Neutral Citation [2016] IEHC 735

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 474 JR]

BETWEEN

N.O.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

IRELAND

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of November, 2016

Introduction
1. The applicant is seeking an order of *certiorari* to quash the decision of the first named respondent refusing to grant the applicant subsidiary protection on 28th March, 2011 and is grounded upon the affidavit of the applicant of 9th June, 2011.

2. The grounds of the application are to the effect that there was a failure in the procedure at the relevant time to provide an effective remedy in the form of a full appeal against the first named respondent's decision aforesaid in accordance with Article 47 of the Charter of Fundamental Rights of the European Union, thereby rendering the decision invalid. The applicant also relies upon the principle of equivalence.

Applicant's Relevant Background
3. The applicant is a Nigerian national. She married in July, 1999. The applicant is a pharmacist and her husband is a solicitor.

4. The applicant left her home in Lagos in June, 2006 because she was then pregnant with triplets, although at the time believing it to be twins, and because of fear that her mother would force her to permit a ritual to be performed on her babies when they were born. The applicant herself was a twin and this ritual was performed on herself and her twin sister however her twin sister died in infancy. The applicant's children were born in Ireland in September, 2006.

5. The applicant was refused refugee status both before the Commissioner and thereafter before the RAT. She subsequently applied for subsidiary protection; however, in accordance with the procedure at that time the Minister dealt with this application on a papers only basis and rejected her application on 28th March, 2011. There was no appeal process available. A deportation order was signed on 21st April, 2011. In March, 2012 the applicant and her children were deported. The youngest children were then aged 6 years old.

Procedural Background
6. On 10th June, 2010 the applicant sought leave to apply for judicial review in respect of the refusal of subsidiary protection and the making of the deportation order.

7. This application came before the High Court for hearing on 13th October, 2011 before Ryan J. who refused her application.

8. The order of Ryan J. was appealed to the Supreme Court by notice of appeal of 7th January, 2013 (the order of Ryan J. was not perfected until 18th December, 2012).

9. On 24th January, 2014 the respondents applied to the Supreme Court to dismiss the proceedings on the grounds of mootness. However it appears that following full argument this application was rejected.

10. On 15th February, 2016 the Supreme Court allowed the appeal. When the matter came back before the High Court on 11th April, 2016 the applicant was granted liberty to pursue the application for *certiorari* against the decision of the first named respondent on 28th March, 2011 based upon the argument under Article 47 aforesaid and on the basis of a breach of the principle of equivalence. At the hearing of the matter before this Court, the applicant accepted that as a consequence of the decision in the case of *Danqua* (Case C-429/15) the principle of equivalence is not relevant, as it was held that both the application for asylum and an application for subsidiary protection concerned two types of application both based on EU law and therefore invoking the principle of equivalence was irrelevant.

Submissions

(1) Principle of Effectiveness
11. In the applicant's submissions, it is suggested that the principle of effectiveness would support the applicant's claim to quash the decision of the first named respondent, notwithstanding that it does not appear that this was one of the grounds afforded to the applicant. That having been said, I do note that at para. 29 of the *Danqua* judgment, it was held that it was for the domestic legal system of the member state to determine the procedural requirements in respect of an application for subsidiary protection, provided that those requirements do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legislation. This point was not developed in any great detail on behalf of the applicant as a ground to review the order of the first named respondent independently of the protection afforded by Art. 47 of the Charter of Fundamental Rights.

12. In the events I am satisfied that the matter falls to be determined under Art. 47.

(2) Mootness
13. Part of the basis on which the respondent wishes to resist the application on the part of the applicant involves mootness/futility of proceedings. The respondent argues that the applicant and her children were returned to Nigeria in March, 2012 and there is no

additional information, notwithstanding requests on behalf of the respondent, from the applicant as to whether or not the fear of the applicant was realised on her return. Further, given that the applicant is now residing in her home in Nigeria for in excess of four and a half years the issue raised by her in the proceedings have effectively fallen away.

14. I have not been furnished with any documents, pleadings or submissions in respect of the application before the Supreme Court brought by the respondents in January, 2014 seeking to dismiss the proceedings on the basis of mootness. That having been said, it appears that both parties acknowledge that the application was rejected by the Supreme Court following a full argument. In addition, I am advised by counsel for the applicant that in a portion of the Supreme Court judgment in respect of the application of the respondent, the Supreme Court refused the relief notwithstanding that the applicant had been deported four years earlier. This of course is not accurate as in 2014 the applicant was residing in Lagos for two years following the deportation. Nevertheless, on the basis that the Supreme Court appears to have rejected the argument of mootness based upon the belief that the applicant had returned to Nigeria four years earlier, and further, given the lack of information available to me at this time relative to the application before the Supreme Court, I do not intend to seek to resolve the matter on the basis of mootness.

Article 47 of the Charter of Fundamental Rights of the European Union
15. Counsel Directive 2005/85/EC, dated 1st December, 2005 is a directive on minimum standards on procedures in member states for granting and withholding refugee status. This directive includes, at Chapter 5, Article 39. This provides that member states shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against one or more of the enumerated grounds including a decision taken on their application for asylum. The applicant accepts in submissions that a subsidiary protection application is not one of the enumerated grounds mentioned in Art. 39.

16. Article 47 of the Charter aforesaid provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

17. Although reference is made in Art. 39 of the 2005 Directive to "before a court or tribunal" and reference is made in Art. 47 of the Charter to "before a tribunal", nevertheless for the purposes of the within application I am satisfied that any interpretation of Art. 39 of the Directive by the courts will, absent special circumstances, apply to Art. 47 of the Charter.

18. The applicant lays considerable emphasis on the Recast Procedures Directive (Directive 2013/32/EU) which is dated 26th June, 2013. Article 46 thereof deals with the right to an effective remedy. Subparagraph 3 thereof provides that:-

> "In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law …"

19. The applicant acknowledges that Ireland has not taken part in this Recast Directive. In this regard at Recital 58 thereof it is noted that the United Kingdom and Ireland are not taking part in the adoption of the Directive and are not bound by it or subject to its application.

20. Nevertheless, the applicant argues that the manner in which an effective remedy can be afforded would be with a procedure that allowed for a full and ex nunc examination of both facts and points of law which is not available to the instant applicant under the procedures relevant to her. The applicant argues that notwithstanding that Ireland did not partake in the Recast Directive, it is nevertheless a useful tool to aid in the interpretation of European law and the applicant relies on two judgments of Humphreys J., namely *F.I. v. Governor of Cloverhill Prison* [2015] IEHC 639 and *S.H.M. v. Minister for Justice and Equality* [2015] IEHC 829 in support of this submission.

21. In the *F.I.* case the applicant was making an Art. 40 application on the basis of his continued detention based upon the State's intention to deport him. At para. 12 the Court stated:-

> *"The real issue in the case is whether even if a settled intention to deport is formed, that such intention must be deemed to continue, even in the absence of any evidence to that effect, despite the making of an application for re-admission to the asylum process."*

22. The Court then went on at para. 14 thereof to indicate for the purposes of the applicant's argument that the making of an application for readmission to the asylum process effectively has a suspensory effect on the power to deport by virtue of Art. 7 of the 2005 Directives. Article 41 of the Recast Directive might conceivably be of assistance in interpreting the intentions, spirit and purpose of the original Directive in the absence of any argument or material to the contrary.

23. A similar issue arose in the case of *S.H.M. v. Minister for Justice and Equality* aforesaid in that the applicant in that case was seeking a declaration that it was unlawful to remove him from the State pending the determination of an application, not then subsisting being a reapplication for subsidiary protection. At para. 19 Humphreys J. indicated that considerable guidance can be had from the Recast Directive and Humphreys J. refers to his earlier judgment of *F.I.* aforesaid.

24. The respondent counters that, in Recital 1 of the Recast Directive it is provided that a number of substantive changes are to be made to the 2005 Directive on minimum standards and therefore Art. 46(3) involves a change to the 2005 Directive and accordingly cannot be relevant to an interpretation of the 2005 Directive.

25. I agree with the respondents' submission in this regard and in fact disagree with the applicant's submission that the two judgments aforesaid of Humphreys J. support the applicant's argument as of course Humphreys J. in the first case, which was referred to by him in the second case, suggests that "in the absence of any argument or material to the contrary" the Recast Directive might be of assistance. In the instant application there is argument to the contrary and as appears hereinafter it is clear that there is also material to the contrary.

26. The applicant relies on the Supreme Court judgment in the case of *M.A.R.A. v. Minister for Justice & Ors.* [2014] IESC 71 to the effect that on an appeal an applicant is entitled to clarify and bring new issues into play. The applicant relies on para. 13 of the judgment where the Supreme Court is identifying the duty on the RAT following an appeal from the Commissioner's negative recommendation and the Supreme Court states:

> *"Hence, on appeal, there is a complete opportunity to present on behalf of the applicant in aid of this enquiry as to refugee status any new facts or arguments; to reargue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full."*

27. The respondent counters that if the applicant wishes to bring fresh evidence then an opportunity to effectively return to the asylum process is available to her under s. 17(7) of the Refugee Act 1996, as amended. The applicant does not deny this s. 17(7) facility.

28. In the circumstances it appears to me that the procedure which was in place at the time of the applicant applying for subsidiary protection, namely that there was no appeal there from, save an application for judicial review, does not have the impact of depriving the applicant from raising new grounds and to have these grounds considered under the 1996 Act, as amended. Further I am not satisfied that para. 13 of the Supreme Court judgment does anything but identify the duty on the RAT under s. 16(16)(a) of the 1996 Act as amended, although I accept that the Supreme Court was satisfied that because of the duty imposed under subs. 16(a) the applicant had been afforded a full opportunity to argue whatever points seemed to be germane.

29. The respondent argues that the bulk of the arguments raised by the applicant in the instant proceedings were in fact raised and rejected by the High Court in several cases, for example in *V.N. v. Minister for Justice* [2012] IEHC 62. The respondent relies on the judgment of Cross J. in *Okunade v. Minister for Justice* [2012] IEHC 134 when the Court held that neither the provisions of Art. 47 of the Charter or Art. 39 of the Directive confer a right of appeal in the sense of a full *de novo* hearing as both provisions refer to a right to an effective remedy.

30. The applicant counters that all such cases relied upon by the respondent in fact were dealt with prior to the EU decision in *M.M.* delivered on 22nd November, 2012 (they were also prior to the Recast Directive however as aforesaid I am not satisfied that the Recast Directive in all of the circumstances is instructive in this matter).

31. I accept the applicant's point in this regard, however, it should be borne in mind that in the judgment of the European Court in *M.M.*, insofar as it touches on issues raised in these proceedings, the Court ruled as follows:-

> *"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 those 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."* (Emphasis added)

32. *M.M.* therefore ruled that an applicant has a right to be heard in the sense of being in a position to make known his views before the adoption of any decision refusing the protection sought.

33. The Court of Appeal delivered a judgment on 14th July, 2016 in the case of *N.M. v. Minister for Justice Equality & Law Reform* [2016] IECA 217.

34. Before dealing with the facts and findings in that case it should be noted that the applicant raises the case of *Donegan v. Dublin City Council & Anor.* [2012] IESC 18 for the sole purpose of demonstrating that the Supreme Court in that case did not review the prior decision of the Supreme Court in the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701 as being as groundbreaking, as suggested by the Court of Appeal in *N.M.* In this regard at para. 132 of the Donegan decision it is stated:-

> *"In light of the comments already made as to the adequacy of judicial review, I would not find that Meadows has substantially altered that position in this regard."*

35. I believe the point made by the applicant is well founded. That having been said, however, the decision in *N.M.* was not based entirely on *Meadows* and in fact in the judgment of the Chief Justice in *Meadows* it was acknowledged that considerable advances have been made in the area of judicial review in the preceding thirty years.

36. The applicant further refers to the case of *H.I.D. & B.A. v. Refugee Applications Commissioner* (Case C-175/11), a judgment of the European Court delivered on 31st January, 2013 where it was held that Article 39 of the 2005 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. It might be noted that that ruling was made in the context of a referral to the European Court in circumstances where the applicants asserted that the Refugee Appeals Tribunal was not in fact an independent court or tribunal.

37. The Court of Appeal decision of 14th July, 2016 in the case of N.M. concerned an appeal against the order of Barr J. in the High Court delivered on 18th December, 2014. The High Court held that the internal review procedure provided by the Minister against adverse decisions refusing to admit a failed asylum seeker back into the asylum process did not comply with the concept of an effective remedy as required by Article 39 of the 2005 Directive. Barr J. determined that an effective remedy was not available because the High Court on a judicial review application could not reverse an earlier decision and substitute its own findings of facts. Furthermore the Court could not look at more up-to-date information and was confined to the information that was before the decision maker and the Court could only review the process as it was not an appellate court.

38. In the Court of Appeal the Court considered the leading decision of the Court of Justice in respect of interpretation of Article 39 as being the case of *Diouf* (Case C-69/10). That case involved a reference from Luxembourg dealing with their accelerated procedures where an applicant for refugee status could not appeal a decision to place him within the accelerated process prior to his application for refugee status being dealt with. At para. 56 of the decision of the Court of Justice it was held that:-

> *"...the absence of a remedy at that stage of the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application."* (Emphasis added)

39. The Court of Justice concluded, at para. 70, with:-

> *"On a proper construction, Article 39 of Directive 2005/85 and the principle of effective judicial protection do not*

preclude national rules such as those at issue in the main proceedings, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application – a matter which falls to be determined by the referring court." (Emphasis added)

40. The Court of Appeal went on to consider the Supreme Court judgment in the case of *Meadows* aforesaid, together with the judgment of Cooke J. in the case of *I.S.O.F. v. Minister for Justice* [2010] IEHC 457 and the judgment of Hogan J. in the High Court in the case of *E.F.E. v. Minister for Justice* [2011] 2 I.R. 798. At para. 51 of the judgment the Court of Appeal said that in the light of this trilogy of case law it is clear that what might be termed modern, post-*Meadows* style judicial review would satisfy the effective remedy requirements of Article 39 of the Directive.

41. At para. 53 the Court notes that although the court in judicial review proceedings cannot review the merits of the decision, it can nonetheless quash the decision for unreasonableness or lack of proportionality or where the decision simply strikes at the substance of constitutional or EU rights.

42. The Court in its judgment acknowledged that judicial review cannot be equated with an appeal *simpliciter*. However that is not what Article 39 requires; and Article 29 provides that it is open in principle to each member state to choose as between some form of appeal on the one hand and judicial review on the other. In the circumstances the Court of Appeal allowed the appeal of the Minister against the decision of Barr J.

43. Although Article 39 of the 2005 Directive does not apply to subsidiary protection in Ireland, nevertheless it is sufficiently similar to Article 47 of the Charter in that both refer to an effective remedy, so as to persuade me that the findings of the Court of Appeal in a discussion on Article 39 of the Directive does dictate the manner in which the within proceedings should be determined under Article 47 of the Charter.

44. I should add that I have some difficulty with the manner in which the applicant has pursued the suggestion that judicial review is not an adequate remedy. In this regard the applicant, in the context of the within application, has not sought to test the remedy of judicial review by running any particular point she wished to make other than the argument that there was a systemic failure in not providing her with a right of appeal as opposed to merely applying by way of judicial review.

Conclusion

45. In conclusion therefore, having regard to all of the foregoing and in particular the Court of Appeal decision in *N.M.* the application for judicial review is refused.