THE HIGH COURT

JUDICIAL REVIEW

[2011 No.95 J.R.]

BETWEEN

V. N. [Cameroon]

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM AND THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 16th day of February 2012

1. By a judgment and order of the 17th November, 2011, the applicant was granted leave by Dunne J. to apply for judicial review of a decision of the first named respondent made on the 11th January, 2011, determining that the applicant was not eligible for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") and of the deportation order made in respect of the applicant on the 13th January, 2011.

2. Leave was granted on the basis of a single ground as follows:-

> "The ground upon which the said reliefs are sought is that the applicant has a right of appeal against the determination that he is not eligible for subsidiary protection and that the respondent cannot therefore reach a lawful decision to deport the applicant until that appeal has been determined. The applicant's right of appeal against that determination arises because he had a right of appeal in respect of his refusal of the most approximate domestic entitlement, namely a recommendation that he be declared to be a refugee in accordance with the Refugee Act 1996, and therefore, by virtue of the principle of equivalence in European law, he must have a like right of appeal in respect of his refusal of the European law entitlement of subsidiary protection."

3. In other words, the issue raised in this application is based upon the proposition that a failed asylum seeker who is declared ineligible for subsidiary protection by determination of the first named respondent is entitled in law to a "right of appeal" against that decision. In particular, it is asserted that under European Union law such an applicant is entitled to an "effective remedy" against such a first instance determination and that the principle of equivalence in European Union law requires that the remedy be equivalent to that available in national law in a procedure prescribed by national law for the protection of a comparable right. Because, it is said, there is a right to appeal from the first instance determination of a claim for asylum made by the Office of Refugee Applications Commissioner to the Refugee Appeals Tribunal, that facility for appeal under national law (the Refugee Act996) must be replicated by a corresponding appeal against a determination made in a procedure as the latter determines a right derived from European Union law, namely Council Directive 2004/83EC ("the Qualifications Directive").

4. The leave judgment of the 17th November, 2011, was given following a hearing of the leave application which had taken place on 31 May 2011. It appears that in the interval the attention of Dunne J. had not been drawn to the fact that the same issue had been the subject of several other judgments of the High Court in which the proposition upon which the ground was based had been rejected as unfounded.

5. These judgments included the judgment of this Court in *S.L. (Nigeria) v. MJELR* of the 6th October, 2011 and *B.J.S.A. (Sierra Leone) v. MJELR* of the 12th October, 2011 ([2011] IEHC 381). It has also been rejected by Birmingham J. in a judgment of the 24th March, 2011, in *M.A.A. v. MJELR*. The issue has subsequently been considered again in the judgment of Ryan J. of the 14th December, 2011 (*N.O. v. MJELR*) and of Hogan J. of the 11th January, 2012 in *P.I and E.I v. MJELR*. In the judgment of this Court all possible nuances of the arguments upon which this ground is advanced have been thoroughly considered in those judgments and nothing has been submitted in the hearing of the present application which could justify this Court departing from the conclusions that have been reached in those judgments.

6. The applicant is an English speaking national of the Cameroon and comes from its North West province which had previously been a part of the British Cameroons. He arrived in Ireland in July 2006 and claimed asylum. His asylum claim was based upon his account of having previously suffered persecution for political reasons in his country of origin. He said that, like his father, he had been an active member of a separatist movement. He joined the Southern Cameroon's Youth League and was involved in campaigning for independence. He claimed his house had been raided on a number of occasions by police looking for documents held by his father. In January 2000, he had been arrested and held in prison for five years without charge. He claimed to have been mistreated in jail.

7. His asylum application was the subject of a negative recommendation by the Commissioner in September 2006 and this was upheld on appeal by the Tribunal by a decision on the 1st February, 2008. In essence, the applicant's claim was rejected upon grounds of lack of credibility as to his account of political involvement and resulting mistreatment.

8. On the 25th April, 2008, an application for subsidiary protection was made on the applicant's behalf. The claim to fear exposure to a risk of serious harm if returned was based upon precisely the same facts, events and claims of mistreatment as had been the subject of the asylum application at both stages. In the application submissions were made by way of reply to, and rebuttal of, some of the findings of a lack of credibility made by the decision makers in the asylum process. In the determination of the application under the heading of Applicant's credibility and whether benefit of doubt should be given", (by reference to Regulation 5(3) of the

2006 Regulations) these submissions were noted and the following observation was made:-

> "In their submissions, the applicant's legal representative raises a number of points in regard to findings made by the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. It is not the purpose of this determination to investigate findings made by these offices."

The decision maker then went on to quote a number of specific credibility findings made by the Tribunal and then concluded that because of the doubt surrounding credibility "the applicant does not warrant the benefit of the doubt".

9. This aspect of the determination and the submissions made in the application has been pointed to as demonstrating the reason why an appeal against such a determination is necessary. It is said that the Minister has simply accepted negative credibility findings made in the asylum process and has not made his own independent determination of the issue. In the judgment of the Court, this argument is unfounded because it fails to appreciate the relationship between subsidiary protection and refugee status as established in the scheme of international protection in the Common Asylum System of the European Union. Subsidiary protection is a form of international protection introduced by the Qualifications Directive for the explicit purpose of complementing refugee status under the Geneva Convention. As explained in greater detail in a judgment of this Court delivered since the hearing of the present application (*N.D. v MJLR* of the 2nd February, 2012) the scheme for the assessment of an entitlement to international protection within the European Union is based upon a procedure in which the essential fact finding and evaluation of an applicant's claim is made by means of interview, report, first instance determination and possible appeal in the asylum procedure. In all Member States except this one, a single application is made both for refugee status and subsidiary protection and, where the asylum claim is rejected, the same decision maker will immediately assess eligibility for subsidiary protection on the basis of the facts and circumstances of the claim as established at that point.

10. Although, in the manner in which subsidiary protection has been implemented in the 2006 Regulations in this Member State, a new application is made and examined after a proposal to deport has been notified, the first named respondent as decision maker remains obliged to take account of the findings on credibility made in the asylum process because an application for subsidiary protection can only be made by an applicant who has been declared not to be a refugee. (See *B.J.S.A. (Sierra Leone) v. MJELR*)

11. Furthermore, the proposition that the Minister is obliged to reconsider issues of credibility where the application for asylum is based on precisely the same facts, events and claims as were rejected by the asylum decision makers, leads to a clearly contradictory result. Where, as in the present case, the claim for asylum was based upon a fear of persecution for a particular Convention reason and has been rejected because its factual basis has been disbelieved, the invitation to the Minister to reconsider credibility would effectively require the Minister to consider whether the applicant was a refugee when his not being a refugee is an essential precondition of possible eligibility for subsidiary protection.

12. In the course of argument the Court pointed out to counsel for the applicant that so far as European Union Law is concerned, both Article 47 of the Charter of Fundamental Rights and Article 39 of the Procedures Directive do not confer a right of appeal in the sense of a full *de novo* re-hearing such as the applicant appeared to require. Both of those provisions refer to the "right to an effective remedy before a tribunal". In circumstances where an applicant will always have been interviewed by the Commissioner and will invariably have had an oral hearing by way of full appeal before the Tribunal, there did not appear to be any valid reason why judicial review of the determination of subsidiary protection would not adequately satisfy any entitlement to an effective remedy as has been held in a number of judgments of the High Court including, in particular, the judgment of Hogan J. of the 11th January, 2012,referred to above in *P.I. and E.I.*

13. Counsel for the applicant submitted that the ground advanced was not based upon an entitlement under European law in that sense, but upon the principle of equivalence and the fact that national law provided a full appeal by way of rehearing before the Tribunal against the comparable first instance determination under the Act of 1996 of an asylum application. As already indicated above, the Court considers this argument unfounded for the reasons already set out in greater detail in the judgments referred to in paragraph 5 above.

14. The essential reasons given in those judgments for the conclusion can be summarised as follows. Firstly, insofar as the possibility of appealing against the administrative determination of a subsidiary protection application is a matter of national procedural law, the intervention of European Union Law to prescribe minimum procedural standards in Council Directive 2005/85/EC (the "Procedures Directive") does not apply to the subsidiary protection form of international protection except in those cases where a Member State has adopted a single or unified procedure for both forms of international protection as required by Article 3.3 of the Directive in question.

15. Secondly, the appeal from the ORAC to the RAT under the Act of 1996, is not an appropriate comparator in national law because prior to 1 December 2007, (the final date for transposition of the Procedures Directive,) the s. 13 Report of ORAC under that Act, was not a first instance determination of the application for asylum. It was a report upon the examination of the asylum claim and on the interview of the applicant with a recommendation to the Minister who made the decisive determination under s. 17(1) of the Act.

16. It was only by virtue of the adaptation of the 1996 Act, authorised by Annex I of the Procedures Directive that the s. 13 report acquired the decisive character of a first instance determination and the appeal to the RAT acquired the function of providing the effective remedy required by Article 39 of the Procedures Directive which, as mentioned, applies exclusively to applications for asylum except in the circumstances identified in Article 3.3.

17. It cannot, therefore, be said that for the purpose of applying the principle of equivalence an appeal from a first instance determination of an asylum application in Irish law is a remedy accorded for the vindication of a comparable right in national law. It is a procedure which affords the remedy required to be accorded by the European Union in the Procedures Directive as applied to asylum applications.

18. Thirdly, it is a mistake to treat the consideration of eligibility for subsidiary protection as wholly divorced from the examinations of the application for subsidiary protection from the first stage examination of the application for refugee status. Subsidiary protection is explicitly enacted as a form of international protection in European Union law to complement refugee status under the Geneva Convention. Because an application for subsidiary protection can only be made by an individual who has been declared not to be a refugee, the scheme of the Qualifications Directive presupposes that when the subsidiary protection decision makers determine the latter claim, the applicant's case has already, so far as concerns the basic facts, history and personal circumstances of the applicant, been examined and analysed by the decision makers in the asylum process. While this more obviously the case where the unified procedure is employed by reason of Article 3.3 it is nevertheless the case that by the time the Minister determines the subsidiary protection application, the majority of claims will not only have been examined and analysed at first instance, but invariably will have

been the subject of reconsideration at an appeal hearing.

19. The principle of equivalence comes into play where European Union Law creates rights in favour of individuals, but leaves to the Member States the choices of procedures and remedies for enforcement or protection of those rights. The Member States have an obligation to provide the appropriate procedures and remedies by national law but subject to the condition that the measures and procedures chosen must be equivalent to and no less effective than the measures provided by national law for the enforcement or protection of comparable rights in national law. A declaration of refugee status under the Geneva Convention is not, as such, the grant of a right in national law. It is declaratory of the pre-existing circumstances of an applicant in international Law coming within the protection afforded by the Convention (See *K.J.J v Refugee Appeals Tribunal* (Unreported, High Court, Cooke J. 4th March 2011, [2011] IEHC 77 and *H.I.D. v Refugee Applications Commissioner*, (Unreported, High Court, Cooke J. 9th February 2011). Subsidiary protection is, therefore, an extended form of international protection which complements refugee status by affording protection to an individual who is genuinely at risk of "serious harm" in the country of origin but who does not qualify as a refugee; invariably because the source of the serious harm in question lacks one of the essential reasons for persecution upon which the Geneva Convention is based - the so-called Convention nexus. It is incorrect, therefore, to regard eligibility for subsidiary protection as a wholly distinct and stand alone right attracting the need for a procedure which duplicates that of the asylum process.

20. In submissions, counsel for the applicant accepted that the Procedures Directive does not apply directly to procedures for subsidiary protection except where a unified system has been adopted in accordance with Article 3.3. He submitted, however, that notwithstanding the role of the Minister in making a formal decision on the declaration for refugee status under s. 17(1) of the Act of 1996, in substance and in practice it is the recommendation in the s. 13 Report which constitutes the first instance determination and the appeal decision of the Tribunal being a "final decision" for the purposes of Article 2(d) of the Procedures Directive. Where a negative recommendation has been given, the Minister retains a residual discretion nevertheless to grant the declaration. Where the recommendation is positive, he has no such discretion, but must grant the declaration. The Court entirely agrees that this is the correct approach that must be taken to the respective roles of the ORAC and the RAT. By not formally implementing the Qualifications Directive by transposition of its provisions and relying upon the facility to adapt the existing national provisions afforded by Annex I of the Procedures Directive, the State cannot now assert that the s. 13 Report of ORAC is anything other than the "first instance determination" and the appeal decision of the Tribunal the "final decision" on the application. Insofar as s. 17(1) retains an executive function it is as a residual discretion on the part of the Minister which can operate only in favour of an applicant.

21. The Court cannot accept, however, the further submission made on the basis of that approach namely, that "if there is an appeal against what is in substance the refusal of asylum in a particular country" then the principle of equivalence means that there must be an appeal against the refusal of the "European law remedy of subsidiary protection". Because the subsidiary protection determination is a complementary or "follow-on" examination of the circumstances of an applicant in the light of a claim to a risk of serious harm for a "non-Convention reason" it does not follow, in the judgment of the Court that the principle of equivalence requires that there be a process of appeal by way of rehearing. Insofar as the determination of the subsidiary protection component of international protection can be characterised as a new decision by a different decision maker taken in implementation of a provision of European Union law, what an applicant is entitled to is the "effective remedy" required by Union law generally, including Article 47 of the Charter of Fundamental Rights of the European Union in particular. As such, the remedy is provided for in Irish law by the availability of judicial review and, as has been held in a number of judgments of the Court, that remedy is adequate to guarantee the validity, reasonableness and lawfulness of a determination of subsidiary protection. (*P.M v MJELR* (Unreported, High Court, Hogan J. 28th October 2011) [2011] IEHC 409, *ISOF v Minister for Justice* (Unreported, High Court, Cooke J. 17th December 2010) [2010) IEHC 457, and *Lofinmakin v Minister for Justice* ((Unreported, High Court, Cooke J. 1st February 2011) [2011] IEHC 38)

22. Finally, counsel for the applicant relied in this regard upon the recent judgment of the Court of Justice of the European Union in a Case 69/10 *Diouf* given on the 28th July, 2011. This case is relied upon to support the proposition that insofar as the cases cited in para. 5 above are to be taken as deciding that Article 39 of the Procedures Directive does not apply to subsidiary protection they are at variance with the ruling of the Court of Justice. It is submitted that in this case the Court of Justice has reaffirmed that the right to an effective remedy under Article 39 is a reiteration of the fundamental right to such a remedy in European law. Accordingly, even if Article 39 has not been expressly applied in the Procedures Directive to subsidiary protection determinations as such, the same right to an effective remedy derived from general law must nevertheless be accorded.

23. The Court has no great difficulty with much of this proposition. It is clear that Article 39 is indeed an embodiment of the general right now given explicit status under Article 47 of the Charter. Where this Court disagrees with the submission is with the suggestion that the *Diouf* case is authority for the proposition that an effective remedy for the purposes of European Union Law necessarily requires an appeal by way of a *de novo* rehearing. The Court of Justice did not so decide.

24. The *Diouf* case arose out of an asylum procedure before the relevant administrative Tribunals in Luxemburg where the application for asylum had been dealt with under an accelerated procedure in the first instance examination. The decision rejecting the application was taken by the Minister for Labour, Employment and Immigration. The applicant then brought proceedings before the *Tribunal Administratif* seeking annulment of the Minister's decision including annulment of the decision to deal with the application and determine it under accelerated procedure. Under the relevant Luxemburg law, no appeal lay against such a procedural decision within the asylum process. It was submitted that the non-existence of such an ability to challenge the accelerated procedure decision was a denial of an effective remedy required by Article 39. In brief, the Court of Justice held that the decisions in the asylum process to which Article 39 applied were the substantive decisions which determine the outcome of the asylum application. It held that the principle of effective judicial protection did not preclude national rules which barred the procedural measures such as the application of an accelerated procedure provided "that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application - a matter which falls to be determined by the referring court".

25. In other words, the Court held that it was competent for the authorities in a Member State in the asylum process to choose to apply an accelerated procedure in a given case and not allow a distinct challenge to be made at that stage to the choice provided the legality of the ultimate substantive decision taken under that procedure and in particular the reasons for rejecting the asylum application as unfounded, can be the subject of review by the national Court within the framework of a challenge to the substantive decision. (See para. 56 of the judgment). In para. 58 the Court said: "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".

26. What is notable about the *Diouf* case is that the action for annulment of the decision rejecting the asylum claim and requiring the

applicant to leave Luxemburg in which the questions were referred to the Court of Justice, was itself a remedy by way of judicial review before an administrative tribunal. The expression 'judicial review" as it appears in the English text of the judgment at, for example, para. 57 is rendered in French - the language of the case -as "controle juridictionnel". This is the term used to describe the exercise by the Court of Justice itself of its jurisdiction in actions for annulment by way of judicial review of the legality of legislative acts and administrative measures under Article 263 TFEU. It is also the term used to define the annulment jurisdiction in the administrative law systems of other Member States including notably those of the French and Belgian Conseils d'Etat on which of course other European systems including that of the Luxembourg courts are based. As such, those courts have competence to review the legality of the reasons for a substantive decision on the merits but that does not mean that they have power to reach a new conclusion on the substantive merits of the original application and to substitute their own conclusion as a replacement adjudication of the application on the merits. They annul and remit. So does this Court in judicial review. Accordingly, while the Court of Justice in the *Diouf* case has reiterated as the characteristic of the effective remedy that the tribunal to which the remedy lies must extend to reviewing the legality of the reasons which l ed to the asylum claim being rejected on the merits, the Court of Justice has not held that the effective remedy requires the provision of an appeal by way of rehearing on the merits as claimed by the applicant. Thus, the *Diouf* case is not, in the judgment of this Court, authority for the central proposition sought to be advanced in support of the ground for which leave was granted in this case.

27. For all of these reasons the Court considers that the ground has not been made and the application must be refused.

APPROVED: Cooke, J