Neutral Citation Number: [2011] IEHC 381

THE HIGH COURT

JUDICIAL REVIEW

2011 697 JR

BETWEEN

B. J. S. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 12th day of October 2011

1. This judicial review proceeding came before the Court on the 3rd October, 2011, on the first return date of the applicant's motion to seek leave to apply for a series of reliefs directed at challenging the legality of the first named respondent's decision to refuse his application for subsidiary protection (dated the 25th February, 2011) and his decision to make a deportation order in respect of the applicant (dated the 2nd March, 2011).

2. The Court was informed that, following the initiation of the proceedings the first named respondent had given an undertaking not to deport the applicant prior to that return date, but that he declined to extend the undertaking beyond the 3rd October, 2011. Counsel for the applicant immediately indicated that he would then wish to move the motion for an interlocutory injunction included in the notice of motion and counsel for the respondent indicated that the respondents were prepared to meet that application. The Court accordingly heard the application together with one other similar application the following morning.

3. The applicant is a national of Sierra Leone who left that country some 40 years ago when aged six and went with his family to live in Nigeria. He claims to have fled Nigeria in 2006, arriving in the State in September of that year when he claimed asylum. His claim to asylum was based upon events he described as having happened to him as a result of his discovery of a cache of guns hidden in a septic tank near his apartment. He claims to have reported this find to the police and to have told the caretaker of the apartment block who was the nephew of his landlord in the apartment. The nephew was, he says, extremely annoyed because the guns had been hidden on behalf of his uncle's boss who was, *inter alia*, the powerful financier of the Oodua Peoples Congress, a group well known for their brutality and terrorism. He claims that as a result he was targeted, pursued, that shots were fired at him and that he received a flesh wound. He claimed to have fled via Accra in mid-August 2006 and to have arrived in Cork on the 4th September, 2006.

4. The applicant's claim to refugee status was the subject of a negative recommendation in a report of the Refugee Applications Commissioner under s. 13 of the Act of 1996, and this was upheld on appeal by the Refugee Appeals Tribunal.

5. In response to the usual letter from the first named respondent under s. 3 of the Immigration Act 1999, a joint application for subsidiary protection and for leave to remain in the State was made on his behalf on the 17th April, 2009. As mentioned, the former application was refused by determination made on behalf of the Minister on the 25th February, 2011 (the "Determination"). The deportation order was made and signed by the then Minister on the 2nd March, 2011 and notified to the applicant by letter dated the 10th March, 2011, accompanied by the "Examination of File" memorandum prepared on the 16th November, 2010, by an Executive Officer of the Repatriation Unit and subsequently endorsed by senior officials on the 10th January, 2011 and 23rd February, 2011.

6. There is before the Court, accordingly, an application for an interlocutory injunction to restrain deportation of the applicant based upon the challenges to both of those decisions. The application for judicial review of the subsidiary protection determination is not affected by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, so that upon the leave hearing the applicant will be required to demonstrate that there is an arguable case that the determination ought to be quashed. The deportation order on the other hand does come within that section so that the applicant must demonstrate a "substantial ground" that the order be quashed as unlawful. For the purpose of the present application for an injunction, the applicant must therefore show that there is first, a fair issue to be raised at the leave hearing as to the existence of an arguable case in respect of the determination or a substantial ground as to the illegality of the deportation order. Given that a deportation order can be validly made under s. 3 of the Act of 1999 only after an application for subsidiary protection has been determined, it is appropriate to consider first the case proposed to be raised as regards the Determination.

7. The essential case made here is that the Determination is invalid in law because the procedure put in place for dealing with such applications under the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") fails to comply correctly or adequately with the requirements of the directive which the Regulations purport to implement, namely Council Directive 2004/83/EC of the 29th April, 2004, on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the contents of the protection granted, ("The Qualifications Directive"). In particular the following deficiencies are alleged:-

> (a) The 2006 Regulations failed to transpose the requirement in Article 4.1 of the Qualifications Directive, that the relevant elements of the application be assessed "in co-operation with the applicant";
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> (b) There is no provision for an effective remedy in respect of a refusal of subsidiary protection contrary to the requirements of the Constitution, of Article 13 of the European Convention of Human Rights of Article 47 of the Charter of Fundamental Rights of the EU and of the requirements of Council Directive 2005/85/EC of the 1st December, 2005, on

minimum standards on procedure in Member States for granting and withdrawing refugee status ("the Procedures Directive");

(c) The failure to provide a mechanism of appeal against such a refusal breaches the principal of equivalence in European Union law in that the procedure under the 2006 Regulations is inferior to that provided for in national law (the Refugee Act 1996 as amended) in respect of decisions on claims for asylum.

8. When the Court inquired at the hearing as to which aspects of the Determination were alleged to be affected by the absence of co-operation on the part of the Minister and which findings in the determination would be challenged if an appeal was available, counsel for the applicant indicated that the challenge was not based on any factual aspects – he said he had not read the decision of the Tribunal in the asylum appeal. The case was based exclusively on the legal argument that the application for subsidiary protection had not been processed in accordance with the minimum standards required by European law and the applicant was entitled to remain in the State until his application for subsidiary protection had been lawfully processed and determined.

9. Implicit in the case thus advanced is the proposition that the form of international protection known in EU law as "subsidiary protection" has been enacted as an independent entitlement in respect of which a claimant has a distinct or stand alone right to an assessment and adjudication procedure including a right to a dedicated appeal remedy in respect of a first instance refusal of subsidiary protection. In the judgment of the Court this proposition is unfounded and is based upon a mistaken understanding of the role of subsidiary protection in the common asylum system of the European Union and of the relationship between the Qualifications Directive on the one hand and the Procedures Directive on the other.

10. Subsidiary protection is an innovation of European Union law and is not derived from the Geneva Convention of 1951 on the status of refugees, although, of course, "complementary protection" has evolved in international law and has been adopted in varying forms in many (but not all) western protection regimes. Recital (24) of the Qualifications Directive explains: "Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention".

11. The term "person eligible for subsidiary protection" is defined in Article 2(e) of that Directive as meaning "a third country national or a stateless person who does not qualify as a refugee but 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 as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". Thus, subsidiary protection is an adjunct of refugee status and is only extended to a person who is not a refugee. A claimant may have fled a country of origin out of fear of risk to life or some form of violence but not qualify as a refugee because the source of the fear does not come within the scope of "persecution" in the sense of the Geneva Convention or lacks the nexus to one of the Convention reasons of race, religion, nationality, membership of a particular social group or political opinion essential to refugee status.

12. While the Qualifications Directive introduces this form of complementary protection, it is otherwise concerned only with establishing common minimum standards for the assessment of substantive qualification (and withdrawal) of the two forms of international protection. It is not concerned with the procedures employed for the processing of either form of claim by the Member States. Minimum procedural standards are laid down exclusively in the Procedures Directive.

13. This Court has pointed out in its judgment in *S.L. (Nigeria) v. Minister for Justice* (Unreported, High Court, Cooke J., 6th October, 2011), that the Procedures Directive applies only to the procedures employed by the Member States in processing claims for refugee status (asylum claims) except where, as provided for in Article 3.3, a Member State employs a form of unified procedure for the processing of joint applications for both forms of international protection. The scope of the Procedures Directive is defined in Article 3.1: "This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status". Article 3.3 then provides:

> "Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 of [the Qualifications Directive] they shall apply this Directive throughout their procedure."

14. Accordingly, except where a Member State employs a single or unified procedure covering both forms of protection, the Procedures Directive imposes no minimum procedural standards in respect of the processing of applications for subsidiary protection.

15. In a report to the European Parliament and the Council on the application of the Procedures Directive in 2010 (Brussels 8/9/10 COM(2010) 465 Final) the European Commission pointed out that all Member States other than Ireland had put in place such a single procedure for the processing and determining of both applications for refugee status and subsidiary protection usually with a single determining authority for both. As the Court also pointed out in the above judgment, such a unified procedure is optional and Ireland has not been under any legal obligation to employ it. It follows that the "right to an effective remedy" conferred by Article 39 of the Procedures Directive applies only to appeals against decisions listed therein, all of which are decisions taken in the course of the asylum process. It is only where a single procedure for both forms of international protection is employed that Article 39 has the effect of extending the right to an appeal to the subsidiary protection procedure by virtue of Article 3.3. In effect, what is provided for and what appears to occur in all Member States other than this one, is that the examination and assessment of the asylum claim simultaneously forms the basis of analysis and assessment of the application for subsidiary protection. Where an asylum claim is rejected because of, for example, the lack of nexus to a Convention persecution reason, the same determining authority considers whether the claim as made nevertheless qualifies for subsidiary protection. The criteria for qualification for subsidiary protection are applied to the same facts, personal history and conditions that have been found established in assessment of the asylum claim.

16. Although under the 2006 Regulations, the subsidiary protection application is made after the asylum process has concluded (including any appeal to the Tribunal), the exercise involved in determining the application is essentially the same. It involves considering whether, having regard to the fact that the claim so far as has been found to be established does not qualify refugee status, it nevertheless comes within the scope of subsidiary protection.

17. It follows from this, in the judgment of the Court, that there is no deficiency in the 2006 Regulations by reason of the absence of any express repetition of the words "in co-operation with the applicant" in relation to the distinct assessment of an application for subsidiary protection. It is to be noted that the expression used in Article 4.1 of the Qualifications Directive in relation to the assessment of "the relevant elements" of "the application for international protection" covers the elements relevant to both forms of international protection. Those elements are described in Article 4.2. They consist of the "the applicant's statements and all

documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection".

18. These are, in effect, the basic facts and documents relating to the applicant's personal history and to the basis of the claim and they are primarily considered and assessed in the asylum process including any appeal. The "co-operative" nature of the first instance assessment phase is reflected particularly in, for example, the initial interview of an arriving applicant under s. 8(1) of the Act; the duty and function of the Commissioner to investigate the application under s. 11(1); the interview of the applicant under s. 11(2) and the powers of the Commissioner to make all necessary inquiries and obtain information; and by the reciprocal duty of an applicant to co-operate in the investigation under Article 11C of the Act. While in an appeal to the Tribunal against a negative recommendation the onus lies with the appellant, the continuing investigative and co-operative character of the second phase is reflected in the power of the Tribunal under s. 16(6) to request the Commissioner to conduct further inquires or supply further information.

19. This explains why, in the view of the Court, Article 39 of the Procedures Directive requires the availability of the "effective remedy" only in respect of the decisions in the asylum process and (by virtue of Article 3.3) in respect of decisions in a unified procedure. The Procedures Directive was adopted more than a year and a half after the adoption of the Qualifications Directive. Given that the latter affords the Member States a choice as to whether to install a unified procedure for international protection and/or a single determining authority for both forms of protection, Article 39 could have explicitly extended the right to an effective remedy to decisions in a separate subsidiary protection process had that been considered appropriate or necessary.

20. This is not to say that the Minister as the deciding authority under the 2006 Regulations is wholly relieved of any obligation of co-operation in appropriate cases. Because the State has opted for separate procedures and because in inviting a distinct application following the conclusion of the asylum process the Minister solicits the information, submissions and documentation identified in the formal application appearing in Schedule 1 to the Regulations, the process of determining the application must conform to the normal rules of fair procedures. These include, obviously, the principle *audi alteram partem*. Accordingly, if in a given case new facts, information or documentation not previously examined in the asylum process are put before the Minister and are material to the claim for subsidiary protection, that principle would require the Minister to afford an applicant an opportunity of comment or rebuttal if the refusal of the application was to be based, for example, upon a finding that the information was untrue or the documents were forged. That, however, is a matter of basic fairness in administrative procedures where individual rights are potentially affected. It is not dependent upon any express reiteration of the word "co-operation" in the 2006 Regulation. Thus, insofar as this reference to "co-operation" is relied upon as requiring the Minister to afford an applicant an opportunity to rebut any proposed adverse finding which is to be based on new information not previously available to the applicant, the entitlement is enshrined in basic principles of administrative law and requires no express implementation in such regulations.

21. It must also be borne in mind that a claim of non-compliance with such a duty of "co-operation" or the principle *audi alteram partem* cannot be made as a purely academic point divorced from specific facts. As indicated in paragraph 8 above, the applicant eschewed the need to identify any particular finding in the Determination which would allegedly have been corrected or altered had the applicant been consulted upon it.

22. Furthermore, insofar as the applicant submits that "co-operation" requires that a draft determination be submitted for comment before it is adopted, this Court has pointed out in its judgment in *I.M.M. v Minister for Justice & Equality* (Unreported, Cooke J. 27th July 2011,) that the submission is unfounded because, *inter alia*, it is inconsistent with the express terms of the Procedures Directive. Where Article 4.1 of the Qualifications Directive refers to the duty of co-operation in respect of the "application" it is in respect of the "application for international protection," that is, the claim to asylum and the claim to subsidiary protection. Article 14.2 of the Procedures Directive recognises, however, that the report of the personal interview with the applicant on which the decision of the determining authority on an asylum application is based, may be communicated to the asylum seeker after the decision has been adopted. It would be inconsistent with these arrangements that the duty of cooperation in Article 4.1 should be construed as imposing on a determining authority a mandatory obligation to submit either the report or a draft decision to an applicant for prior comment.

23. In the judgment of the Court it follows from these considerations that there is no deficiency in the manner in which the Qualifications Directive has been transposed in national law by the 2006 Regulations. Furthermore, as the right to an effective remedy by way of an appeal under Article 39 of the Procedures Directive applies only to the subsidiary protection procedure when it forms a part of a unified procedure with the asylum application, the 2006 Regulations are not deficient in failing to provide for a distinct and second appeal.

24. There remains to be considered, therefore, the further proposition advanced as set out in para. 7 above, namely that, independently of the right under Article 39 and of any right to a fair procedure, the failure to provide an appeal against a determination of subsidiary protection breaches the applicant's entitlement in European law and particularly the principle of "equivalence". The essential argument is as follows.

25. The asylum procedure is put in place by domestic legislation namely the Refugee Act 1996 (as amended). It is said that s.16 of that Act confers a right of appeal against a negative decision to the Refugee Appeals Tribunal. The entitlement to apply for subsidiary protection, on the other hand, is entirely an innovation of European Union law in the Qualifications Directive and is transposed into national law by the 2006 Regulations which provide no equivalent remedy.

26. Article 19.1 of the Treaty on European Union provides: ". . . Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". As a result it is argued, where European Union law creates rights in favour of individuals but the relevant law does not prescribe any particular form of remedy to ensure protection of such rights, it falls to the Member States to provide the appropriate remedies and to prescribe the procedural conditions applicable to them and they must do so upon terms that are equivalent to and no less effective than the remedies available in national law for the protection of comparable rights. In other words, it is a principle of the European Union law that there be procedurally equal treatment for claims based upon that law and comparable claims based on national law. In case C34/02 Pasquini [2003] ECR 1-6515, the Court of Justice stated that this principle of equivalence "must be applied not only with regard to provisions of national law on limitation of actions and recovery of sums paid though not due, but also to all procedural rules governing the treatment of comparable situations, whether administrative or judicial".

27. The immediate and obvious flaw in this argument is that, as a matter of purely Irish law, there is no superior remedy by way of appeal against a first instance determination of an asylum application so that the procedures under the Refugee Act 1996, do not constitute a comparator for the purpose of applying the principle of equivalence.

28. At least until the 1st December, 2007, (the date of expiry of the period for transposition of the Procedures Directive), the Act of 1996 provided that the only definitive determination of an asylum application was that made by Minister under s. 17(1) of that Act. That decision was preceded by the interview of the applicant; by the report and recommendation of the Refugee Applications Commissioner and, where sought, by a review of that report and either a rejection or affirmation of its negative recommendation by the Tribunal. Neither the Commissioner nor the Tribunal had any competence to make a negative decision upon an asylum application.

29. It is only since the requirements of the Procedures Directive, and, in particular, the deeming provision of its Annex 1, became effective in Irish law that the recommendation of the s. 13 report falls to be considered as the first instance determination by the Commissioner as a "determining authority" and that there is a right of appeal against such a determination to the Tribunal. Thus, insofar as the provisions of the 1996 Act can now be pointed to as providing a two-stage determination for an asylum application including a right to an effective remedy by way of appeal, it is only because of the manner in which the State has adapted the arrangements of the 1996 Act in order to comply with the requirements of the Procedures Directive. Accordingly, what is now pointed to by the applicant as a superior remedy provided by national law is in fact a remedy brought about European law and it is the same European Union law which makes the distinction described earlier in this judgment between the remedies applicable to the asylum procedure and those applicable to subsidiary protection when the latter is applied separately.

30. In relying upon this principle counsel for the applicant placed great emphasis upon a recent judgment of the United Kingdom Supreme Court *in F.A. (Iraq) v. Secretary of State for the Home Department* [2011] U.K.S.C. 22. He submitted that in that case the argument now raised was considered in detail and found to give rise to sufficient uncertainty to justify that court in applying to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union for a preliminary ruling. (Counsel informed this Court that so far as he was aware, that application for preliminary ruling had not in fact subsequently been made as the case in question was compromised).

31. There is no doubt that the judgment of the United Kingdom Court is concerned with an issue of equivalence as between the right to appeal against an adverse asylum decision under the provisions of the Nationality, Immigration and Asylum Act 2002 – a piece of domestic legislation – on the one hand and, on the other, the apparent absence of a right to appeal against an adverse determination of an application for "humanitarian protection", the term applied in the United Kingdom to subsidiary protection implemented on foot of the Qualifications Directive. In the judgment of this Court, however, the arguments considered in that case are not of direct assistance to the applicant here.

32. What is important to note is that, as already indicated, the United Kingdom is a Member State which has opted for a unified procedure for "international protection" in both forms. It is clear from the description of the procedural background to the case given in paragraphs 1-10 of the judgment that, as a result of the particular circumstances of that applicant and the precise terms of the provisions governing appeals under the 2002 Act, the applicant was found to be entitled to appeal the adverse asylum decision but not the refusal of humanitarian protection. On the 9th October, 2007, the Secretary of State had refused the asylum application and then immediately considered whether he qualified for humanitarian protection. It was decided that he did not so qualify, but he was granted discretionary leave to remain until he reached the age of 17 years. The applicant appealed the asylum refusal and included grounds to the effect that he would suffer serious harm. That appeal was dismissed by the Immigration judge in respect of both the asylum grounds and the humanitarian protection grounds. The applicant then applied to the Asylum and Immigration Tribunal (AIT) for reconsideration of his appeal. When the application for reconsideration was heard the AIT held that the original appeal should have been confined to the asylum refusal because no appeal was available under s. 83 of the 2002 Act, in respect of the claims for humanitarian protection. According to the description given in paragraphs 7 and 8 of the judgment, it was due to the particular limitations imposed upon rights of appeal against a specific immigration decision combined with the fact that there had been no refusal to vary the applicant's existing leave to remain in the United Kingdom that created the gap in the relevant provisions of national law which led to the applicant not having a right of appeal against the decision to refuse humanitarian protection made immediately following the rejection of the asylum claim.

33. It is clear to the Court, accordingly, that the uncertainties encountered in this context by the United Kingdom Supreme Court have no relevance to the distinct legislative and administrative position in this jurisdiction. Those uncertainties arose because the United Kingdom has opted for a single unified procedure such that by virtue of Article 3.3 of the Procedures Directive an effective remedy by way of appeal against the joint decision on the two forms of protection was obligatory.

34. It follows in the judgment of the Court that the arguments sought to be raised as to the illegality of the Determination by reason of deficiency in the transposition of the Qualifications Directive by the 2006 Regulations and the failure to provide a distinct remedy by way of appeal, are unfounded. As a result, no fair issue for consideration at the leave application has been made out and the first limb of the *Campus Oil* test for an interlocutory injunction is not satisfied.

35. The applicant also relies, of course, on the proposed challenge to the legality of the deportation order. However, the primary argument raised here necessarily falls for the reasons given above for rejecting the case to be made in respect of the Determination. It is submitted that no valid deportation order can be made or implemented if there is no valid determination of an outstanding application for subsidiary protection and this determination was invalid for the reasons discussed above. That argument is not stateable for the reasons given in the earlier part of this judgment.

36. There is, however, a further and more fundamental reason why, in the judgment of the Court, no stateable case is made out as to the illegality of the deportation order in this case. The applicant is a national of Sierra Leone. He has never suffered and has never claimed to have suffered persecution in that country. So far as the evidence before the Court on this application is concerned, no basis appears ever to have been put forward as to why he should now fear persecution if returned to Sierra Leone. His claim throughout the process has been based upon the events described above as having happened to him in Nigeria, prior to his leaving that country in 2006. The representations made under s. 3 of the Immigration Act 1999, for humanitarian consideration and leave to remain, were directed exclusively at the applicant's reasons for not being returned to Nigeria. Although the representations refer explicitly to him being a national of Sierra Leone, no case whatsoever has been made as to why the deportation order made on that basis is unlawful. Contrary to the suggestion made at paragraph e) 13 of the Statement of Grounds, it is clear from several statements in the Examination of File memorandum that it was on the basis of possible repatriation to Sierra Leone that the assessment was made.

37. For all of these reasons the Court is satisfied that the test for the grant of an interlocutory injunction in this case has not been made out and the application must be refused.