Neutral Citation [2013] IEHC 244

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 899 J.R.]

BETWEEN

J. A.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 19th day of April, 2013

The Reliefs Sought

1. This is an application for leave to apply for judicial review by way of *certiorari* quashing the decision of the Refugee Appeals Tribunal dated 20th June, 2010, and notified to the applicant on 2nd July, 2010. The applicant also seeks leave to apply for an order of *certiorari* quashing the decision of the second named respondent refusing to grant the applicant subsidiary protection made the 9th September, 2011, and notified to the applicant by letter of the same date. The original notice of motion dated 26th September, 2011, was confined to a challenge to the aforementioned orders. Subsequently, the second named respondent made a deportation order in respect of the applicant on 23rd September, 2011, notification of which was furnished by letter dated 27th September and was said to have been received by the applicant on or about 30th September.

2. The second notice of motion issued was dated 6th October, 2011, and sought to amend the statement of grounds to incorporate a challenge to the deportation order made by the second named respondent.

3. The application to seek leave to apply for judicial review in respect of the decision of the Refugee Appeals Tribunal dated 2nd July, 2010, should have been made within fourteen days of its notification to the applicant. The notice of motion seeking to amend the grounds in respect of the deportation order issued on 6th October, 2011, and a challenge to that order is therefore within time. An extension of time to challenge the Tribunal decision cannot be brought pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, unless the High Court considers that there is good and sufficient reason for extending the period within which the application should have been made. Although an application to extend the time has been made to this Court, no evidence setting out the reasons for the delay in applying for judicial review has been submitted.

4. The normal procedure in respect of a challenge to a refusal to grant subsidiary protection is to bring an application *ex parte* to the High Court but in this instance the application was included in the first notice of motion dated 26th September, 2011, as a matter of convenience. That application was made within time pursuant to the normal rules then applicable under O. 84 of the Rules of the Superior Courts. A further application was later made to this Court following the decision of the High Court in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9 which followed the decision of the European Court of Justice in *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2012] EUECJ, C-277/11 (22nd November, 2012), in which the applicant sought to amend the grounds upon which the challenge to the refusal of subsidiary protection was originally brought. The new grounds were based upon the recently delivered decisions, to which I will return.

Background

5. The applicant is a national of Bangladesh born on 8th February, 1974. He claims that he suffered persecution as a result of his father's political activities and that he was falsely charged with criminal offences, as a result of which he fled Bangladesh in fear of his life and freedom. He arrived in Ireland on 19th December, 2008, and applied for asylum. A s. 11 interview was conducted with him on 25th March, 2009. On 29th May, 2009, he was notified that the Refugee Appeals Commissioner had recommended that he not be granted refugee status. A copy of the s. 13 report was furnished to him. He appealed to the Refugee Appeals Tribunal and following an oral hearing on 26th January, 2010, a decision confirming the recommendation of the Refuge Applications Commissioner was made on 30th June, 2010, which was notified to the applicant on the 2nd July.

6. Following receipt of the "three options" letter the applicant applied for subsidiary protection on 7th September, 2010, following which he received notification of its refusal on 9th September.

7. At the time of his application for asylum the applicant's parents resided in Bangladesh. He was single, and had two brothers and a sister. He claimed that his father was a public representative and social worker. His father stood for election and succeeded in being elected chairman of a local village council in 1997 and served as such until 2002. It was claimed that his opponent's son was jealous because the applicant's father had been elected and, as a result, threatened the applicant three times following the election. The applicant claimed that he was first threatened following his father's election in 1997. He was again threatened on 26th October, 2002, by the same man who this time threatened his life. Shortly afterwards, it was claimed that his father held a meeting at which his opponent's son asked for forgiveness of the applicant's father for the threat. A third threat was made, again to his life on 14th November, 2003. This was allegedly accompanied by a threat by the same man that he would accuse the applicant falsely of a robbery or murder. Following this threat the applicant's father went to the local police and made a complaint. The applicant then claimed that the same man falsely accused him of robbing his home with others on 25th January, 2004. His father went to the police station to inquire why his son had been accused of robbery and was told by the police that it was because they believed that he had committed it. The applicant then absconded. A warrant issued for his arrest on 22nd September, 2004. The applicant denies the charge and alleges that it was falsely and maliciously made by the son of his father's electoral opponent in 1997 who procured false testimony against him.

8. Thereafter, the applicant claims that he was charged and prosecuted for robbery and following a trial held in his absence,

convicted on 9th June, 2008, in a District Court following which he was sentenced to life imprisonment. He claimed that the son of his father's opponent made these false allegations against him because of his desire to insult his father, lower the reputation of his father's family and his standing in the community. Following his conviction and sentence on 15th October, 2008, the applicant and his father decided that the applicant should leave Bangladesh and his father arranged this for a sum of €8,000.

9. A number of documents were submitted by the applicant which he claimed were related to the investigation of the robbery and his trial. These were:-

(1) Original birth certificate and translation;

(2) A general diary dated 15th November, 2003, and translation;

(3) An arrest warrant dated 26th January, 2004, and translation;

(4) A First Information Report (police report FIR) dated 9th June, 2008, and translation;

(5) A court report dated 9th June, 2008, and translation;

(6) Purbkom newspaper article dated 10th June, 2008, and translation;

(7) First Information Report (police report FIR) signed 26th January, 2004, and translation;

(8) A DHL envelope in which these documents were said to have been sent to the applicant from Bangladesh.

11. The following is an account of the offence outlined in a document said to be the court's determination. It recites that after the victim went to bed with his family on the night of 25th January, 2004:-

> "All of a sudden, he (the complainant) woke up from bed hearing the sound of breaking of the door. Then he saw that ten to twelve people had entered the house. After entering the house they held up the plaintiff and his elder brother in different rooms of the house. At first they bound up the plaintiff. Then they directed their guns to the wife, the eldest brother of the plaintiff and the wife of the second brother of the plaintiff and told them to keep quiet. Then they directed their guns to Babu, the one year old son of the eldest brother of the plaintiff and Farida, the six month old daughter of the second brother of the plaintiff and told the wives of the eldest and the second brother "give us the keys otherwise we will kill the children". They handed over the keys instantly. With the keys the robbers opened up the steel and wooden closets in the rooms of the eldest brother and the second brother and took away different goods including cash money, gold ornaments and other goods valued about 2,03,045.00 taka in total."

12. There then follows an account of the escape of the robbers and the police investigation.

13. The documents presented suggest that nine men were charged with the robbery. Six were on bail and three were present for the trial. Three were said to have absconded and it is stated that:-

> "As the accused Akramulislam Jony did not attend in spite of summoning again and again, his bail and attendance have been cancelled."

The document said to be a record of the trial states that the three accused present in court for the trial were examined under the Criminal Procedure Code. They declared their innocence and informed the court that they could not offer any defence witnesses or submit any papers. Since the other accused had absconded it was not possible to examine them in a like manner to those in attendance. The accused alleged that they had been implicated in the case falsely. The court was satisfied that the charge brought against the accused had been proved beyond any doubt. The three accused who had absconded were also convicted, including the applicant in this case. He was sentenced to life imprisonment and a fine of €50,000 taka. The sentence was to come into effect from the date of the voluntary surrender to the court or capture of the accused persons. It was directed that an arrest warrant should be issued for the arrest of the applicant and the two others who had absconded.

14. On the applicant's account, therefore, there is in fact a valid arrest warrant in existence against him following a trial before a court of competent jurisdiction in Bangladesh. A document said to be an arrest warrant issued by a Magistrate and dated 20th February, 2004, was also submitted. He claimed that when suspected of serious criminal offences by the police, he fled. He was charged and failed to appear at this trial. His father retained a lawyer on his behalf. He maintains that witnesses committed perjury at his trial *in absentia*. It is clear that the suggested motive for the false charge relates to a personal vendetta arising out of local village politics and personal animosity, and has nothing to do with political opinion or ideology or party politics or state or state sponsored persecution. The applicant accepts that a robbery took place at the house of the complainant and that a robber was arrested. He maintains that the complainant enticed the arrested robber to give the applicant's name as one of his accomplices to the police. He made a deliberate choice to avoid his trial hoping to be acquitted at its conclusion. He made no allegation in his application for asylum that the investigation or prosecution of the offence by the authorities in Bangladesh was in any way biased or tainted by corruption. His request for asylum is based on his desire to avoid the consequences of the conviction. (See pp. 16 to 17 of the questionnaire dated 5th January, 2009). His story was repeated in the s. 11 interview in which he also claimed that his father was not a political figure, though he served as a councillor from March, 1998 to December, 2002.

The Decision of the Refugee Appeals Tribunal

15. The applicant's claim for refugee status was based on a stated fear of persecution due to membership of a particular social group and political opinion. The Tribunal noted that the Office of the Refugee Applications Commissioner had been unable to verify the authenticity of the documents submitted on behalf of the applicant. The Tribunal also noted that the applicant had been threatened in December, 1997 after his accuser's father lost the 1997 election to the applicant's father. He was again threatened on 26th October, 2002, by the same man and a third time on 14th November, 2003. It was noted that following the laying of the charge against him in January, 2004 the applicant claimed to have moved his home to Comiha where he remained until December, 2006. He then moved to Sylhet in December, 2006 until July, 2007. He then moved to Mulivi Bazar where he remained until November, 2007. He then moved to Habigong until July, 2008 and from there to Sunamonji in July, 2008 where he lived until he came to Ireland on 13th November, 2008. Prior to the applicant's conviction and sentence nothing had occurred arising out of the threats made to him. The Tribunal determined that it was not a reasonable explanation for the applicant to claim that the alleged victim of the crime was threatening the applicant because he wanted to insult his father's name, particularly when he could have accused the applicant's father of robbery or threatened him at any time.

16. The Tribunal was satisfied that the documents produced, if valid, confirmed that he had been charged and convicted of a robbery and that a general diary produced appeared to be a record of a report that his father made to the police regarding threats allegedly made by the victim of the crime to the applicant. Although an arrest warrant was issued for him in September, 2004 in respect of the charges, the applicant was able to relocate within Bangladesh, though a fugitive, over a period of almost five years and was convicted *in absentia*.

17. The Tribunal doubted the credibility of the account given by the applicant concerning his trip to Ireland and pointed to inconsistencies in that account. It was noted that his case was based solely upon his unsupported personal testimony which could not be verified. The Tribunal concluded:-

> "The applicant's problems relate to alleged false accusations due to a dispute between two families. It is reasonable to conclude that the applicant's claim of a fear of persecution lacks both substance and credibility."

18. The Tribunal noted in its analysis that although the applicant claimed to have owned and operated a business for twelve years, he had nothing to prove this. A photograph of the applicant attached to a warrant was submitted as part of the documentation. The applicant claimed that the photograph was from his home and could not explain why it was attached to the warrant. He said that he never complained to the police about any of the threats made against him in 1997, 2002 or 2003, but that his father went to the police on 15th November, 2003, in respect of these complaints which was said to have been recorded in the diary submitted. He said he did not leave Bangladesh until 2008, even though serious threats were made against him since 1997, because he did not believe they had substance. The Tribunal found it difficult to believe that if a report had been made to the police two months before the robbery on 24th January, 2004, concerning the threats made to the applicant, that the police would not have made any further investigations into the applicant's claim that he had been wrongfully accused.

19. The Tribunal also found that the applicant's credibility was further undermined by the evidence considered under s. 11B of the Act in respect of:-

> (a) Whether the applicant possessed identity papers or could provide a reasonable explanation for their absence;
>
> (b) Whether the applicant had provided a reasonable explanation to substantiate the claim that Ireland was the first safe country to which he had arrived since departing Bangladesh;
>
> (c) Whether the applicant had provided a full and true explanation of how he travelled to Ireland.

In that regard the applicant claimed that he used no documents to travel to Ireland. He travelled to Ireland by ship transferring from one ship to another during the voyage. He said that he was transferred to a small boat on arrival in Ireland which took him into Dublin port, from which he took a taxi that brought him to the offices of the Refugee Applications Commissioner. The Tribunal noted that the benefit of the doubt could only be given when all the evidence had been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. Clearly the Tribunal was not so satisfied. It found that the applicant's account of his journey from Bangladesh to Ireland and his failure to claim asylum in an unknown port and in Dublin port, neither plausible nor credible.

20. The Tribunal referred to country of origin information on forged and fraudulently obtained official documents in Bangladesh which included information from the Canadian High Commission and British High Commission in Daka (2009) and from the Country Information Service of the Australian Department of Immigration and Multicultural Affairs, which referred to the ready availability of falsified documents such as birth certificates. The Australian information indicated that asylum applicants from Bangladeshi political parties would often submit voluminous documentation to support their claims:-.

> "including in particular outstanding warrants for their arrest if they return to Bangladesh and other alleged court and police documents. Arrest warrants are not generally available to the public, and all such documents should be scrutinised carefully. Many documented cases of outstanding arrest warrants are proved to be fraudulent. As of December, 1997, the Embassy had examined several hundred documents submitted by asylum applicants; none proved to be genuine". (Australian Department of Immigration and Multi-Cultural Affairs (1998) entitled "*Bangladesh: Profile of Asylum Claims and Country Conditions*")

The court has already set out the documents submitted in the course of the application which included purported copies of an arrest warrant and extracts from the court proceedings at his trial. The documents submitted were found not to be verifiable.

21. However, a conclusion was reached that the applicant was, in truth, fleeing prosecution rather than persecution. That finding is part of the Tribunal's decision. It was also satisfied that country of origin information indicated that the judiciary was independent in Bangladesh and that the applicant could seek justice through the courts. It cited a United States State Department Report of 2006 which stated that Bangladeshi law provides accused persons with the right to be represented by counsel, to review accusatory material, to call witnesses and to appeal verdicts. It noted that there was no jury trial and that all cases were tried by judges. Trials were held in public and defendants have the right to an attorney, though state funded attorneys were rarely provided. Defendants were presumed innocent, had the right of appeal and had the right to see the government's evidence against them. In that regard, no complaint was made in the application for asylum of any defect in the Bangladeshi criminal justice system such as to amount to a serious or flagrant denial of a fair trial. The court notes that the applicant alleged that his conviction was secured on the basis of evidence provided by an accomplice who was enticed by the complainant to give false testimony against the applicant and to nominate him as the robbers' accomplice.

22. The Tribunal concluded that on the basis of the information provided by the applicant, he had not suffered any persecution for a Convention reason in Bangladesh nor was he likely to face persecution upon his return in respect of his membership of a particular social group or political opinion. The determination was based on a finding that the applicant lacked credibility in respect of his story. It also examined the claim on the basis that the applicant might have been the subject of prosecution and conviction. It concluded that even if it were to be accepted that a false charge was laid and false testimony procured against him in order to procure his conviction for robbery arising out of personal jealousy of the failed candidate's son against this father for winning an election, that did not amount to a fear of persecution within s. 2 of the Refugee Act 1996. The Tribunal concluded that the applicant left Bangladesh, on his own evidence, "fleeing prosecution…not persecution", that is to avoid imprisonment following the conviction.

The Challenge to the Tribunal Decision

23. The Tribunal decision is challenged in respect of the adverse credibility finding made against the applicant on the basis of grounds 1, 2, 4, 6, 7, 8, 9 and 10 set out in the amended statement of grounds of the 23rd November, 2011. These grounds were reduced to two propositions in the course of argument. The first was that the Tribunal's conclusion that the applicant's father "would have been

accused of the robbery" if the complainant in the criminal case wished to offer him insult or lower his reputation rather than procure the conviction of the son, was based on conjecture and related to a peripheral matter. The court accepts that conjecture by the Tribunal is not a sufficient basis upon which to reach a determination and that there must be a cogent nexus between the matters upon which the applicant has been found not to be credible and the core issue in the application. However, the submission made in this regard seeks to isolate an observation made by the Tribunal in its decision from all other issues which the Tribunal concluded undermined the credibility of the applicant in respect of the persecution issue. The comment must be read in context as an observation as to whether the story given by the applicant would likely give rise to the sequence of events described by him. In context, the observation was logical, reasonable and consistent with commonsense. It could not, in any event, be regarded as the core of the decision.

24. The second argument advanced under the rubric of these grounds is that the Tribunal considered the documents submitted by the applicant in a manner which was confusing in that they were relied upon to make a credibility finding and a finding that the applicant was fleeing prosecution rather than persecution whilst at the same time concluding that the veracity of the documents was disputed. It was submitted that each of the three findings appeared to be mutually exclusive. This is an incorrect assessment of the Tribunal decision. The court has already set out the basis upon which the Tribunal considered the story told by the applicant in the context of the documents that were submitted. The documents were not verifiable. The story was not thought to be credible insofar as it alleged political persecution. The Tribunal determined that the evidence did not establish a fear of persecution but only that the applicant was evading justice. The Tribunal in considering the matter in this manner took the applicant's case at its highest notwithstanding doubts about documentation and determined that the applicant could not establish a fear of persecution. Contrary to the submission made by the applicant, the court is satisfied that the principles set out by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* [2009] IEHC 353 were applied, and in particular that the assessment of credibility was made by reference to the full picture that emerged from the available evidence and information taken as a whole "when rationally analysed and fairly weighed", and that the reasons given related to the substantive basis of the claim made. Accordingly, the court is satisfied having reviewed the Tribunal's decision that the applicant's claims in this regard do not afford substantial grounds upon which to seek leave to apply for judicial review. Though the Tribunal has accepted that the applicant failed to establish a fear of persecution based on a Convention reason because his evidence was not credible in that regard, nevertheless, the finding remains that he was a fugitive from justice in Bangladesh.

Article 39 of Directive 2005/85 – Grounds 3 and 11
25. The Tribunal decision is also challenged on the basis of a claimed absence of an effective judicial remedy under Article 39 of Directive 2005/85 in grounds 3 and 11, a point that was conclusively determined by the European Court of Justice in the recent judgment of *H.I.D. & B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Case C-175/11 of 31st January, 2013). In that case the European Court of Justice determined that Article 39 of the Directive must be interpreted as not precluding national legislation which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal and to bring an appeal against the decision of that Tribunal before a higher court such as the High Court or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court. This aspect of the claim was adjourned on 12th July, 2012, pending the determination of that case in the European Court of Justice. Following that determination, the court put the case in for mention to determine whether the applicant wished to make further submissions on grounds 3 and 11. The applicant indicated that he did not wish to make any further submissions on that matter and there would be no further challenge to the decision on those grounds.

Extension of Time to Challenge the Tribunal Decision
26. As a result of this development it is not necessary to consider any further the issue raised by the respondents in relation to the suggested non-compliance with the time limits imposed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and/or O. 84 of the Rules of the Superior Courts on this aspect of the case in which European Union rights were asserted. The balance of the grounds in respect of the Tribunal decision relate to non-European Union rights and remain subject to the limitation period of fourteen days within which application for leave to apply for judicial review must be sought under s. 5. However, there is no evidence as to why the application was not brought within time. As already indicated the court is not satisfied that the grounds advanced amounted to substantial grounds under s. 5, and thus no injustice will be suffered by the applicant if the extension is not granted. The court refuses the extension of time in respect of the challenge to the Tribunal decision.

27. The applicant also complained that the determination of the Refugee Appeals Tribunal lacked precision and was based on supposition and conjecture. Having reviewed the Tribunal's decision, the court is satisfied that this generalised submission is without substance.

The Deportation Order and Letter – the Identity of the Applicant
28. It is also complained that the deportation order contained an error on the face of the record because it referred to the applicant as "Rony Akramulislam" rather than "Jony Akramulislam". The letter that stated the reasons for the making of the deportation order also contained the same error. The determination of the subsidiary protection application referred to the applicant as "Jony Akramulislam AKA Rony Akramulislam". An affidavit was filed in court explaining the error made and the court is entirely satisfied that the applicant at all times understood that the decisions in respect of the deportation order and the letter and the subsidiary protection order were made in respect of and addressed to him. The applicant suffered no prejudice because of this error and the court is satisfied that it did not inhibit in any way the conduct of correspondence, the making of submissions, the conduct of these proceedings or any potential challenge by way of judicial review to any of the decisions made in respect of the applicant and cannot be regarded as giving rise to any stateable or substantial ground entitling him to leave to apply for judicial review.

Subsidiary Protection
29. At the hearing of the application for leave on 12th July, 2012, the applicant challenged the refusal by the Minister to grant subsidiary protection on the ground that, as the decision of the Tribunal was fundamentally flawed, the decision on subsidiary protection must be quashed because it was made in respect of a failed asylum seeker which the applicant could not be if the Tribunal decision were quashed. The written submissions in the matter were confined to a submission that the Minister failed to consider the submissions made in respect of the application for subsidiary protection and, in particular, failed to have regard to the provisions of s. 5 of the Refugee Act 1996 (non-refoulement).

30. It is clear that the applicant originally challenged the subsidiary protection decision within time and a number of grounds were set out in the original application (grounds 12 – 19). These included pleas that:-

> (1) The Minister failed to cooperate with the applicant in assessing the relevant elements of the claim in breach of the minimum standards mandated by the Qualification Directive (Council Directive 2004/83/EC) and, in particular, Article 4(1) (ground 14);

(2) There was a failure to provide an effective remedy (ground 16);

(3) The subsidiary protection decision insofar as it was based on the country of origin reports relied upon was irrational and unreasonable (ground 18); and

(4) The decision insofar as it failed to consider and determine the actual application submitted was reached without due regard to fair procedures and natural and constitutional justice (ground 19).

31. It is also correct to say that the applicant placed emphasis on the failure to take account in the consideration of the file of prison conditions in Bangladesh and what the applicant might face if returned. It was submitted that the failure to consider the disproportionate nature of the sentence of life imprisonment for robbery imposed on the applicant in Bangladesh in respect of the crime of which he was convicted, and the absence of consideration of whether the life sentence of itself constituted a threat to his life and/or torture and inhuman and degrading treatment under Article 3 of the European Convention on Human Rights by reason of the prison conditions in Bangladesh, made the decision unlawful.

32. By notice of motion dated 26th February, 2013, the applicant sought to amend the statement of grounds again and an extension of time to do so on the basis of the following draft ground:-

> "The Minister, in determining the subsidiary protection application of the applicant failed to provide the applicant with an effective hearing in that reliance was placed on the adverse credibility findings previously made by the Refugee Appeals Tribunal and no independent and separate adjudication was made on the applicant's claim."

33. This application was made under O. 84, r. 18(4) of the Rules of the Superior Courts which provides that the court has power to amend an application for leave "on such terms if any, as it thinks fit" and may "allow the applicant's statement to be amended whether by specifying different or additional grounds of relief or otherwise".

34. The reason for seeking this amendment is set out in the written submissions of the applicant and arose from the decision in *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Case C-277/11) by the European Court of Justice on 22nd November, 2012, following a reference by Hogan J. for a preliminary ruling in relation to a subsidiary protection decision challenge. The court rejected the applicant's argument concerning the interpretation of Article 4(1) of the Qualification Directive and held that the duty of cooperation did not require the subsidiary protection decision maker to supply the applicant with a draft of any possible adverse decision for comment prior to its formal adoption. That effectively deals with ground 14 in this case. The European Court of Justice, however, went on to consider the right of a foreign national to be heard in the course of the examination of his subsidiary protection application and concluded:-

> "However, in the case of a system such as that established by the National Legislation at issue in the main proceedings, a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance, in each of these procedures, of the applicant's fundamental rights, and more particularly of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection."

35. Hogan J. heard further argument arising out of this decision and delivered judgment on 23rd January, 2013. The applicant relies on para. 31 of this judgment as follows:-

> "The judgment (of the Court of Justice) specifically emphasises the fact that the asylum and subsidiary protection procedures presently contained in Irish law are distinct and different. The logical corollary of this is that under our bifurcated system the subsidiary protection application must be considered distinctly and separately from the asylum application. This in turn means that the Minister must decide the subsidiary protection issue without reliance on the prior reasoning contained in the asylum application insofar as this otherwise may be taken effectively to preclude an applicant for subsidiary protection reopening certain issues at that stage or in as much as it creates any quasi estoppel arising as against such an applicant by reason of a failure to challenge an adverse asylum application in separate judicial review proceedings, at least in the absence of an effective hearing where the applicant was given an opportunity afresh to revisit these issues: where matters expressly put to the applicant by the decision maker and where the decision maker independently made a fresh decision on the applicant's credibility and other relevant issues."

It was submitted that Hogan J. found in *M.M.* that in rejecting a specific claim of serious harm made by the applicant in that case "the Minister relied entirely on the reasons advanced by the Refugee Appeals Tribunal to reject the credibility of these claims and he made no separate and distinct findings of his own on these critical questions". He granted *certiorari*.

36. The applicant further submits that this involves a radical departure from existing jurisprudence in Ireland in that previously there had been a number of High Court decisions which held that the Minister in a subsidiary protection application was entitled "indeed obliged" to take into account the findings made in the asylum process and which have, of course, been accepted as the basis for his refusal of the declaration under s. 17(1) of the 1996 Act. It had been found that where the decision of the Tribunal finds an asylum seeker's claim implausible or lacking in credibility such that the events described or the facts relied upon were considered not to have happened or not to have involved the applicant, there was no obligation on the Minister to reconsider the same facts or events or to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection "at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers". It was, therefore, submitted that the applicant was only now in a position to make this further legal argument as set out in the proposed amended ground following the decision of Hogan J. in January, 2013.

37. It was further submitted that an extension of time in relation to the amended of grounds should be granted.

38. It is also submitted that the ground is arguable because the consideration prepared for the Minister prior to the making of the subsidiary protection decision relied heavily on the adverse credibility findings of the Tribunal which were recited in the report. It is submitted, therefore, that the Minister failed to carry out an independent and separate adjudication on the applicant's claims that he would suffer serious harm if returned to Bangladesh.

The Application for Subsidiary Protection
39. In the application for subsidiary protection made on 7th September, 2010, the applicant claimed that there were substantial grounds for believing that if returned to Bangladesh he would face a real risk of suffering serious harm and was unable or owing to such risk unwilling to avail himself of the protection of that country. It then describes the nature of the serious harm likely to be suffered by the applicant.

40. The first subheading is under torture, inhuman or degrading treatment or punishment. The court has already referred to details of the applicant's claim as set out in his application for asylum including claims that the applicant has already been subject to such treatment in that he was threatened a number of times by the person who ultimately made the criminal complaint against him. It then claimed that the treatment already suffered by the applicant supports his contention that he is at risk of further torture if returned and that this was borne out by country of origin information. However, there is absolutely no allegation in his application for asylum or, in any evidence submitted up to that point, that the applicant had been tortured or subjected to any process that might constitute a violation of Article 3 of European Convention on Human Rights.

41. It was also claimed that if the applicant were to be returned to Bangladesh he would be at risk of being imprisoned and subject to inhuman and degrading treatment. The submission is made that he was charged, convicted and sentenced to life imprisonment for a crime he did not commit and that "the judicial system in Bangladesh is corrupt". This is the first allegation made by the applicant of corruption in the Bangladeshi judicial system and he has never made an allegation that his trial was corrupt in any particular respect. He claims that the case against him was based on the evidence of an accomplice whom he claims was enticed to give evidence against him by the complainant in the robbery charge. His allegation is that his conviction arose out of false testimony given against him, not that the police investigation or the trial process was corrupt.

Determination of Application for Subsidiary Protection
42. In the consideration of the applicant's claim for subsidiary protection it was noted that the applicant claimed to have received a life sentence for robbery on 9th June, 2008, and that he fled Bangladesh as a result. The issues to be considered were whether there were any substantial grounds for believing that the applicant would face a real risk of torture or inhuman and degrading treatment in his country of origin, and whether he could avail of state protection against such threats. There is no doubt that the determination lays particular emphasis on the findings in relation to the applicant's credibility as determined by the Refugee Appeals Tribunal. It cited the determination of the Tribunal that it was reasonable to conclude that the applicant's claim of a fear of persecution lacked both substance and credibility and that his claim was based solely on his unsupported personal testimony which could not be verified. It cited the conclusion that it was clear from the information provided by the applicant that he had not suffered any persecution for a Convention reason in Bangladesh, nor was he likely to face persecution upon his return.

43. The determination also cites the conclusion that the applicant was "fleeing prosecution in Bangladesh, not persecution". It noted that country of origin information indicated that the judiciary was independent in Bangladesh and that the applicant could seek justice through the courts. The court has already determined that the Tribunal decision is to be interpreted as a finding that the applicant was lacking in credibility on the core issue of his claim in relation to political persecution. The documents submitted in relation to his trial and conviction were found not to be "verifiable". But even if they were, and proved that he had been convicted and sentenced, this did not amount to grounds upon which to hold that he had a fear of persecution because of the limited and local nature of the dispute between two families that lay at the root of the alleged procurement of false testimony against him.

44. It is still the applicant's claim that he is a convict sentenced to life imprisonment in Bangladesh, which he must serve on return. He fears torture and inhuman and degrading treatment if imprisoned in Bangladesh because of the appalling prison conditions which he claims exist there. This is to an extent supported by country of origin information submitted in the course of his application for subsidiary protection. Although the Tribunal found the applicant to be lacking in credibility on the core issue, its decision that the applicant left Bangladesh for fear of prosecution rather than persecution was not given particular significance by the decision maker in the subsidiary protection decision. However, as already noted, the Tribunal found that "it is considered that the applicant is fleeing prosecution in Bangladesh not persecution". Thus, that element of the story has been accepted. Though the applicant was not entitled to protection on the grounds claimed, the issue of his potential imprisonment should he return to Bangladesh should have been fully addressed in the application for subsidiary protection, particularly in the light of the emphasis in the M.M. judgment on the separate nature of the procedure required when considering subsidiary protection in this jurisdiction.

45. The court is, therefore, satisfied that the applicant has established that the Minister has failed to consider the core basis of his application for subsidiary protection namely, his fear that as a person convicted of a criminal offence and sentenced to life imprisonment, he is in danger of a threat to his life and/or torture, inhuman or degrading treatment if returned to Bangladesh to serve that sentence. This finding was acknowledged in the summary of the findings on credibility set out in the subsidiary protection decision, but mistakenly under a heading which considered aspects of the applicant's lack of credibility. Clearly, the Tribunal decision made a finding accepting his reason for leaving Bangladesh but rejecting the alleged political motivations of the complainant of the robbery charge. The fear of the threat to his life and/or torture, inhuman or degrading treatment was not addressed in the decision at all and the court is, therefore, satisfied that Ground 19 of the applicant's grounds is stateable.

46. Further, the court is disposed, with some hesitation, to grant liberty to the applicant to amend his application on the ground already quoted and, for that purpose, the court will extend the time for the making of this application. The court is satisfied to do so on the basis that this case is at a preliminary stage and further, because it is difficult to see any prejudice to the respondent in allowing the amendment. Though argument had concluded on the leave stage on 12th July, 2012, save for the decision in *H.I.D. & B.A.,* I am nevertheless satisfied that as a matter of justice to the applicant, liberty should be granted to amend the grounds as is sought.

47. The court is not satisfied to grant leave to apply for judicial review on grounds 12, 13, 14, 15, 16, 17 or 18.

48. It should be noted that the previous determination by the Tribunal that the applicant is fleeing justice in Bangladesh raises an issue as to how this aspect of the decision should be considered if the applicant is successful in these proceedings. If successful, it may well be that he will not be able to rely on the finding of fact in that regard at a later review of the subsidiary protection application by reason of the *M.M.* decision, because any future adjudication may require the issue to be reconsidered separately and afresh by the decision maker. It may also mean that if successful under ground 19, relief in respect of the amended ground may be unnecessary as any future determination in respect of subsidiary protection would have to be conducted in accordance with the *M.M.* principles.

The Deportation Order
49. An application was submitted on behalf of the applicant for leave to remain in the state pursuant to s. 3 of the Immigration Act 1999, on 6th September, 2010. It was submitted that the return of the applicant to Bangladesh would be in breach of s. 5 of the

Refugee Act 1996, and Articles 3 and 8 of the European Convention on Human Rights in that the applicant would face a serious risk to his life or liberty if deported. It was submitted that Article 3 was absolute in nature and not limited to persons who had been recognised as refugees. A new element was introduced to the case in that it was claimed that the applicant suffered from chronic hepatitis B infection for which he was under specialist care in Ireland, and that he would be deprived of health care if returned to Bangladesh. The United States Department of State Report on Bangladesh 2009 on prison conditions was again cited which indicated that they were "abysmal due to overcrowding, inadequate facilities and lack of proper sanitation. Human rights observers believed these conditions contributed to custodial deaths".

50. An examination of the applicant's file under s. 3 of the Immigration Act, 1999 was carried out by officials. The applicant's case was considered under s. 3(6) of the Immigration Act 1999, and s. 5 of the Refugee Act 1996. Refoulement was found not to be an issue in the case and no issue was said to arise under s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights.

51. Humanitarian considerations were addressed under s. 3(6)(h) of the Act and the conclusion was reached that in the light of case law which has established that a state is not under any general obligation to permit an individual to remain in their state solely for the purpose of obtaining medical treatment of a level not available to them in their own country, there was nothing to suggest that the applicant should not be returned to Bangladesh on that basis, and it was added that it seemed possible that the applicant came to the state for the purposes of availing of health care rather than fleeing persecution.

52. In respect of s. 5 of the Refugee Act 1996, and Article 3 of the European Convention on Human Rights, the examination of file repeats the findings of fact made by the Tribunal. It omits the finding in the Tribunal decision that the applicant's problems related to alleged false accusations due to a dispute between two families and that "it is reasonable to conclude that the applicant's claim of a fear of persecution lacks both substance and credibility". There is no reference to prison conditions in Bangladesh which was part of the applicant's claim in relation to Article 3 of the Convention and in respect of s. 5 of the Act. Therefore, the applicant contends that there are substantial grounds on that basis to grant leave to apply for judicial review in respect of an order based on the consideration of an examination of file which failed to address a core issue in the applicant's claim. This matter is covered by ground 24 in the proposed amendment of grounds sought by notice of motion dated 6th October, 2011.

53. The applicant also complains that the deportation order dated 23rd September, 2011, was not signed by the Minister (ground 22). The court is not satisfied to grant leave to apply for judicial review on this basis which is governed by the decision of Hogan J. in *L.A.T. v. Minister for Justice and Equality and Ors* [2011] IEHC 404.

54. The court is not satisfied that any of the other grounds advanced by the applicant by way of challenge to the deportation order amount to substantial grounds under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Accordingly, the court will only grant an amendment to the statement of grounds in respect of ground 24 of the proposed amendments the subject of the notice of motion of 6th October, 2011.

Conclusion

55. The court is, therefore, satisfied to extend the time for the making of the application to amend the statement of grounds in respect of the challenge to the decision made on subsidiary protection and to allow the amendment in respect of the ground already quoted in this judgment and arising out of the *M.M.* decision. The court is also satisfied that the applicant has established an arguable or stateable ground upon which to grant leave to apply for judicial review in respect of the subsidiary protection decision in respect of ground 19. Further, the court will grant leave to amend the grounds in the terms set out in the notice of motion dated 6th October, 2011, at ground 24, and will grant leave to apply for judicial review of the deportation order on that ground.