THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 411 J.R.]

BETWEEN

A.S.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 23rd day of February, 2017

Issues

1. By order on 20th June, 2016 the applicant herein was afforded liberty to apply for judicial review for an order of *certiorari* quashing the decision of the respondent refusing to consent to the applicant making a further asylum application under s. 17 (7) of the Refugee Act 1996. The decision was made on 24th May, 2016.

2. Leave was afforded to the applicant on the basis that:

> (a) the respondent erred in failing to express on a reasoned basis why the redacted decisions of the RAC in respect of Afghan nationals relied upon by the applicant were not such as to make it significantly more likely that the applicant will qualify for protection in the State and
>
> (b) the respondent failed to take into account the relevant consideration that the applicant is from Nangarhar, Afghanistan.

Background

3. The applicant is from Afghanistan. He arrived in Ireland on 31st October, 2011 and made an application for asylum on 3rd November, 2011. At that time he suggested he was from Nangarhar. He did not at any time thereafter mention Nangarhar. A EuroDac hit revealed that he had applied for asylum in Italy on 11th November, 2010 using a false name and date of birth. An interview was scheduled for 9th July, 2013 however he did not attend and he effectively absconded so that apparently the letter proposing to deport him of 31st July, 2013 was never received by him. On 26th August, 2014 he sought to be readmitted to the asylum process and he did so without the aid of a solicitor. On the 9th March, 2015 this application was refused.

4. Some time prior to 11th August, 2015 some accommodation was reached between the parties whereby the applicant might apply further under s. 17 (7) of the Refugee Act 1996. In this regard submissions were made by solicitors on his behalf on 11th August, 2015. Subsequently by letter of 24th August, 2015 further submissions were made including two redacted decisions of ORAC one of which, at hearing stage was accepted on behalf of the applicant as not being particularly material however the second decision that was furnished was considered by the applicant to be material. This decision was given on 23rd January, 2015 when a recommendation was made that that particular applicant would be eligible for subsidiary protection. On 30th March, 2016 the applicant through his solicitor made further representations. In each of the representations made on behalf of the applicant no mention is made of Nangarhar and country of origin information is supplied in all three of the letters. Kabul features in all three country of origin documents furnished. In the letter of 26th November, 2015 by way of submissions referable to the redacted decisions of ORAC and it was indicated that notwithstanding the rejection of credibility in respect of portion of one of the applicant's claim the commissioner found that the applicant was eligible for subsidiary protection based upon being a civilian facing an individual threat to his life or person by reason of indiscriminate violence in a situation of armed conflict. The letter further suggests that there are other similar type decisions and goes on to state:-

> "On the basis of these positive reports of the commissioner in respect of nationals of Afghanistan there is at the very least a reasonable chance of our client is eligible for subsidiary protection."

Submissions

Nangarhar

5. The applicant suggests that the Minister failed to take into account that the applicant was from Nangarhar, that the Minister erred in law and in fact by examining the security situations in other parts of Afghanistan. It is asserted that Nangarhar province is substantially more dangerous than other provinces mentioned by the respondent. The only case relied upon by the applicant in this regard was the European Court of Justice's Case C – 465/07 *Elgafaji v. Staatssecretaris van Justite* [2007] OJ C 008 to the effect that a risk of serious harm from indiscriminate violence may be limited to a particular region that the applicant comes from.

6. I find that the application in this regard to be wholly without merit given the lack of reference to Nangarhar in any of the three submissions made by the applicant to the Minister and in circumstances where the country of origin information furnished by the applicant to the Minister did not in fact address the status in Nangarhar at all but rather concentrated in the main on Kabul.

7. Insofar as the applicant complains that the Minister looked at regions other than Nangarhar in its decision the respondent correctly points to the statement of grounds in this regard which complains that the respondent failed to take into account the relevant consideration that the applicant is from Nangarhar – it did not complain that irrelevant provinces were taken into account.

8. In my view in circumstances where the applicant did not deem fit to even mention the province of Nangarhar in the various submissions made to the Minister the applicant cannot now complain that Nangarhar was not the focus of the Minister's attention in dealing with the applicant's application.

9. I find this argument to be entirely devoid of merit.

Prior ORAC decisions
10. The applicant's complaint is to the effect that the respondent failed to express on a reasoned basis why these decisions were not such as to make it significantly more likely that the applicant will qualify for protection. In this regard the applicant relies on two judgments, the first being *PPA v. RAT and Ors.* [2006] IESC 53 where the Supreme Court dealt with an appeal from an order of MacMenamin J. in the High Court. The decision of the Supreme Court was given by Geoghegan J. The applicant refers in particular to para. 24 of this judgment to include the following:-

> *"Thus, as in these appeals, it may be a problem of gross or official discrimination against homosexuals or it may be a problem of enforced female circumcision or it may be a problem of some concrete form of discrimination against a particular tribe. Where there are such problems it is blindingly obvious, in my view, that fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this of a similar category… It is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate cases, be a significant element in ensuring that a decision is objectively fair rather than arbitrary."*

11. The applicant also relies on the decision of *PBN v. Minister for Justice and Equality* [2016] IEHC 316. That decision related to a complaint that the Minister did not have regard to a Ramos report. Apparently the report contained new material on the fate of failed asylum seekers. At para. 75 of the judgment the Court indicated that the Court was of the view that the applicant counsel placed too much emphasis on the actual language in the decision however the Court was in agreement that on the face of the decision the Ramos report appears not to have been engaged with by the reviewing officer. The Court went on at para. 79 to say that given the particular submissions in the review application it was incumbent on the Minister to address the argument and this required an actual analysis of the material. At para. 83 the court indicated that it was not at all clear from the face of the decision that the decision maker had the Ramos report in his sight when stating as much given that reference is made only to a 2006 UNHCR report.

12. The respondent counters that the Court noted at para. 24 of the decision aforesaid that the Minister failed to have regard to the Ramos report in any sense and at para. 25 the Court notes that there was no reference to it whatsoever in the decision.

13. The respondent therefore counters that the case before Faherty J. is in marked distinction to the instant circumstances where at p. 2 of the appeal decision three references are made to the submissions by the applicant's solicitor and the ORAC prior reports (in the letter of 24th August, 2015 the argument tendered on behalf of the applicant based upon the redacted decisions tendered is to the effect that other nationals of Afghanistan were granted subsidiary protection based upon a serious and individual threat to their life or person).

14. The difficulty from the applicant's point of view in relying on these decisions would be as follows:-

> (i) The within applicant does not come within any of the categories identified at para. 24 of the *PPA* judgment, and that judgment endorsed consistency to establish objective fairness as opposed to an arbitrary decision.
>
> (ii) The applicant acknowledged at hearing stage that the first decision in fact involved a claim of persecution where credibility was accepted and therefore could be distinguished from the instant matter.
>
> (iii) However considerable emphasis is placed in respect of the second matter where that applicant claimed to be from Nangarhar and at para. 3.1.2 of the decision details of the applicant's familiarity with the region was identified. That applicant also submitted documents identifying that he was born in Nangahar Province. In submissions made on behalf of the applicant the applicant asserts that the situation in Afghanistan differs in different regions and Nangarhar is a particularly vulnerable area. The instant applicant did not however identify to the Minister that he was from the province of Nangarhar in that save that the decision enclosed related to Nangarhar, no other reference is made by the applicant in his submissions and country of origin information tendered to Nangarhar.

15. The respondent refers to two decisions of Humphreys J. where the Tribunal had not involved itself in a narrative analysis of material furnished. The Court rejected this as reasons to afford the granting of an order of judicial review. The cases are those of *G.I. v. Minister for Justice & Ors.* [2015] IEHC 682 and *R.A. v. Refugee Appeals Tribunal & Ors*. [2015] IEHC 686.

16. The applicant makes the point that in fact Humphreys J. is dealing with country of origin information rather than other documents.

17. I accept the respondents submission that these decisions are pertinent as the relevant ORAC decision relied upon is not specific to the applicant and is therefore akin to country of origin information. I am also mindful of the fact that the applicant in support of his position relied on PBN, aforesaid, which also relates to a country of origin report.

18. At para. 22 of Humphreys J.'s decision in G.I., in referring to the Tribunal Member, the Court states:-

> "… [A]t para. 16 he recites that he has perused the documents submitted. As the decision on its face purports to have taken the documents into account, the onus is on the applicant to show that this is not the case… The right to a narrative discussion of the evidence submitted could only arise if the documentary evidence was being positively rejected, as opposed to a situation where it was insufficient to take the applicant over the line."

19. The respondent also relied on *Meadows v. Minister for Justice* [2010] IESC 3 where the Court found that the decision should at least disclose the essential rationale on foot of which the decision is taken and this should be patent from its terms or capable of being inferred.

20. The applicant argues that although there is reference to the fact that the two prior ORAC decisions were before the Minister in or about a consideration of the s. 17 (7) application the value of these decisions to the applicant were effectively dispatched by the following:—

> "Having given careful consideration to this application, the arguments put forward and the country of origin information provided I find that no new elements or findings have arisen or been presented by the applicant which makes it significantly more likely that he would be declared in need of protection…"

21. Based upon the foregoing case law the applicant argues that there is insufficient reasoning contained in the foregoing finding to

discount the prior ORAC decisions whereas the respondent counters that though the decision does not expressly address why the unredacted decisions do not in view of the respondent make it significantly more likely that the applicant will qualify for protection, it is submitted that this does not render the decision susceptible to *certiorari*. As, in the words of Meadows, the decision discloses "*the essential rationale on foot of which the decision is taken*."

22. The respondent further argues that the argument now made by the applicant that there should be consistency as between decisions was not in fact an argument presented to the Minister but rather the argument presented to the Minister based on the two redacted decisions enclosed was to the effect that the decisions enclosed confirm that other nationals of Afghanistan have been granted subsidiary protection because of a threat to their lives or a threat of indiscriminate violence because of an internal armed conflict ongoing in Afghanistan. The submissions on 26th October, 2015 are to the effect that on the basis of such decisions "there is at the very least a reasonable chance that our client is eligible for subsidiary protection."

23. I am satisfied that para. 22 of G.I. applies.

Conclusion
24. In accordance with the Supreme Court decision of Meadows the relevant decision now impugned must disclose the essential rationale on foot of which the decision is taken and this must be patent from its terms or capable of being inferred.

25. The impugned decision did not include a discussion as to why the Minister determined that the two ORAC decisions did not comprise new elements or findings making it significantly more likely that the applicant would be declared a refugee or entitled to subsidiary protection however it is clear that this finding was made having considered the application, the arguments put forward and the country of origin information. It appears to me in these circumstances that there is no question but that the applicant was afforded the broad gist of the basis for the Minister's decision and although the decision was certainly sparse, nevertheless the reasons were clear and the basis for the decision was unambiguous – the ORAC decisions tendered did not make it significantly more likely that the applicant would be declared in need of protection merely because the applicant also claims to be from Afghanistan.

26. I believe in these circumstances that the applicant was made aware that effectively the ORAC decisions did not bring the applicant over the line in establishing new elements or findings making it significantly more likely that he would be declared in need of protection. In all of the circumstances I find such a decision to be rationale. I do not see how the applicant has been substantially prejudiced by the failure to afford a more detailed discussion as to why the ORAC decisions (in the circumstances of the arguments and information tendered) make it significantly more likely that he would be declared in need of protection.

27. The parties also argued as to whether or not the decision made a finding that the information and submissions tendered by the applicant in the various letters and enclosures dated the 11/08/15, 24/08/15 and 30/03/16 could have been furnished at his previous application. However, given my views as to the reasons contained within the decision it is not necessary for me to determine this aspect of the matter.

28. For the reasons above I refuse the application for *certiorari*.