THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 683

[Record No. 2023/1365/JR]

BETWEEN

FZ

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Miriam O'Regan, delivered on 28 November 2024.

Introduction.

1. The within applicant is an Algerian national and arrived in Ireland on 06 December 2016 and on that day applied for international protection. His international protection application was not ultimately decided until he received a refusal of his claim by letter of 07 November 2018. Following an appeal the decision of IPAT of 20 August 2019 upheld the prior refusal. The applicant then sought permission to remain in the State however under cover letter of 29 September 2020 this also was refused. Notwithstanding the foregoing no Deportation Order has yet been made against the applicant.

In February 2022 the applicant made an application pursuant to the provisions of the Scheme to Regularise Long Term Undocumented Migrants in Ireland ("the Scheme"). In this regard it might be noted that the scheme contains effectively two strands.

a. The first which came into effect on 31 January 2022 was for the purpose of creating a new pathway for long term undocumented people and their dependents in Ireland with the objective of this strand being set out in the relevant policy paper at para. 3. It is said that it is a time limited scheme developed to provide residence permission to persons who are living in Ireland and have been doing so for a long period of time without a valid residence permission in the State irrespective of how they entered the State initially. This scheme is aimed at alleviating the particular challenges faced by those undocumented persons in integrating into society and maintaining labour market mobility.

b. The second strand was also time limited and commenced on 07 February 2022 closing on 07 August 2022. In this strand para. 1 of the relevant policy paper identifies that the strand has been introduced in light of the recommendation of the advisory group on direct provision to consider a one-off simplified case processing approach applying to international protection applicants who have been in the system for two years or more. It is clarified at para. 2.2 that the scheme is open to international protection applicants only. To be an applicant a person must have a current application for international protection submitted and accepted and otherwise meet the relevant eligibility criteria. It is specified that the scheme is not open to individuals who do not have a live application for protection or individuals who have been applicants for such protection for less than two years.

2. Leave was secured on 15 January 2024 in respect of the matters contained in the statement of grounds of 24 November 2023. Following production of the application form it was accepted by the applicant's counsel that the application was maintained under the main strand of the scheme.

Application

3. By letter of 13 February 2023 the applicant was refused permission under the scheme on the basis that he had not been undocumented for a four year period prior to January 2022. The applicant was advised of his entitlement to appeal that decision. By letter of 01 March 2023 the applicant's solicitors made an appeal on behalf of the applicant by reference to the fact that it was held that the applicant had valid permission up until the letter refusing permission to remain of 28 September 2020 and therefore he was not eligible. The appeal letter respectfully disagreed with the decision and submitted that it erred both in fact and in law and was irrational and unreasonable vis-à-vis the assertion that the applicant had valid permission to remain until 28 September 2020. In a further submission the background to the international protection application process was outlined and it was argued that there was inordinate delay on the part of the IPO in processing the application between 11 February 2017 and 07 November 2018 and therefore this period should be disregarded. It is also argued that there was no permission between effectively 20 August 2019 and 29 September 2020 (it is noteworthy that neither of these arguments appear in the statement of grounds). On this basis it was submitted that the applicant was eligible under the scheme and if not it was an appropriate case in which the Minister would exercise her discretion in the particular circumstances to withdraw or overturn the decision of 13 February 2023. In oral submissions when asked the applicant's counsel indicated that the discretion sought to be exercised was the Minister's residual executive discretion.

4. The appeal decision of 31 August 2023 is the decision now impugned. In the cover letter it is identified that the applicant had not provided satisfactory documentary evidence to prove that he had been living in the State continuously for the required period under the scheme and included with the letter was the appeal consideration document also dated 31 August 2023. In the penultimate page of the consideration it is identified that the scheme was set up by executive decision and it is for the Minister to determine the qualifying criteria. It is also said that this does not preclude the Minister from exercising his discretion in any particular case and the appellant is entitled to request the Minister to use his discretion to grant permission to remain in the State outside the criteria of the scheme. The possibility of an exercise of ministerial discretion is not otherwise considered in the consideration document and the applicant states that this amounts to a fettering of ministerial inherent discretion. It is acknowledged by the applicant that there is no discretion mentioned in either policy paper of the two strands of the scheme.

5. The application of the applicant under the scheme was not produced to the Court until the respondent was making submissions in reply to the oral submissions of the applicant and following a request by the court to identify which strand of the scheme was relied on by the applicant. In this regard in the impugned decision of 31 August 2023 the decision is based on an application under the first or main strand of the scheme whereas the statement of ground and written submissions are suggestive of an application having been made under the second strand of the scheme.

Applicant's Submissions

6. In the statement of grounds the relief sought was to quash the decision of 31 August 2023 and quash the requirement *inter alia* in respect of strand two of the scheme that an

applicant be in the international protection application process for at least two years prior to the commencement date of the second strand namely 07 February 2022. A further declaration is sought that this requirement of being in the international protection application process for at least two years prior to 07 February 2022, without exception, is arbitrary, capricious, a breach of fair procedure, irrational, unreasonable and disproportionate in nature.

7. In oral submissions it was clarified that the main legal ground relied upon is contained at para. E(ii) of the statement of grounds to the effect that the restriction in the scheme to persons who have been in the international protection application process for at least two years prior to 07 February 2022 unlawfully discriminates against the applicant without objective justification contrary to Article 40.1 of the Constitution and provisions of the ECHR and the Charter of Fundamental Rights and Freedoms.

8. It is also said that the second portion to the applicant's claim is to the effect that in the decision the decisionmaker fettered her discretion as to whether or not permission could issue notwithstanding the applicant had not established strict compliance with the terms of the scheme and particular reference was made to paras. E(vii) and E(ix) of the statement of grounds.

A: Discretion

9. It appears from a review of both the applicant and the respondent's written submissions that the applicant is saying there is no freestanding right to apply for the exercise of residual executive discretion whereas the respondent is saying it is an avenue open to the applicant.

10. In written submissions it is argued that there is no freestanding right to apply to the Minister for the exercise of executive discretion. However, in oral submissions it was argued that the applicant was entitled to make an application for the exercise of discretion of the Minister under the Minister's general discretionary powers even if the applicant was outside the terms of the scheme. It is said there was a fettering of discretion by acknowledging the discretion available to the Minister but not exercising same – by failing in the decision to engage with the discretionary application the Minister is said to have fettered her discretion.

When asked about this anomaly it was argued that the applicant was entitled to make an application under a scheme for which he was not eligible and in or about such application was entitled to ask the Minister to exercise her Ministerial discretion. However, on the other hand it was not possible to apply to the Minister for an exercise of her executive discretion absent an application under a scheme or other such procedure. It appears on this basis the applicant is at large as to which scheme/procedure he wishes to apply under and is not constrained by eligibility. No explanation, jurisprudence or other basis was identified by the applicant entitling him to pick/choose which ineligible/inapplicable scheme he might apply under to trigger the entitlement to have the Minister exercise or consider discretion notwithstanding that such discretion is not freestanding.

11. In my view this is a fundamentally absurd proposition that a party can only secure an entitlement to apply for Ministerial executive discretion in the context of an application under a scheme or such provision where the applicant is ineligible and yet it is denied that there is a freestanding ability to request the exercise of ministerial discretion although the Minister has indicated in these proceedings that there is a policy for a freestanding application for the exercise of executive discretion. Reference is also made in the decision to the ability to apply

to the Minister for the exercise of discretion outside the scheme.

12. Although caselaw is cited by the applicant in support of the suggestion that there is no freestanding right to require the Minister to exercise ministerial executive discretion it appears to me that presuming the applicant is correct in this regard nevertheless there is no authority identified to suggest that when an applicant applies under a scheme or provision for relief where he is manifestly not eligible, the applicant might nevertheless be 'entitled' to have executive ministerial discretion exercised in the context of such scheme or provision.

13. Unlike in the case of *McCarron & Ors. v Superintendent Peadar Carney & Ors.* (Supreme Court) [2010] 3 IR 302 there is no statutory discretion provided in the instant scheme as it was in the legislation under review in that Supreme Court decision. In *McCarron* the Superintendent had refused to exercise a statutory discretion on the basis of a policy that a particular classification of firearm could not be imported simpliciter. The Supreme Court found that this was an unlawful fettering of discretion laying down a rigid policy from which he did not permit himself to depart. The court indicated that it would be difficult to draw the line between permissible guidelines and impermissible rigid and inflexible policies. However, in *McCarron* no such difficulty arose with reference to a singular policy in circumstances where it was held that the fourth named defendant had no function in the granting of firearms certificates and, a fortieri, in formulating such policies. In addition, the fourth named respondent did not offer the successful applicant an opportunity to address the possibility of any exception to the policy or the merits of the particular firearm.

14. I am satisfied in the above circumstances that the applicant has not established sufficient evidence of a fettering of discretion in the decision of 31 August 2023 bearing in

mind the context of the decision, that the scheme was intended as a fast process to identify eligible parties which is clear from the limited information sought of the applicant in the online form completed and there is no provision in the scheme dealing with the exercise of a discretion.

B: Discrimination

15. The applicant asserted that he was relying on written submissions in respect of the ECHR provisions and the charter of fundamental rights and freedoms. However, the only reference to these documents is contained at paras. 16 and 17 of the written submissions which records the provisions of Article 14 of the ECHR and Article 21.1 of the Charter together with a comment on the statement of opposition in respect of reliance on the Charter. Accordingly, I do not accept that any submissions are in fact before the court under these documents. In addition, during the course of oral submissions it was accepted on behalf of the applicant that the within claim did not involve an assertion of discrimination based on age, vulnerability, intrinsic characteristics, sexual or other such matters.

Notwithstanding the above it is said that the applicant is entitled to an examination of the rationality of the distinction made between the applicant and (who the applicant says is an appropriate comparator) a person who has been in the international protection application process for at least two years prior to the commencement date of the scheme, 07 February 2022.

16. In *EL v The Minister for Justice* [2024] IEHC 647 the applicant was in a similar situation to the applicant in the current matter namely he had arrived in Ireland, applied for international protection, and was within the system for a considerable period of time before he was ultimately refused his application. During that period he held s.16 permission to

remain in the State. He applied under the main strand of the scheme asserting that he was eligible under the scheme or in the alternative the scheme was irrational and therefore in breach of Article 40.1 of the Constitution. The applicant was undocumented for a period less than four years when the main strand of the scheme commenced and in those circumstances it was clear that because of the timeframe he was not eligible under the main strand. I was satisfied that the main strand was not disproportionate arbitrary capricious or irrational. I also found that the main strand of the scheme did support the legitimate objective expressed in the main strand.

17. Insofar as strand two is concerned the policy paper identifies at para. 1.2 that this aspect of the scheme is a one off simplified case processing approach applying to all international protection applicants who have been in the system for two years or more. In para. 2.1 it is said that the time limited strand is developed to regularise the immigration status of international protection applicants currently in the international protection system for two years or more with a current valid temporary residence certificate. In para. 2.2 of the policy paper it is identified that an eligible applicant must be a person who has a current application for international protection and the scheme is not open to individuals who do not have a live application or applicants for international protection in the State for less than two years. In para. 3.3 it is provided that the applicant must be a current applicant for international protection and anyone who has been issued with a decision letter or withdrawn their application is no longer an applicant for international protection and is not eligible for this scheme.

18. In view of the foregoing I am satisfied that it is manifest that neither strand of the scheme applied to the instant applicant. Insofar as the applicant asserts that he fell between

the two strands it is the case that he doesn't qualify under either strand. However, there is no evidence that parties in the applicant's particular position were intended to be covered by one or other of the strands and the applicant is therefore simply outside of the scope of the qualifying applicants under both strands.

19. In written submissions it is asserted that the second strand was to accommodate those persons who had been in the system for two years or more. However, it is clear from the second strand and the portions of the policy paper herein before outlined that stating that the second strand applied to persons 'in the system for two years or more' is inaccurate as it does not refer to the end date of 07 February 2022 nor does it refer to the fact that such a person must be awaiting a decision on an international protection application.

20. It is argued that there is no legitimate difference between the applicant's facts and those of a person who on 07 February 2022 had an application for asylum pending for two or more years. I cannot agree. Given the extracts from the policy document in respect of the second strand the legitimate difference between the applicant and a qualifying person is the fact that: -

(a) the qualifying applicant must hold a temporary residence certificate which the applicant does not;

(b) the applicant is not a current applicant for international protection;

(c) the applicant was not awaiting an international protection decision for a minimum of two years to 07 February 2022.

21. The applicant's comparator therefore for the purposes of the discrimination argument is not valid.

22. The applicant argues that the respondent's position that the Minister was not implementing EU law in the instant scheme nor is the applicant entitled to rely on the charter, is undermined by the fact that at para. 1.1 of the main strand of the policy paper it is provided that the new pathways for long term undocumented people and their dependents can be created by the scheme 'bearing in mind EU and common travel area commitments'.

The applicant acknowledged in oral submissions that the discrimination claim did not involve matters which affect age, vulnerability or other matters intrinsic to an individual's characteristics. There is no mention of the Charter in para. 1.1 of the main strand of the scheme. In addition, the applicant has not identified any right or freedom of the applicant which has been engaged (otherwise than an apparent entitlement in the context of a scheme that does not apply to the applicant to nevertheless raise a ministerial executive discretion) under Article 14 of the ECHR or Article 21.1 of the Charter of Fundamental Rights and Freedoms, or otherwise.

I am satisfied that reference to 'bearing in mind the EU and common travel area commitments' without more does not amount to an engagement in the implementation of EU law and no such EU law has been identified either in the document or by the applicant. Finally, this argument conflates the main strand and the second strand of the scheme.

Decision

23. In *Donnelly v Minister for Social Protection* [2022] IESC 31 O'Malley J explained that law makers are entitled to make policy choices and must be entitled to distinguish between classes of persons. In the circumstances a pure equality challenge can only succeed

if *inter alia* the scheme is grounded upon a constitutionally illegitimate consideration and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason: -

> *"The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the group would be fairer…".* (para. 195)

24. In considering rationality it is necessary to determine if there is discrimination grounded on a difference in social function and if so does it have a legitimate purpose relevant to the object of the legislation? Is it *"arbitrary, or capricious, or not reasonably capable, when objectively viewed in the light of the social functions involved, of supporting the selection or classification complained of?"* (para. 193).

In *AF & I v Minister for Justice* [2021] 3 IR 140 at pages 212/213 Dunne J stated:

> *"Ultimately, however, the fact that the legislation may be viewed as harsh when viewed through the prism of it's application to minors, it is at the end of the day a matter of policy for the legislature and it is not an issue for the courts."*

The above quotation supports a heavy onus on an applicant to demonstrate an absence of any rational justification underpinning differential treatment.

25. The applicant does accept that it is for the Minister to formulate policy for the purposes of creating a scheme however it is argued that nevertheless by virtue of the decision of the Supreme Court in *Donnelly* that some further scrutiny of the scheme is required. This is accepted.

Conclusion

26. Having regard to the various matters identified by O'Malley J in *Donnelly* at paras. 188 and 189 I am satisfied that the classification in strand 2 of the scheme is for a legitimate legislative purpose and is not arbitrary capricious or irrational, certainly not based on the fact that the applicant is not eligible thereunder. As with the first strand the classification is relevant to the purpose and is capable of supporting that purpose.The rationality status of the second strand of the scheme is similar to the rationality status of the mainstream of the scheme as found in *EL* aforesaid.

27. On refusal of his application under the scheme the applicant is in effect in no worse a position as he was in prior to his application.

28. There is no evidence of discrimination based on a person's human personality or sense of self.

29. The comparator suggested by the applicant is invalid as the first strand of the scheme excludes all immigrants who have not been undocumented for a four year period prior to the commencement of the scheme and the second strand excludes all current international protection applicants who have not been awaiting a decision as of 7 February 2022 for two years or more.

30. As in *Bode v Minister for Justice* [2008] 3 IR 663 the Minister was entitled to introduce an *ex gratia* scheme which does not engage in legal rights of the parties but merely confers a gift or benefit to certain parties.

31. The scheme does support the legitimate objective expressed in the second strand, and the discrimination, if any, is not arbitrary, capricious, irrational or otherwise not unreasonably capable of supporting the selection/classification of the second strand of the scheme.

32. The applicant has not demonstrated that strand two of the scheme was arbitrary, capricious or irrational in all of the circumstances having regard to the objectives expressed in respect of strand two of the scheme.

33. In the light of the foregoing I am satisfied that the applicant has not discharged the onus on him to either quash the decision made by the respondent in this matter or demonstrate that the scheme, and the two strands thereof, either individually or collectively, is arbitrary capricious irrational disproportionate or otherwise discriminates against the applicant.

34. The relief claimed is therefore refused.

35. As this judgment is being delivered electronically, with regards to the issue of costs, as the respondent has been entirely successful, it is my provisional view that she should be entitled to her costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 10 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.