Neutral Citation [2012] IEHC 153

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 592 J.R.]

IN THE MATTER OF EU DIRECTIVE 2004/83/EC

IN THE MATTER OF STATUTORY INSTRUMENT 518/2006

BETWEEN

OSARETIN OSAGHE

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 20th day of April. 2012

1. By an order of 25th July, 2011, Cooke J. granted the applicant leave to apply for judicial review in respect of the following reliefs:-

(i) *Certiorari* by way of an application for judicial review to quash the decision of the first named respondent refusing to grant the applicant subsidiary protection dated 6th July, 2011.

(ii) A declaration that S.I. 518/2006 fails to properly transpose into domestic law of the provisions of EU Directive 2004/83/EEC.

(iii) A declaration that the consideration of the applicant's claim was not carried out in accordance with the provisions of EU Directive 2004/83/EC of 24th April, 2004 and/or S.I. 518/2006.

(iv) A declaration that the unavailability of an effective remedy by which the impugned decision may be appealed renders the decision invalid.

(v) Further or other relief as to this Honourable Court shall de-meet.

(vi) An order providing for an award of costs of these proceedings to the applicant.

2. The grounds allowed, to summarise were:-

(i) The decision of the first named respondent dated 14th April, 2011 was not in accordance with the procedures mandated by EU Directive 2004/83/EC (the Qualification Directive) in particular and without prejudice Article 4.1 of the Qualification Directive provides:-

> "Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application." (Emphasis added)

It was contended that Article 4.1 had not been properly transposed into domestic law as there was no reference to the requirement of cooperation.

(ii) The failure of the first named respondent to cooperate with the respondent in assessing the relevant claim where the breach or the minimum standards mandated by the terms of the Qualification Directive.

(iii) By omitting the requirement to cooperate with an applicant from the provisions of S.I. 518/2006, the respondents have failed to properly transpose the terms of the Qualification Directive into domestic law.

(iv) The failure to provide an effective remedy in accordance with the Constitution and/or Article 3 of the European Convention and/or Article 47 of the Charter of Fundamental Rights renders the decision to refuse subsidiary protection or the purported finality of this decision invalid.

(v) The failure to provide a mechanism by which the applicant can appeal the refusal of subsidiary protection in breach of the principle equivalence in that subsidiary protection which is based on EU law is subject to the rules which are less favourable those applied in national law to similar decisions in particular the applicant's asylum claim.

Background

3. The applicant claims to be a Nigerian national who arrived in the State and sought refugee status on 21st March, 2006. She claims that she was seeking asylum on the basis that she would be forced into marriage if returned to Nigeria. She was pregnant at the time of her entry into the State and she claimed that her parents had tried to force her to marry a 65 year old Muslim man though she is a Christian and that following the threat of a forced marriage, she had married a Christian man and that her life was under threat when the 65 year old man became aware of the existence of the marriage.

4. The ORAC concluded the applicant had not presented any indication that she was in need of international protection. The applicant initially sought to challenge the decision by the ORAC by judicial review which was refused by Feeney J. on 7th December, 2007. The applicant also files a notice of appeal to the Refugee Appeals Tribunal (RAT). The RAT had an oral hearing on 14th August, 2008 and in its decision of 16th September, 2008, held against the applicant by affirming the ORAC decision and also making credibility findings against the applicant.

5. By letter of 4th November, 2008, the applicant applied for subsidiary protection and for leave to remain within the State and resubmitted an application on 19th October, 2009 as the previous application was incomplete.

6. This application for subsidiary protection was considered on 5th July, 2011 and determined on 6th July, 2011 and the applicant was notified by letter dated 7th July, 2011.

7. The within judicial review proceedings challenging the decision were filed on 15th July, 2011 and on 25th July, 2011, Cooke J. heard the application for leave ex parte and granted leave in respect of the above grounds.

8. Accordingly, the above grounds and one further matter of importance fell to be considered by this Court.

9. The matter of further importance will be discussed below.

The Grounds upon which Leave was Granted

10. Grounds 1, 2 and 3 in which leave was granted in relation to the alleged failure to properly transpose or to properly apply the provisions of Article 4.1 of the Qualification Directive by reason of the alleged failure to cooperate have been considered and rejected in a large number of cases in this Court.

11. In particular, *F.N v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88 at p. 131, para. 69; *Ahmed v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Birmingham J., 24th March, 2011); *Mayie (IMM) v. Minister for Justice and Equality* (Unreported, High Court, Cooke J., 27th July, 2011) (paras. 16 and 17); *Akhile (BJSA) v. Minister for Justice and Equality* (Unreported, High Court, Cooke J., 12th October, 2011); *Oziegbe v. Minister for Justice and Equality* (Unreported, High Court, Ryan J., 14th December, 2011) (paras. 16 and 17); *P.I and E.I v. Minister for Justice and Equality* (Unreported, High Court, Hogan J., 11th January, 2011); *Jayeola v. Minister for Justice and Equality* (Unreported, High Court, Cross J., 3rd February, 2012); and *Nendah v. Minister for Justice and Equality* (Unreported, High Court, Cross J., 16th February, 2012).

12. These judgments were made notwithstanding in some cases the reference to the Court of Justice of the European Union by Hogan J. of this point in *M.M*

13. Given the weight of these judgments, counsel on behalf of the applicant properly just made and submitted these points should they be required to be made for a further consideration in another court.

14. For the reasons as outlined in the above cases, the court rejects the application for judicial review on those grounds.

15. In relation to the alleged failure of effective remedy (Grounds 4 and 5), this matter has also been heard and considered and rejected by the High Court on a large number of cases as being, *inter alia*, "manifestly unstatable": *J.B. (A Minor) v. Minister for Justice and Equality* (Cooke J.) [2010] IEHC 296 and *ISOF v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 17th December, 2010) in terms as follows:-

> "...if the High Court has a constitutional obligation to vindicate personal constitutional rights in the face of administrative or quasi judicial decisions; and if it has by default a statutory duty under the European Convention on Human Rights Act 2003 to ensure protection under the Convention for rights not otherwise guaranteed by the Constitution, so be it. The remedy of judicial review under O. 84 of the Rules of the Superior Courts is sufficiently comprehensive and flexible in the exercise of the jurisdiction of the High Court to ensure that both of those objectives are met. The mistake is to confuse the jurisdictional rules and procedural incidents of the judicial review remedies with the manner which the criteria for the review fall to be applied."

16. Again, subject to one issue, counsel on behalf of the applicant accepted that the law in the High Court is clear that judicial review does provide an effective remedy in the case of subsidiary protection decisions.

17. The one exception relied upon by the applicant is the decision of the Supreme Court in the case of *Donegan v. Dublin City Council* and *Dublin City Council v. Gallagher* (Unreported, Supreme Court, 27th February, 2012) in which McKechnie J. delivering the decision of the five judge court stated that judicial review was not an effective remedy to a decision under s. 62 of the Housing Act 1962.

18. This case was argued after the argument in *Lukombo v. Minister for Justice and Equality* [2011] 830 J.R. and *Okunade v. Minister for Justice and Equality* [2011] 793 J.R. but before the judgments of this Court delivered on 27th March, 2012 and 30th March, 2012, respectively.

19. In the said judgments, this Court pointed out that the Donegan decision was specific to the peculiar provisions of s. 62 of the Housing Act which allowed a local authority to obtain possession merely by showing the formal proofs that they had provided the tenancy that no tenancy exists in respect of such dwelling and that notwithstanding demand for possession, the dwelling remains occupied by the individual to whom demand is addressed and that the demand contained a statement of the housing authority's intention to invoke s. 62 of the Act.

20. Once the local authority was able to furnish the above proofs, they were entitled to an order for possession automatically and there could be no examination by the District Court of the reasons behind this invoking of Section 62.

21. In particular, in the Donegan case, the central allegation was that Mr. Donegan or a member of his family was dealing in drugs from the premises. That issue could not be litigated in the District Court and accordingly judicial review could not be a remedy for that dispute.

22. This Court in the above cases refused relief and held that the Donegan case (above) provided no new ground to challenge judicial review as an effective remedy for a subsidiary protection decision.

23. In a subsidiary protection decision, the Minister is obliged to set out the rational and the reasons for his decision and how he came to it and the Minister did just that, and this decision is subject to judicial review under the principles as set out by the Supreme Court in *Meadows*. So subsidiary protection is not one of the exceptional cases referred to in *Donegan* whereby judicial review is not an effective remedy.

24. Accordingly, subject to the one proviso discussed below, the applicant must fail in her case.

Serious Harm and Actors of Serious Harm
25. As part of the analysis of the issue of subsidiary protection, the decision maker in his decision is obliged to make the decision in accordance with the provisions of the European Community (Eligibility for Protection) Regulations 2006, S.I. 518 of 2006 which, *inter alia*, implemented in the State, the Council Directive 2004/83/EC (29th April, 2004).

26. Making this analysis, the decision maker considered the applicant's fear of serious harm from the Muslim man and his associates known as the Kanduna Mafia and the availability of State protection for the applicant and her family.

27. The decision maker found after examining the country of origin information that there was a functioning police force in Nigeria and that avenues of complaint were open to the applicant if she was not happy with the service she received and the decision maker concluded:-

> "I am not satisfied the applicant has demonstrated that she is [not] well protected in Nigeria and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by 'torture or inhuman or degrading treatment" in Nigeria if she is returned there."
>
> The decision maker then went on to consider whether the applicant has been subjected to 'serious harm' as defined in Regulation 2(1), as stipulated in Regulation 5(2) and the decision maker concluded as he has done so in numerous cases such as this that "in accordance with Regulation 2(1) non State actors can only be considered to be actors of serious harm if it can be demonstrated that the State or parties or organisations controlling a State or a substantial part of the territory of that State are unable or unwilling to provide protection against serious harm. It has not been demonstrated that Nigeria is unable or unwilling to provide protection against the treatment already suffered by the applicant and therefore the alleged inflictors of this treatment cannot be considered to be 'actor of serious harms' within the meaning of Regulation 2(1) as serious harm can only be carried out by 'actors of serious harm' within the meaning of Regulation 2(1). I do not find any evidence that (the applicant) has suffered treatment in Nigeria that would come within the definition of 'serious harm' as defined in Regulation 2(1)."

28. In the case of *JTM v. Minister for Justice and Equality* [2010] 1492 J.R., this Court held in the judgment delivered on 1st March, 2012 that "serious harm" is defined in Regulation 2(1) as being:-

> "(a) Death penalty or execution;
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
>
> (c) serious and individual threats to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

29. I held that the terms "actors of persecution or serious harm" appeared in the interpretation section only of the Irish Statutory Instrument not to reappear in the substantial portion of the instrument and indeed not to be mentioned again. In this regard, the Irish Statutory Instrument is at least arguably different from the formulation in the European Council Directive and this Court found in the *JTM* case:-

> "34. ...serious harm means what is says, it is not to be confined only to harm carried out by actors of serious harm.
>
> 35. Clearly, however, where harm has been carried out by persons who are not actors of serious harm is of great relevance to the decision in ascertaining whether the applicant will ultimately [be] entitled to a subsidiary protection decision. The definition of persons eligible for subsidiary protection is as stated quite clear as being (persons in) '...respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin...would face a real risk of suffering serious harm...and is unable, or owing to such risk unwilling to avail themselves of the protection of that country'.
>
> …
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> 37. The court holds that the statement by the Minister that 'serious harm can only be carried out by actors of serious harm within the meaning of Regulations 2.1, I do not find any evidence that the applicant has suffered treatment in her country of origin that would come within the definition of serious harm as defined in Regulation 2(1)', is manifestly false."

30. Accordingly, in this case, counsel for the applicant sought leave to amend the grounds and be granted leave and then to argue the substantive case on the basis of the decision of *JTM* (above) that the Minister erred in the decision of the decision maker that serious harm can only be carried out by "actors of serious harm".

31. This is a case in which leave was not sought to be obtained in the above point and was not granted on the above point. It was not a point unknown to practitioners at the time leave was sought to be granted in this case. The legal advisers to this applicant are well versed and skilled in application for judicial review but they chose not to seek leave on this point, which has been made

previously in the *JTM* case and indeed other cases.

32. The applicant first sought to extend the time to make this application and amend her grounds.

33. The decision that is sought to be impugned was made on 6th July, 2011 and accordingly, the applicant is more than three months out of time in respect of this application.

34. The applicant submitted, however, that it would be contrary to the interest of justice not to allow the amendments as sought in order to have the entirety of the matter litigated.

35. In *G.K v. MJELR* (Unreported, Supreme Court, 17th December, 2001), it was held that the time for applying for judicial review in respect of any matter under s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000, could only be extended if the court considered that they were "good and sufficient reason" for extending that period. It was further held in that case that "good and sufficient reason for extending the period" clearly permitted the court to consider whether the applicant's substantive claim was arguable.

36. In this case, counsel for the applicant and the indeed the respondent submitted that I should not look into the merits of the substantive point made in respect of "actors of serious harm" before deciding whether the time should be extended.

37. The court held that it would consider the matters in the round and would hear submissions on the merits oft he extension of time and substantive argument "*de bene ese*" and then give a judgment as to whether the time should be extended and if so, whether the point was valid.

38. Notwithstanding the views of counsel for both sides and accepting that the case of G.K. was decided in terms of the special time limits imposed under the Illegal Immigrants (Trafficking) Act 2000, this Court is also of the view that in deciding whether or not to exercise its discretion, the provisions of O. 84, r. 21, means that the guidance of the Supreme Court in *G.K.* was indeed relevant.

39. Under O. 84, r. 21, an application for leave for judicial review must be made promptly and in the case of *certiorari* at the outside six months unless the court considers they are good reasons to extend the time.

40. Accordingly, the court will examine the principles involved and will include an examination of the merits of the substantive claim that it is sought to make at this stage. The applicant did not swear any affidavit setting out this claim for an extension of time but in the circumstances, the court will treat the matter as if an application was formally made.

41. In *O'Driscoll v. Law Society of Ireland*, McKechnie J. in the Supreme Court (27th July, 2007) reviewed the case law of dealing with extension of time under O. 84, r. 21(1) and said:-

> "There is no doubt but that whichever analytical approach is taken, the pursuit of justice is the overriding criteria applicable to all stages of either process. Whether one approaches this task by firstly establishing the presence or absence of inordinate and inexcusable delay, or whether one firstly identifies particular factors such as: the nature of the order being sought; the conduct of the parties; the impact on third party rights; the existence of prejudice; or other like matters, the dominant achievement remains one of justice. That issue can only be determined in light of the circumstances of each case..."

42. In *Maurefn v. Minister for Justice* [2003], Finlay Geoghegan J. concluded that the fact that a new counsel come into the case and had taken the view that a differing and additional claim could be made was not a ground for an extension.

43. In *MYG v. MJLER*, Herbert J. (28th April, 2010) dealt with the issue of an amendment of the statement grounding the application for judicial review as follows:-

> "The exercise of its jurisdiction of this Court to permit amendment of a Statement Grounding Application for Judicial Review has been considered in very many cases. However, where, as in the instant case, the applicant must demonstrate the existence 'substantial grounds' and make the application for leave to seek judicial review within a specified period of time, a stricter approach is adopted than in the general run of cases decided under the provisions of O. 84, r. 23 ..."

44. This is a challenge to a subsidiary protection decision and in order to grant leave only arguable grounds may be shown but as leave has already been granted on the other grounds discussed above and as the applicant seeks to argue the substantive case, clearly the applicant must show "good and sufficient reason". In *MYG*, the reasons advanced on behalf of the applicant to add an entirely new ground is that the matter can only be determined by the court and that the respondents would not be prejudiced by allowing the amendment.

45. In this case, the applicant says she will be prejudiced by a refusal of the amendment though it is conceded that no deportation decision has been made and indeed that the respondent halted any consideration of the deportation until the proceedings herein had been determined.

46. In *MYG*, Herbert J. concluded:-

> "The Court will not allow the proposed amendment for the following reasons. There has been a delay of nineteen months in bringing this application from the date when the time...expired... I am not satisfied that good and sufficient reason has been shown for extending the time over such a period. Opportunity and coincidence do not in my judgment constitute good and sufficient reasons. The application is not based upon the discovery of material facts which despite the exercise of all due diligence and care could not have been known or discovered at the date of the motion seeking leave to apply for judicial review ... The application is posited upon a legal argument the basis for which has existed since Council Directive 2005/85/EC...and, the applicant has had the services of solicitors and counsel...
>
> In my judgment, to permit the proposed amendment would be to defeat and circumvent the clear legislative policy expressed ins. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. It would also be a breach of the principle that there should be an end to litigation. If an amendment of the type sought were to be permitted every time leave was granted in some other application on some consideration which it could be claimed was also applicable to the instant case, judicial review applications would become interminable and the great remedy for an alleged abuse of due process would itself become such abuse..."

47. The Court is of the view that the applicant has a very difficult task to persuade the court to grant the amendment and to allow the argument based upon "actors of serious harm".

48. Notwithstanding that difficulty, however, the court is of the view that it should examine the merits of the substantive case sought to be made by the applicant to ascertain whether or not there is indeed an injustice which could only be remedied by the amendment.

49. In the *JTM* case discussed above, it is essential to remember the particular facts which following from the court's rejection of the approach taken by the decision maker led to the further decision to grant judicial review.

50. In *JTM*, in which the credibility of the applicant was unchallenged, the applicant claimed, as was the case, that she had been subjected to a number of acts of rape, physical assaults and threats of assault from family members of her husband in a ritual manner in order to supposedly cure her of infertility and that clearly she had been subjected to "serious harm" unless the definition of "serious harm" had confined that harm to incidents carried out by a group of persons called "actors of serious harm".

51. What was central to the judgment in JTM was the fact that in the Irish Statutory Instrument, an addition not contained in the equivalent European Directive had been added to the provisions of Regulation 5(2) as follows:-

> "compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection." (Emphasis added)

52. In the *JTM* case, the court concluded that because the applicants had clearly suffered "serious harm", the Minister in ruling out the issue of serious harm was excluding his obligations to consider under Regulation 5(2) whether compelling reasons arising out of previous serious harm alone warranted a determination that the applicant is eligible for protection. It seems to the court that in very many cases where the Minister has made this error, it will have no practical impact as either no serious harm was actually suffered, as defined in the Regulation or if serious harm was suffered, the error may well not be material to the decision.

53. In the instant case, the applicant was not subjected to any past serious harm though threats were allegedly made against her.

54. Accordingly, the court is not of the view that even if leave had been granted in respect of the application in relation to "serious harm/actors of serious harm" and such application were made within time that no case can be made by this plaintiff that notwithstanding any error on the part of the Minister indefining "serious harm" that this applicant could avail of this error and successfully set aside the subsidiary protection decision.

55. The court therefore will not allow the amendments sought and if the matter had been made in time would hold that the applicant must fail on this ground.

Conclusion
56. The applicant must fail on grounds sought by way of *certiorari*.