THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 739 J.R.]

BETWEEN

OLUWASEUN COMFORT OKUNADE AND

DANIEL DEMILOLUWA OKUNADE (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND OLUWASEUN COMFORT OKUNADE)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 30th day of March, 2012

Background

1. The first named applicant is a Nigerian national who fetched up in the State in May 2008 and the second named applicant is her infant son born in the State on 23rd June, 2008 and is a Nigerian national. The applicants made application before the Refugee Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT) and following the above applications both of which were rejected, the applicants made applications for subsidiary protection to the first named respondent which also were unsuccessful and deportation orders were made in respect of both applicants.

2. It is in respect of the above decisions that the applicants commenced these proceedings on 16th August, 2011 and seek leave to challenge by way of judicial review, the validity of (a) the decision of the first named respondent to refuse subsidiary protection; and (b) the deportation orders made against them. The appropriate standard in relation to judicial review for the subsidiary protection application is that of arguable grounds and in respect of the deportation order it is substantial grounds. It is accepted by both sides that in the event of any finding in favour of the applicant on the subsidiary protection that the deportation order cannot take effect.

3. In addition to the reliefs of *certiorari* sought, the applicant is also seeking various declarations, however, the applicant is clearly out of time (three months) in respect of the declarations sought arising from the subsidiary protection decision. In any event, the court fails to see why the applicant or other applicants in cases such as this, seeks wide declaratory relief when in most circumstances, if they are entitled to relief of *certiorari* the declarations are superfluous and if the applicant should fail in their quest for *certiorari*, they must also fail in the declaratory relief.

The Applicants' Claims

4. The first claim of the applicants is that the claim for subsidiary protection and non-refoulement are subject to the principles of fair procedure, autonomy, effectiveness and equivalence.

5. It is submitted by the applicants that the Qualifications Directive has been incorrectly transposed so that the applicant for subsidiary protection is "enmeshed in the deportation process". It was also formally submitted that Qualifications Directive was incorrectly transposed into Irish law whereby the implementing measures did not require the first named respondent to cooperate with the applicants.

6. The issue of "cooperation" was first considered by Birmingham J. in *Ahmed v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 24th March, 2011) which comprehensively rejected this ground:-

> "In my view the argument ignores the fact that an application for subsidiary protection is not made in isolation but is ordinarily made, and this was the situation in the present case by someone who was applying for asylum, and has had that application considered and been refused refugee status.
>
> Even before the stage of submitting an application for subsidiary protection is reached, there has already been a considerable degree of interaction between an applicant and the authorities...."

7. The matter was further considered in *M.M. v. Minister for Justice, Equality and Law Reform & Ors* (the *Mujyanama* case) (Unreported, Hogan J., 18th May, 2011) in which case though he expressed severe doubts about the proposition, Hogan J. did make a reference to the Court of Justice but notwithstanding this reference, the High Court has further rejected the argument in a large number of cases: *BJSA (Sierra Leone) (Akhiele) v. Minister for Justice, Equality and Law Reform* [2011] 1 IEHC and by myself in *Jayeola v. Minister for Justice and Equality* [2011] 656 J.R. and in the view of this Court as stated in *Jayeola*, this proposition is without merit.

8. The second submission on behalf of the applicant is that there was breach in the principle of equivalence notwithstanding the views I expressed in *Jayeola* (above) in relation to equivalence and notwithstanding the fact that Cooke J. has held in the comprehensive judgment of *Nendah v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 16th February, 2012), counsel for the applicant maintained that the applicant on this occasion was advancing a new and previously unconsidered argument based upon equivalence.

9. I do not find any new argument having been advanced on this point.

10. To quote Cooke J. in *Nendah* (above):-

> "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."

11. Cooke J. referred to the judgments of the High Court in *S.L. v. MJELR* of 6th October, 2011 and *BJSA (Sierra Leone) v. MJELR*, 12th October, 2011 and Birmingham J's judgment in *M.A.A. v. MJELR* (24th March, 2011) and Ryan J. in *N.O. v. MJELR* (14th December, 2011) and Hogan J in *P.I. and E.I v. MJELR* (11th January, 2012).

12. In addition there have been a number of further judgments on the same point by this Court.

13. The argument briefly put is that a failed asylum seeker who has been ineligible for subsidiary protection by determination of the Minister is entitled in law to a right of appeal against this decision it is submitted the principle of equivalence in European law requires that the remedy in relation to subsidiary protection be equivalent to that available in national law in a procedure prescribed by national law for the protection of a comparable right or indeed equivalent to comparable EU rights.

14. It is submitted that as there is a right to an appeal from a determination in an asylum claim by the ORAC to the RAT that this facility under national law (the Refugee Act 1986) must replicated by a corresponding appeal against a determination made in a procedure for subsidiary protection as this procedure determines a right derived from European law namely the Qualification Directive.

15. In the manner in which a subsidiary protection has been implemented in the 2006 Regulations in this State an application is made and examined after the issue of refugee status as being determined a proposal to deport has been notified. The Minister as the decision maker must take into account the findings of 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 *BJSA (Sierra Leone) v. MJELR* and *Nendah* (above)).

16. Neither the provisions of Article 47 of the European Charter of Fundamental Rights nor Article 39 of the Procedures Directive confer a right of appeal in the sense of a full *de novo* rehearing. Both of these provisions referred to a "right to an effective remedy before a Tribunal".

17. The fact that national law provides for a right of appeal by way of a rehearing before the RAT against the asylum application decision is not a reason for the law to provide for a full appeal by way of a rehearing in respect of a subsidiary protection application. (see *Nendah* (above))

> "The essential reason 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/EEC (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 3.4 of the Directive in question."

18. Furthermore, it has been held in the cases referred to above that the appeal from ORAC to the RAT under the 1996 Act is not an appropriate comparator in national law because it is only by virtue of the adaptation of the 1996 Act as authorised in Annex 1 of the Procedures Directive that the appeal to the RAT acquired the function of providing an effective remedy required by Article 39 of the Procedures Directive which only applies to applications for asylum save in the circumstances identified in Article 3.3 (i.e. where Member States have adopted a single or unified procedure for both forms of international protection).

19. It has also been held that the lack of an appeal on the merits is not a breach of any principle of equivalence either in national or under EU law.

20. In the instant case, counsel on behalf of the applicant sought to adopt what Cooke J. might refer to a further "nuance" by submitting that an applicant for subsidiary protection was particularly disadvantaged by the fact that with a separate and distinct application for subsidiary protection to the Minister there is a threat of a life long deportation order should the application fail, as the applicant for subsidiary protection can only be a failed asylum seeker who if he or she fails in the application for subsidiary protection then may be deported.

21. The court fails to understand whether this submission was a submission based upon an alleged lack of proportionality or whether it was based upon some further nuance in relation to equivalence.

22. In any event, the court is of the view that there is not merit to this submission.

23. Whether a State (as in the case of all other EU members) adopts a unified procedure so that an applicant applies at the same time for asylum and subsidiary protection or separate procedures, as in this State, before the relevant decision maker considers the issue of subsidiary protection the applicant must be at that time a failed asylum seeker liable for deportation.

24. Indeed, it was argued by the respondent, and I accept, that an applicant for subsidiary protection in this State is under certain advantages compared with applicants in the rest of the Union. Where States adopt a unified procedure the application will be made at the same time as the refugee claim and an applicant will not be aware of the particular grounds that have been used to deny him refugee status and it is quite possible that the applicant would be able to submit, in this State, further information that at the subsidiary protection stage which might have granted him relief which he would have been unable to have done so had the decision been made at the same time as his refugee application. In other words, in this State after the failure of an asylum application an applicant is given extra time firstly to consider whether they will or not make an application for subsidiary protection and if they decide to do so to reconsider and fine tune the submissions he may make.

25. Further, an applicant for judicial review of a subsidiary protection need only advance arguable grounds whereas any judicial review of the appeal decision of the RAT must show substantial grounds and indeed must be on notice to the respondent.

26. Accordingly, far from being disadvantaged an applicant for subsidiary protection under the system as operates in this State is particularly advantaged in that he or she is faced with a decision by the ORAC which may be either appealed or should it be so justified subject to judicial review then he has an appeal before the RAT which may be subject to judicial review and then the applicant may make an application for subsidiary protection and/or for leave to remain to the Minister armed with the previous decisions which are also subject to judicial review on the lower threshold that prevails in this State for such determinations.

27. Therefore, on the only practical nuance not previously raised, the court is not of the view that any further ground has been established.

28. Finally, dealing with the issue of equivalence it was submitted that while an asylum application is one possible comparator to subsidiary protection application that is by no means the only comparator. It was submitted that a comparator would be to look to see how fundamental rights are protected within the domestic legal system. In this regard, reliance was made on the manner in which the court deal with, for example, refusals by a District Judge to grant legal aid and the fact that the court will rather than remit the case to the judge, make the order in respect of legal aid themselves.

29. The applicant placed reliance upon the decision of *Paquay* [2007] ECR 1 - 8511 in which the court said:-

> "in choosing the appropriate solution for guaranteeing that the objective of Directive 76/207 is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance..."

30. The *Paquay* case above, is not any authority in relation to the principle of equivalence rather it requires similar penalties in domestic law for similar breaches of similar infringements of community law. It has been held in the above Irish cases referred to that there is no issue in relation to equivalence either in relation to domestic or EU law for the reasons stated therein. No case has been made by this applicant to the effect that they are prejudiced by the system of judicial review of subsidiary protection which exists in the State.

31. As Hogan J. stated in *M v. MJELR* [2011] 1 IEHC 409:-

> "In view of this case-law, it is unnecessary to explore this matter further in any detail. It is clear 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. In any event, as I have already pointed out, the applicant has not indicated how or in what manner she has been denied an effective remedy."

32. I shall deal with the issue of effective remedy separately but in this case and at this stage it is suffice to say that the applicants have not made out any case how they as individuals have been prejudiced or deprived of any rights by way of any supposed lack of equivalence.

33. Such matters cannot merely be determined in theory and in a vacuum. In order for the applicants to succeed they must show that they have been prejudiced by some alleged failure in this State. Clearly they failed to do this. In addition as has been stated they have not even advanced a theoretical basis for such a claim.

Effective Remedy

34. The issue of the alleged lack of effective remedy by reason of the fact that in Irish law there is only the remedy of judicial review open to an unsuccessful applicant for subsidiary protection is in fact linked to the issue of equivalence as discussed above.

35. The arguments based upon effective remedy in relation to the asylum system has been considered in a number of judgments: *ISOF v. MJELR (No. 2*) [2010] IEHC 455; *Efe v. Minister for Justice, Equality and Law Reform (No.2)* [2011] 1 IEHC 214; *P.I. and E.I v. MJELR* (Hogan J.) (11th January, 2012); *Nendah* (above) (Cooke J.); and myself in *Jayeola* (above).

36. In these cases, it was held that the remedy of judicial review was sufficiently flexible to vindicate the applicant's rights wherever they arose (see the quotation from Hogan J. in *P.I and E.I* above).

37. In the instant case, the applicants submit that the decision of the Supreme Court in *Donegan v. Dublin City Council* and *Dublin City Council v. Gallagher* (27th February, 2012) fundamentally alters the position.

38. Clearly, the earlier decisions were not made with the benefit of the *Donegan* decision and in *Donegan*, the Supreme Court held that judicial review was not an effective remedy in a case where a local authority was evicting a tenant pursuant to the statutory scheme set out in s. 62 of the Housing Act 1966.

39. Under this Act, the local authority to obtain an order of possession must show (a) that the dwelling is provided by the local authority, (b) that no tenancy exists in respect of the dwelling whether by a fluxion of time or by termination for breach or otherwise, and (c) that notwithstanding a demand for possession, a dwelling remains occupied by the individual to whom the demand was sent and that this demand is contained in a statement of the housing authority's intention to invoke s. 62 of the Act in the event of possession being refused or denied.

40. In the *Donegan* case, the local authority demanded possession because they alleged that Mr. Donegan or a member of his family was dealing in drugs and the Supreme Court stated:-

> "It follows from this construction of the section that an occupier has no right or entitlement to raise any defence to such an application, other than by way of challenging the housing authority on these formal proofs. In addition, the absence of judicial discretion means that the personal circumstances of such occupier must be disregarded as being irrelevant; equally so with questions regarding the reasonableness or fairness of making the Order: these simply have no part in this statutory procedure."

41. In *Donegan*, the Supreme Court considered the decisions of the ECtHR in a number of cases including one called *Connors* and the Supreme Court said in relation to the *Connors* case that the central issue was whether the legal framework, within which possession of the site could be recovered from the Connors family, provided sufficient procedural protection to safeguard their Article 8 rights and stated:-

> "[It] identified the family's real complaint as being unable to have determined by an independent body, the clear factual dispute regarding the anti-social acts complained of, and those responsible for them."

42. When considering the adequacy of a judicial review in the *Donegan* case, the Supreme Court stated:-

> "123. In considering this matter, it is immaterial whether the primary aim or principal focus of the remedy lies elsewhere; even therefore, if judicial review is directed to such matters as *ultra vires*, the control of statutory and other powers or duties, discretionary or otherwise, it would not matter. Once there is a mechanism available within the process which is adequate and which affords fairness and independence, such will suffice for Article 8 purposes.
>
> 124. ... What has been lost sight of in this submission is the very simple and straightforward conflict which requires resolution. Was Mr. Donegan's son a drug addict or a drug pusher? It is purely a question of fact, simple, I even dare say to resolve."

43. Accordingly, in the *Donegan* case, the Supreme Court were saying that the mechanism provided by law was entirely inadequate when fundamental rights including ECtHR rights were involved.

44. It is the view of this Court, however, that the situation in *Donegan* is entirely different from the situation in the case of applicants for subsidiary protection.

45. Applicants for subsidiary protection have as it is stated in case after case being first through the asylum process which involves exchange of documents and interview before the ORAC and subsequently an appeal (and in this case an oral appeal) before the RAT. These bodies make findings of credibility and assess the issues in the asylum application. Should the application for refugee status fail, the subsidiary protection application then occurs in circumstances when decisions such as the credibility of the applicant in relation to his refugee application has been determined and when it has been determined as a matter of final law that the applicant is not a refugee but is seeking, notwithstanding that fact, subsidiary protection. The applicant sets out his claim for subsidiary protection and the decision maker is obliged to consider this application in detail under the terms of S.I. 518 of 2006 and give detailed reasons for all decisions. The decision in relation to subsidiary protection is subject to judicial review under the law as reiterated by the Supreme Court in *Meadows*. Therefore, all the issues of fact must be analysed and are subject to the independent review of this Court. This is entirely different from the situation in *Donegan* when at no stage was there any analysis of the essential factual issue in dispute.

46. There is nothing in the *Donegan* case that alters the established jurisprudence of this Court in relation to subsidiary protection applications.

The Proportionality of the Decision
47. By way of a final submission in relation to subsidiary protection, the applicant submits that there is a breach of the principle of proportionality. The applicant submitted that the very nature of the life long exclusion from the State constituted disproportionate penalty.

48. When one examines the Qualifications Directive, there is no limitation imposed as to the length of deportation. The effect of a deportation is to require the deportee to leave the State within a specified period of time and to remain thereafter outside the State.

49. It is open to an applicant who wishes to re-enter the State to apply for revocation of the deportation order in order to allow the applicants to invoke the provisions of s. 3(11) to revoke the deportation order, the applicants must advance matters which are truly materially different from those presented or capable of being presented in the earlier application.

50. This having been said, however, the State has a right and a duty to control its borders and to refuse access to the State to those who had been unlawfully present therein. Nothing that has been advanced would suggest that these applicants have any case against the proportionality or indeed in the reasonableness of the deportation order.

51. The applicants' submissions in relation to the supposed unfairness of the applicants having to make their application for subsidiary protection with a threat of deportation having over them have already been dealt with. In countries of the Union which have a unified procedure for subsidiary protection and asylum, the applicant once his case for subsidiary protection has been asserted will know that it will only be considered if he should fail in his refugee application and at that stage he will be aware that there is a risk of deportation. The only difference between the unified procedure and the separate procedures applied in this State is that at the time of drafting and lodging the subsidiary protection application, the applicant in this State will be aware that his asylum application has failed and he will be in the advantageous position that he may choose not to make an application for subsidiary protection at all should there be no merit in doing so. Accordingly, an applicant for subsidiary protection in this State is in the view of the court in an advantageous rather than a disadvantageous position vis a vis an applicant in other Member States.

Conclusions
52. For all of the above grounds, the court holds that the applicant has failed to sustain any arguable grounds which the case against the subsidiary protection decision could be challenged and has failed to establish any grounds either arguable or indeed substantial to challenge the deportation decision.