AN CHÚIRT ACHOMHAIRC
COURT OF APPEAL

CA No. 2024/26

[2024] IECA 186

Hogan J.
Whelan J.
Meenan J.

Between/

B.D., T.D. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, B.D.)

AND M.D. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, B.D.)

Appellants

-and-

INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE

Respondents

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 30th day of July, 2024

Introduction

1. In judicial review proceedings it has long been recognised that the High Court enjoys a power to sever part of an impugned decision so that the *ultra vires* aspects of that

decision may be excised, with the remaining part of that (otherwise valid) decision thereby upheld. The question in this appeal is whether the High Court enjoys this power in respect of a decision of the International Protection Appeals Tribunal ("IPAT"), where the reasoning of part of whose decision dealing with state protection is acknowledged to be *ultra vires*. The essential question therefore is whether the entire decision must thereby fall or whether, as the applicants contend, that part of the decision which found that they were liable to suffer persecution should be allowed to stand.

2. The issue arises in the following way. The applicants are South African nationals. The first applicant is the mother of the second and third applicants. Their father is Algerian. They (*i.e.,* the mother and the two children) applied for refugee status because they feared persecution in South Africa on the grounds that their children were mixed-race. Their application was originally refused at first instance by the International Protection Office, but they subsequently appealed this decision to the IPAT.

3. In its decision of 23rd March 2021, the IPAT rejected parts of the applicant's case but, critically, it did accept that the applicants faced a well-founded fear of persecution if they were to return to South Africa because of the second and third applicants' mixed race. It is only proper to acknowledge the exceptional quality of the detailed analysis contained in this decision, based as it was on up-to-date country of origin ("COI") information.

4. So far as the well-founded fear was concerned, the Tribunal member recorded (at paragraph 5.30 of the decision) that:

> "…the Tribunal is satisfied that the level of xenophobia in South Africa is such that there is a reasonable likelihood that the appellant's dependant sons, if they

were returned to South Africa, would face a well-founded fear of persecution on the basis of being of mixed-race ethnicity. In the light of that finding, the Tribunal is satisfied that the appellant herself would also be subject to the same likelihood due to her connection with her dependent sons."

5. Having found that the applicants faced a well-founded fear of persecution, the Tribunal member then went on to state at para. 5.40 and para. 5.41 of this decision that:

"It is clear from all of the COI that while there are issues with the police response to Xenophobic violence, efforts are made to deal with [such] violence. The State is resourcing the police and [is] making serious efforts to protect all the people residing within it. In light of all of the above, the Tribunal is satisfied that State protection is available to the appellant and her dependant sons."

6. This latter conclusion was critical because it meant that the applicants failed on the second limb of their case, namely, the adequacy of State protection. Had the IPAT ruled otherwise on this issue then in view of its conclusion on the first part of the case regarding well-founded fear of persecution the applicants would have been entitled to asylum status in the State.

7. By letter dated 2nd December 2021 the respondents agreed to the making of an order of *certiorari* quashing the decision of the IPAT in its entirety. While the correspondence from the IPAT's legal advisers did not quite say so in terms, one may infer that it was concluded that the reasoning of the Tribunal on the state protection issue was inadequate for this purpose. In particular, the Tribunal member did not offer any view as to the *adequacy* of the state protection available to the applicants: it is not in itself enough to say that the country of origin is making

endeavours to prevent the persecution if it should transpire that those efforts are themselves ineffective.

8. Accordingly, while it is now common case that the IPAT's decision is flawed and should be quashed, the issue before the High Court at first instance and this Court, on appeal, is whether (as the IPAT contends) that decision should be quashed in its entirety or whether (as the applicants contend) partial severance is possible, so that the only issue remaining open bears solely on the adequacy of state protection. If partial severance was possible, then the effect of this would be to preserve in the applicants' favour the well-founded fear of persecution finding. The first applicant, Ms. D., also says that she would find the experience of having to giving evidence again on this issue distressing.

The High Court Judgment

9. In the High Court Bolger J. delivered a judgment on 24th October 2023 in which she found against the applicants on the partial severance issue: see *BD v. International Protection Appeals Tribunal* [2023] IEHC 589. Applying the general principles enunciated by Keane J. in *Bord na Móna v. An Bord Pleanála* [1985] I.R. 205, she noted that the doctrine of severance had been applied to allow for the partial quashing of a range of administrative and, indeed, judicial decisions which had been tainted by ultra vires. She also noted that the principle had been applied to asylum cases (including *HAA (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 34, *AA (Pakistan) v. IPAT* [2018] IEHC 497, *NNM v. IPAT* [2020] IEHC 590 and *PAF (Nigeria) v. IPAT* [2019] IEHC 204) where the underlying decision had not been quashed in its entirety.

10. Bolger J. nevertheless concluded that severance was not possible in the present case. She took the view that the language of the International Protection Act 2015 ("the

2015 Act"), taken together with the requirements of the Qualification Directive 2004/83/EC and the Procedures Directive 2005/85/EC (as judicially interpreted by the CJEU) required that:

> "This remitted application to be considered on an *ex nunc* basis by reference to such up-to-date information, including COI, as may be available. I am therefore granting *certiorari* of the Tribunal's decision and remitting the entire matter back to the Tribunal for a fresh hearing of the applicants' appeal."

11. The applicants have now appealed to this Court as against that decision. They maintain that the High Court erred in refusing to sever and in concluding that the 2015 Act and the relevant provisions of the Procedures Directive required a unitary decision on the issue of international protection. For its part the IPAT insists that the decision of Bolger J. was correct. It contends that the *ex nunc* requirements of EU law (a topic I will presently examine) mean that the assessments of whether there was a well-founded fear of persecution on the one hand and adequate State protection on the other must be assessed at the same time and based on the same COI and other information, so that severance was simply not possible.

The potential distress which Ms. D may suffer

12. Before proceeding any further, it may first be convenient to address one issue raised by Ms. D. in particular. She says that if the decision is quashed in its entirety she will then be faced with the dilemma of either having a paper-based appeal or else to give oral evidence. While she can elect for the former, this, she says, is not an attractive option as she feels that a paper-based hearing would prejudice her application. So far as giving oral evidence afresh is concerned, Ms. D maintains that she would find this prospect very distressing and she urges this consideration as a reason for effecting the severance.

13. Bolger J. rejected this particular argument, not that Ms. B. "has not furnished medical evidence that giving her evidence again would cause her to suffer any recognisable psychiatric symptoms." Noting that Ms. D. had not furnished any medical evidence to this effect, Bolger J. added (at paragraph 18):

> "I do not wish to minimise her distressing experiences and I accept that she believes engaging in further interviews will be distressing for her. However, the challenge of giving oral evidence, where an applicant chooses to do so, is part of the asylum process, similar to many State processes including litigation. In the absence of medical evidence of a medical condition that might require a different process to conducting another interview with an applicant for asylum (a point on which I make no finding) I do not consider the applicant's anticipated distress, in itself, could merit the partial order of *certiorari* which she seeks."

14. I can only agree with this admirably concise analysis. In my view, the absence of medical evidence is fatal to any argument along these lines. It is accordingly unnecessary to consider what the position might have been had this contention been supported by medical evidence. It is sufficient for present purposes to say that the first applicant's anticipated distress could not in itself have any direct bearing on this question of partial severance.

The doctrine of severance in administrative law

15. The doctrine of severance is a general public law doctrine which seeks to conserve judicial and administrative resources by a process of winnowing out – where this is possible – that portion of a judicial or an administrative decision which is ultra vires and thereby preserving that which is valid. It avoids the inconvenience of the needless quashing of the entirety of an administrative or judicial decision simply by reason of the fact that one portion of that decision is ultra vires. This principle finds

expression at constitutional level in that Article 15.4.2º of the Constitution provides that a law which has been found to be unconstitutional "shall, but to the extent only of such repugnancy, be invalid."

16. The wording of Article 15.4.2º can, I think, with advantage be applied by analogy to the wider sphere of administrative law. So stated, the doctrine of severance reflects the idea that if the validity of an administrative decision can be cured by excising that which is *ultra vires*, then this step should generally be taken unless this would have an unacceptably distorting effect on the remainder of the decision or where this would otherwise be in some way unfair or inappropriate.

17. An example here is supplied by *The State (McLoughlin) v. Eastern Health Board* [1986] IR 416. In this case, the Supreme Court held that a portion of a statutory instrument dealing with the provision of a fuel allowance for heating purposes during the winter months was *ultra vires*. The Minister for Social Welfare had promulgated a statutory instrument which had purported to exclude persons in receipt of unemployed assistance from the scope of the fuel allowance scheme. The Supreme Court held that the Minister had no power to make conditions of this kind so that this excluding clause was accordingly held to be ultra vires.

18. The Court further held, however, that it was not possible to effect a partial severance because the simple invalidation of the offending clause would have had the effect of greatly expanding the scope and reach of the scheme, thereby imposing unanticipated burdens on the Exchequer. Finlay C.J. accordingly stated that the statutory instrument must be condemned in its entirety.

19. Yet in other cases the general tendency of the courts is to effect a severance if this can fairly be done. A good example here is supplied by another decision of the Supreme Court in *Cassidy v. Minister for Industry and Commerce* [1978] IR 297.

Here a ministerial order had applied maximum prices order in respect of alcoholic drinks to both public bars and lounge bars alike. This was held by Henchy J. to be arbitrary and unfair because the application of these order to both species of bars failed to take into account the higher capital and other costs associated with lounge bars as compared with the public bars. The net result was that the statutory instrument in question was held to be *ultra vires* so far as lounge bars – but not public bars – were concerned.

20. It was true that the order in question had not been "composed in such a way that the provisions applicable to public bars could be severed from the rest." This feature of the drafting of the legislation did not, however, deter the Court from effecting a severance. As Henchy J. explained ([1978] IR 297 at 302-303):

> "But the orders do not lend themselves to verbal severance: they simply fix the maximum prices without reference to whether they are charged in lounge bars or public bars. However, there is no reason why the order should not be severed in the range of their application, so that they may be preserved and implemented in so far as they are *intra vires*, and ruled inoperable only in so far as their application would run into the area of ultra vires….By the operation of what Lord MacDermott L.C.J. called 'horizontal severance' in [*Ulster Transport Authority v. James Brown & Sons Ltd.* [1953] NI 79 at 118] the layer of application to lounge bars may be detached and ruled inoperable, and the underlying range of application to public bars may be given the effectiveness which its validity warrants."

21. If one applies these principles to the present case, it is clear that what Henchy J. described as "verbal severance" is indeed possible, since it is perfectly possible to separate out those sections of the IPAT decision dealing with effective state

protection on the one hand with from those dealing with the well-founded fear of persecution on the other. In the light of this there are then really only two possible objections to the proposed severance. First, it is said that such severance would have a distorting effect in respect of a unitary decision, Second, it is contended that such severance would be inconsistent with the *ex nunc* requirements of EU law. We may now consider these objections in turn.

Whether the decision on an international protection application is of necessity a unitary decision which does not admit of the doctrine of severance

22. The 2015 Act is just the latest re-statement by the Oireachtas of this State's obligations under both the Geneva Convention and the various iterations of both the Procedures Directive and Qualification Directive. The concept of "refugee" is set out s. 2 of the 2015 Act and this provision requires a person claiming such status to establish both a well-founded fear of persecution for the relevant reasons and the person's inability or unwillingness to avail of state protection in that state. Section 2 of the 2015 Act accordingly provides:

> "a person… who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it".

23. At the heart of the present objection to the proposed severance is the argument that the decision whether or not to grant international protection is in essence a unitary decision. In this vein it was contended that it would be essentially artificial to

separate out the question of whether there was a well-founded fear of persecution on the one hand from the separate issue of the adequacy of state protection on the other, particularly if – as might well be the case – the identity of the Tribunal member who later came to adjudicate on the state protection issue following severance was different to the member who had previously adjudicated on the well-founded fear issue. Counsel for the IPAT stressed the relatively lengthy interval of almost five years which would of necessity elapse between the hearing date in the IPAT (September 2019) and any subsequent determination following the decision of this Court which was confined to the state protection issue.

24. It is true that there might well be cases where this artificiality might well be established such that severance in such a case would not be appropriate. It is perfectly possible to envisage a case where, for example, a specific law or practice directed in some hostile fashion at a particular minority in a specific country which was in full force and effect in 2019 and yet by 2024 this need for international protection had all but vanished because of, for example, a regime change in the meantime. In this type of case it would be rather unreal to say that the IPAT could now only adjudicate on the issue of state protection when the underlying basis of the well-founded fear no longer existed. In those particular circumstances, one could readily see why severance would be inappropriate, precisely because of these changed circumstances.

25. The present case is, however, quite different. It is true that there will now be an interval of some five years between the adjudication on the well-founded fear of persecution on the one hand and any determination as to the adequacy of state protection on the other. Yet there has been no suggestion that the underlying facts on the issue of the well-founded fear will have changed dramatically or even

appreciably in the meantime. This Court can, of course, take judicial notice of the fact that there is now a multi-party Government in office in South Africa since the most recent elections in May, 2024. Yet unlike many claims for international protection the claims of the applicants did not rest on the supposed iniquities of the Government of their country of origin. The claim was rather based on the existence of racial prejudice towards the children of mixed-race ethnicity. It is, unfortunately, the case that this prejudice is unlikely to have changed in the meantime and, as I have just stated, there has been no suggestion that it has. I would accordingly reject this particular argument.

The *ex nunc* requirements of Article 4 of the Qualification Directive

26. The second objection is said to flow from the obligations of Article 4 of the Qualification Directive itself. This provision imposes a general obligation on Member States to assess the relevant elements of any application for international protection, including (as per Article 4(3)(a)) "all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied."

27. This provision has been recently interpreted by the CJEU in *X. v. International Protection Appeals Tribunal* (C-756/21: EU:C: 2023: 523) where the Court the "full and *ex nunc"* character of the IPAT's appellate functions from the original decision of the International Protection Office: see paragraph 50 of that decision. The duty of co-operation imposed by Member States in considering asylum applications under Article 4(1) of the Qualification Directive "must be interpreted as meaning that the duty of co-operation laid down in that provision" required the IPAT to obtain "up-to-date information concerning all the relevant facts as regards the general situation

prevailing in the country of origin of an applicant for asylum and international protection": see paragraph 61.

28. In the previous paragraph of its judgment (paragraph 60) the Court had held that:

> "Such a review of the merits of the grounds of the IPO's decision [by IPAT] involves obtaining and examining precise and up-to-date information on the situation existing in the applicant's country of origin on which, inter alia, that decision is based, and the possibility of ordering measures of inquiry in order to be able to rule *ex nunc*. The IPAT may therefore be required to obtain and examine such precise and up-to-date information, including a medico-legal report deemed relevant or necessary."

29. In the light of these observations from the CJEU in *X* counsel for the State urges that this Court cannot effect a severance because, it is said, this would be inconsistent with the *ex nunc* obligations imposed on the IPAT to obtain up-to-date COI information before making any decision in respect of international protections. I think that this, with respect, is something of an over-interpretation of the CJEU's comments. These were, admittedly, general statements of principle, but one may presume that the CJEU did not have the particular and special situation of the present case in mind.

30. While the decision in *X* is certainly premised on the assumption that up to date COI will be available to the decision-maker, this does not, I think, mean that a court cannot sever the state protection aspect of the decision where this is otherwise appropriate just because there will then be a temporal gap between the decision on the well-founded fear on the one hand and state protection issue on the other. If this were the case, it could possibly lead to the risk of arbitrary and inconsistent decision-

making to the disadvantage of the very persons whose interests these rules are designed to serve.

31. Applying, therefore, the general principles in *X* to the particular circumstances of the present case, I would hold that Article 4 of the Qualification Directive requires that the IPAT obtain up to date COI and other relevant information in respect of *each aspect* of the case. This has already been done in the case in respect of the well-founded fear aspect of the case and one may assume that the IPAT will do likewise when dealing with the state protection issue when the matter is remitted to it following the severance of that aspect of the decision of the IPAT. It does not mean, however, that there cannot be severance of the ultra vires aspect of the decision simply because on the remittal back there will now be an appreciable temporal gap between the 2019 decision on well-founded fear and a fresh assessment of state protection issue some five years later.

Conclusions

32. In conclusion, therefore, I would allow the appeal by severing that aspect of the original decision of the IPAT dealing with state protection and which is conceded to be *ultra vires*, while preserving that aspect of the decision addressing the issue of well-founded fear. While the CJEU's decision in *X*. emphasises the necessity to have up-to-date COI information in respect of all aspects of the decision on international protection, this *ex nunc* obligation should not, however, be over-interpreted or over-extended such as to the preclude the severance of aspects of the *ultra vires* decision on international protection where (as here) this remedy is otherwise appropriate.

33. I would accordingly allow the appeal to the extent that I have just indicated. I am authorised to state that both Whelan J. and Meenan J. agree with this judgment and the order I propose.

34. Since this judgment is being delivered electronically, it is perhaps appropriate that I should indicate my provisional view regarding costs. As the applicants have succeeded in this court, I consider that they have been wholly successful in this litigation for the purposes of s. 169 of the Legal Services Regulatory Authority Act 2015. I consider therefore that they should recover their costs in their ordinary way, such costs to be adjudicated in default of agreement.

35. In the event that this provisional view regarding the disposition of costs is disputed, then the parties should file short submissions (no more than 2,500 words) by Tuesday, 1st October, 2024. The Court will then thereafter finally rule on the issue of costs.