to the explanation set out. In any event Mr. Quinn's objection to the explanation lacks substance, for reasons I have explained. Mr. O'Shea has clearly satisfied the test of providing an explanation, as set out in his written submission. I note that the Court of Appeal in another context has recently seen little difficulty with the court giving directions as to a modular trial without a formal notice of motion, which would normally have been grounded on affidavit *(Kerins v. McGuinness* [2015] IECA 267 at para. 12), and this seems consistent with my view that a formal motion or affidavit is not automatically necessary where an application to amend is based on factors such as those in the present case. The criterion of an explanation has been met.

**Lack of irremediable prejudice**

19. The final heading is that of lack of irremediable prejudice. No particular prejudice was alleged by the respondents other than that they did not particularly want to deal with a significant new point, which they characterised as "an entirely new case." In that regard they sought to rely on some elements of the pre-*Keegan* case law.

20. As I explained in *B.W. (No. 1)*, the *Keegan* approach is the current law, and articulates a more open approach to amendment than

in the pre-*Keegan* case law. I consider that earlier case law should not now be looked to as the source for guiding the Court on how it should approach the question of amendment. I have also fully addressed the question of whether it is crucial that a new point is a major one, in my judgment in *B.W. (No. 1)*, and concluded that it is prejudice rather than the significance of the new point that is the important factor.

21. Mr. O'Shea submits that the decision in *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 142 (*per* Clarke J. at p. 163, para. 50) has the consequence that there is an obligation on the applicant to include any challenges to legislation within a judicial review under s. 5 of the Illegal Immigrants (Trafficking) Act 2000, if the intention is that the effect of the challenge is to go to the validity of the decision in question. Thus, while Mr. O'Shea could hypothetically challenge the section in separate plenary proceedings, he would not get the benefit of potentially setting aside the present decision and would therefore face the difficulty that such litigation would not achieve benefit for him (although perhaps at least in theory the challenge could be allowed as a basis for a damages claim). Nonetheless, the fact that Mr. O'Shea must include any constitutional challenge within the present judicial review in order to be able to get a benefit from it in terms of overturning the impugned decision would seem to be a reason, in the interests of justice, to allow him to pursue the challenge in the context of the present application under s. 5 of the 2000 Act.

22. Mr. O'Shea also submits that by reason of *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2011] IEHC 116 (see para. 6), s. 5 should not be construed in a way that would preclude him from raising EU law points, and contends that this is another reason why he should be allowed to raise this challenge in the present proceedings.

23. In the circumstances there is no basis to suggest that any irremediable prejudice to the State will be occasioned by the amendment.

**Order**

24. Having regard to the foregoing, I am satisfied that the tests for amendment as explained in *B.W. (No. 1*), are satisfied in this case. However in order to minimise difficulties to the respondents including as to costs, I will allow the applicant to amend her statement of grounds, but will relieve the respondents from the need to argue the constitutional question until such time as I have determined the non-constitutional issues.

25. In the light of the foregoing I will order as follows:-

(i) The applicant will have liberty to amend her statement of grounds in accordance with the draft amended statement of grounds furnished on her behalf, to be filed within seven days of the date of this judgment.

(ii) The respondents are to file a statement of opposition within 21 days from receipt of the statement of grounds. As far as the constitutional issue is concerned, that statement of opposition may simply deny that the Act is unconstitutional, and the respondents will have liberty to particularise or expand this pleading at a later stage if it becomes necessary to argue the issue.

(iii) I will fix a date for the conclusion of submissions on the non-constitutional issues, which will comprise the new EU law points and the conclusion (if any) of the applicant's reply on the issues originally pleaded, which was not completed as of the point in time when the application to amend was made.

(iv) I will direct that the constitutional issues will not be argued until the non-constitutional issues have been finally determined; assuming that following such determination, there remains a continuing need to address the constitutional issues.

(v) I will reserve costs of the proceedings to date including the application to amend.