Neutral Citation: [2012] IEHC 569

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2011 / 1005 J.R.

Between:/

KHALED ISLAM KHATTAK

APPLICANT

-AND-

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 27th day of June 2012

1. When the applicant in this case was informed in August 2010 that his claim for refugee status had been refused, he sought subsidiary protection and humanitarian leave to remain. It was subsequently determined that he did not qualify for subsidiary protection and a deportation order was made against him. An application for an injunction to prevent his deportation was refused but the applicant remains in the jurisdiction. In November 2011 he issued proceedings seeking to challenge the validity of the decision of the Refugee Appeals Tribunal, the subsidiary protection decision and the decision to make a deportation order. However, challenging the Tribunal decision at this stage would involve impermissible procedural backtracking and setting at nought the normal time limits for challenging a Tribunal decision and the setting aside of the applicant's informed election to seek subsidiary protection which can only be done if one has been refused refugee status.

2. The Court notes that the applicant was legally represented at all stages of his asylum claim and the subsidiary protection application was prepared by his legal advisors. Such an application represents an implicit acceptance of the determination of the Tribunal. The applicant made no attempt to explain why a challenge to jurisdiction or to the legality of the Tribunal decision should be entertained by the Court apart from stating on affidavit that he did not know until he consulted different solicitors that he had a right to an effective remedy and that the Tribunal was incapable of providing such a remedy.

3. Relying on the preliminary reference to the Court of Justice of the EU in *H.I.D. and B.A. v. The Minister for Justice, Equality and Law Reform* (see O.J., 2001/C 204/26, Vol. 54, 9th July 2011) the applicant argues that that his asylum application has never been properly assessed because the procedures followed in Ireland do not satisfy the requirements of Council Directive 2005/85/EC, the Procedures Directive. This, he contends, is because the Refugee Appeals Tribunal lacks institutional guarantees in respect of independence and impartiality and consequently does not constitute an "effective remedy" for the purposes of Article 39 of the Directive. When these identical arguments were argued before Cooke J. in *H.I.D. and B.A.* they were rejected. It was in the context of an application for leave to appeal to the Supreme Court in that case that Cooke J. made a referral to the CJEU.

4. When the applicant was first notified of the Tribunal decision in July 2010 the *H.I.A. and B.A*. leave decision had been delivered and all the "effective remedy" arguments were available to the applicant. The substantive application in *H.I.D. and B.A.* was refused in February 2011 and the referral to the Court of Justice was made in April 2011 at a time when the Minister was still considering the subsidiary protection and leave to remain applications of the applicant herein. No step was taken even at that stage to apply for a stay on the consideration of those applications or for an extension of time to challenge the Tribunal decision so as to join the growing number of cases backing up the CJEU decision. No new facts have arisen since he applied for subsidiary protection which might justify the court in now considering this unmeritorious application.

5. The applicant has not identified any prejudice to him arising from the alleged absence of institutional guarantees at the Tribunal stage nor has he related his particular circumstances to this apparently opportunistic challenge and reliance on the preliminary ruling sought in the *H.I.D. and B.A.* case. The fact that the fundamentals of his claim for international protection were found not credible and that it was found that in any event, relocation was a viable option to flight, have been totally disregarded in the context of these proceedings. The Court is asked to simply ignore the undoubted acts of approbation in seeking subsidiary protection instead of challenging the Tribunal decision at the appropriate time. As Cooke J. found *in N.X.Q. v. Refugee Applications Commissioner & Anor* [2009] I.E.H.C. 218, the fact that alternative courses were considered, for whatever reason, to be more appropriate than seeking judicial review of the Tribunal decision does not constitute a legal excuse for delay. Equally, the fact that the applicant having a choice between two courses elected to follow one procedure which is inconsistent with the other, does not mean he can now resile from his informed election and pursue the other course.

The Donegan Argument

6. The applicant made an alternative argument that the decision of the Supreme Court in *Donegan & Gallagher v. Dublin City Council & Others* [2012] IESC 18 has re-opened the question of whether judicial review is an effective remedy for the purposes of Article 13 of the European Convention on Human Rights. It was argued that arising from *Donegan*, all the previous decisions on judicial review as an effective remedy such as *M.B. & Ors v. The Minister for Justice and Law Reform* [2010] IEHC 320 (Clark J.); Cooke J. in *J.B. (a minor) & Ors v. The Minister* [2010] IEHC 296; *Lofinmakin (a minor) v. The Minister* [2011] IEHC 38; *I.S.O.F. v. The Minister* [2010] IEHC 457 and V.*N. (Cameroon) v. The Minister* [2012] IEHC 62; and Hogan J. in *Efe v. The Minister* [2011] IEHC 214; *P.I & Ors v. The Minister* [2012] IEHC 7 and *S.Z. (Pakistan) v. The Minister* [2012] IEHC 47 have been reopened. The Court does not accept this argument. This Court adopts the finding of Hogan J. in *P.M. (No. 2)* – relying on the findings of Cooke J. in *I.S.O.F*. – that "*the modern law of judicial review is sufficiently flexible and accommodating so that every legal right and entitlement - whether deriving from the common law, statute, the Constitution, ECHR or the European Union law itself - can and will be adequately protected*." Cooke J. further held in *I.S.O.F.* that the matter has been settled "*with sufficient clarity"* and in *J.B. (a minor)* he held that arguments relating to the ineffectiveness of judicial review are "*manifestly unstateable*". This Court finds no reason in this case to revisit that conclusion.

7. Case C-69/10 *Diouf v. Ministre du Travail, du L'Emploi et de L'Immigration,* delivered on 28th July 2011 concerned the decision of the *Ministre du Travail* to apply an accelerated procedure to the asylum application of a Mauritian national. The applicant had no right to judicially review that decision. He argued that he was not afforded an effective remedy as is required under Article 39 of the Procedures Directive. The Court of Justice found that the decision to apply accelerated procedures was a procedural decision which does not come directly within the ambit of Article 39. However, it added the following proviso:

> *"56. Accordingly, the absence of a remedy at that stage of the procedure [i.e., to invoke the accelerated procedure] does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure - and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded - may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application.*
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> *57. As regards judicial review within the framework of a substantive action against the decision rejecting the application for international protection, the effectiveness of that action would not be guaranteed if - because of the impossibility of bringing an appeal under Article 20(5) of the Law of 5 May 2006 - the reasons which led the Minister for Labour, Employment and Immigration to examine the merits of the application under an accelerated procedure could not be the subject of judicial review. In a situation such as that at issue in the main proceedings, the reasons relied on by that Minister in order to use the accelerated procedure are in fact the same as those which led to that application being rejected. Such a situation would render review of the legality of the decision impossible, as regards both the facts and the law (see, by analogy, Case C-506/04 Wilson [2006] ECR I-8613, paragraphs 60 to 62).*
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> *58. What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum. It would not be compatible with EU law if national rules [...] were to be construed as precluding all judicial review of the reasons which led the competent administrative authority to examine the application for asylum under an accelerated procedure."*

8. Cooke J. in *E.K.K. v. Refugee Applications Commissioner* (Unreported, High Court, 5th March 2012) found the applicant's reliance on *Diouf* in support of arguments concerning the effectiveness of judicial review to be misconceived. The applicant in that case sought to challenge the decision of the Commissioner. In that context Cooke J. held:

> *"10. [...] That case [i.e. Diouf] concerned an application which was submitted to an accelerated procedure, an issue which has arisen in a number of cases, and, as far as the Court recollects, the Court of Justice of the European Union look the same view that had been taken in the earlier case, that the absence of the possibility for an immediate direct challenge to a procedural decision to adopt an accelerated procedure is not in itself contrary to Union law provided any flaw resulting from the use of an accelerated procedure is capable of being raised or litigated in the ultimate challenge to the final determination. Insofar as it could be said - and no particular point has been identified in this case-that there is anything in this Section 13 Report which could feed through into a Tribunal decision following a full rehearing at an oral hearing, those are matters which are capable of being addressed by judicial review of the Tribunal decision.*
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> *11. In the absence of anything more than counsel's reference to it insofar as the Court understands the issue raised in the Donegan case before the Supreme Court last week it would seem to underline the logic of this approach in that if there are issues of fact that are disputed in the finding of an authorised officer in the Section 13 Report it is clearly not only apt but necessary that they should be the subject of challenge in the RAT appeal by way of rehearing rather than the subject of judicial review at this stage."*

9. Reliance on *Diouf* with respect to the effectiveness of judicial review was also rejected in *P.M. (Botswana) v. Minister for Justice and Equality (No. 2)* [2012] IEHC 34, where – like Cooke J. in *E.K.K.* – Hogan J. stressed that the adequacy of the reasons for a particular administrative decision relating to international protection *can* be challenged in judicial review proceedings in this jurisdiction. This Court would go further and say that the High Court on an almost daily basis scrutinises the reasons for the decisions of protection decision makers whenever such challenges are brought. *Diouf* does not alter the overwhelming body of case law in this jurisdiction which rejects arguments as to the ineffectiveness of judicial review.

10. In the view of the Court the decision of the Supreme Court in *Donegan* does not reopen the adequacy of judicial review as an effective remedy as *Donegan* was determined on its own specific facts which relate to the procedures applicable when a local authority was seeking to evict a tenant under s. 62 of the Housing Act 1966. That Act afforded the occupier no right to any judicial or independent tribunal determination of disputed facts leading to the process of eviction. Once a notice to quit was served, on its expiry a warrant for possession followed. Under the Act, the only formal proofs in the District Court were the fact of the tenancy and the service of the notice to quit on the appropriate tenant. The Supreme Court found that in those circumstances, judicial review could not be described as a sufficient procedural safeguard as required under Article 8 of the European Convention on Human Rights (ECHR) as the applicant had no mechanism to challenge the local authority's disputed finding of fact.

11. The findings in *Donegan* will obviously have wide reaching implications for procedures for the eviction of tenants who are believed to be guilty of anti-social behaviour but they have no wider application than to the specific provisions of the Housing Act 1996 and in particular they have no application to the asylum and immigration process. Neither the Refugee Act 1996 nor S.I. No 518 of 2006 operate procedural limitations or constraints comparable to the summary procedure applicable under the Housing Act 1996. Factual disputes relating to the decisions of the Refugee Applications Commissioner can be fully ventilated before the Refugee Appeals Tribunal and the adequacy and reasonableness of the Tribunal findings on any factual disputes or the reasoning of the appeal decision may be subjected to an examination by the High Court in judicial review. The same applies to decisions of the Minister with respect to family reunification, subsidiary protection, leave to remain, refoulement and various citizenship and immigration applications including residency and visas. This is patently different to the position of a court reviewing decisions taken under s. 62 of the Housing Act 1966.

12. Since the leave hearing in this case, identical arguments relating to *Donegan* have continued to be made and have been comprehensively rejected in *A.O. v. The Minister* [2012] IEHC 104; *Lukombo v. The Minister* [2012] IEHC 129; *Okundade & Anor v. The Minister* [2012] IEHC 134; and *Osaghe v. The Minister* [2012] IEHC 153.

13. In his written submissions the applicant also addressed the indefinite nature of the deportation order made against him by reference to Article 8 of the ECHR but those submissions were not pursued at the hearing. The Court notes that the applicant's connection with the Irish State lies exclusively with his protection applications. According to his narrative those family members with whom he still has contact are in Pakistan. There is no evidential basis for concluding that he enjoys any form of private or family life in

Ireland.

Decision
14. Substantial grounds have *not* been established which warrant the grant of leave to challenge the RAT decision or the deportation order, nor have arguable grounds been established for the purposes of challenging the subsidiary protection decision. The application is refused.