

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 931 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

M.A.H.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, COMMISSIONER OF AN GARDÁ SÍOCHÁNA, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 16th day of May, 2013

1. The applicant, a Bangladeshi national, arrived in the State on 30th October, 2008. On 3rd November, 2008, he made an application for a declaration of refugee status in the course of which he completed an asylum questionnaire on 13th November, and attended for interview with the Office of the Refugee Applications Commissioner pursuant to s. 11 of the Refugee Act 1996, on 22nd April, 2009. On 30th April, the Refugee Applications Commissioner reported pursuant to s. 13(1) of the Act and recommended on 8th May, that the applicant should not be declared a refugee. This decision was notified to the applicant on 26th May.
2. An appeal was lodged against this decision with the Refugee Appeals Tribunal on 12th June, 2009, following which an oral hearing took place on 9th September. On 30th September, the Refugee Appeals Tribunal affirmed the original recommendation of the Commissioner. On 23rd October, 2009, the applicant was advised that the Minister proposed to make a deportation order in his case and was also advised of his entitlements including his right to make representations pursuant to s. 3 of the Immigration Act 1999 and an application for subsidiary protection.
3. An application for leave to remain was made on behalf of the applicant on 6th November, 2009. A subsidiary protection application was also made on his behalf on 13th November. On 14th December, a personal statement was submitted on behalf of the applicant in support of both applications.
4. It is standard to issue a three options letter in respect of proposals to make deportation orders in respect of failed asylum seekers. Option three offered the applicant the opportunity to apply for subsidiary protection or to make representations to remain temporarily in the State. It was expressly indicated in the letter that a decision on eligibility for subsidiary protection would be determined before the Minister's consideration of representations to remain temporarily in the State. The latter representations would only be considered if the subsidiary protection application failed. Thereafter, if the Minister decided that the applicant was not to be allowed to remain temporarily in the State, he would be made the subject of a deportation order.
5. On 15th August, 2011, the applicant was informed that he had failed in his application for subsidiary protection. On 25th August, the applicant's solicitors wrote to the first named respondent challenging the decision and indicating that judicial review proceedings would issue if the Minister failed to vindicate the applicant's rights. This letter was acknowledged on 26th August, 2011, and a request contained in the same letter that the s. 3 leave to remain application be deferred was not granted. In the letter of 25th August, the applicant's solicitors claimed a right under Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights and Fundamental Freedoms to a hearing before an independent and impartial tribunal previously established by law in respect of subsidiary protection.
6. It was submitted that the applicant had a "live application" for subsidiary protection and that it would be inappropriate for the Minister to take any steps towards his deportation. An undertaking was sought not to proceed with the consideration of a deportation order until such time as a hearing before an independent and impartial tribunal of appeal had been granted and determined. It was indicated that "the department is not in a position to give such a commitment at this time".
7. Judicial review proceedings were commenced and ultimately determined by this court (Clark J.) on 20th June, 2012, [2011 No. 802 J.R.]. The judgment was appealed to the Supreme Court by notice of appeal dated 11th July, 2012.
8. On 20th and 24th September, 2012, the first named respondent's officials considered the applicant's application for leave to remain in the State pursuant to s. 3 of the 1999 Act and s. 5 of the Refugee Act 1996, following which a recommendation was made that a deportation order should be signed in respect of the applicant. An order was made on 19th October and notified to the applicant's solicitors by letter dated 1st November.
9. By notice of motion dated 12th November, 2012, the applicant sought leave to apply for judicial review for orders of *certiorari* and prohibition quashing the deportation order and restraining the second named respondent from executing it until the applicant's subsidiary protection application had been determined in accordance with law. He also sought an interlocutory injunction restraining the second named respondent from taking any step to arrest, detain or deport the applicant pending the final determination of the proceedings.
10. The grounds upon which relief was sought are directly linked to the ongoing proceedings in respect of subsidiary protection now on appeal to the Supreme Court. It is contended that the respondent may not make a deportation order unless the applicant's application for subsidiary protection has been considered and refused and further that, should the applicant's appeal be successful, the refusal of subsidiary protection to him would be a nullity and the deportation would, as a consequence, be invalid and *ultra vires*.

It was further contended that the deportation order was issued when the court was seized of an issue in respect of the power of the first named respondent to make a deportation order in respect of the applicant and further, that the deportation decision did not consider whether the applicant on return to Bangladesh would be at risk of capital punishment in breach of Article 2 of the Charter of Fundamental Rights of the European Union.

11. An undertaking had previously been given by the respondent prior to the judgment of Clark J. not to deport the applicant. However, this was withdrawn as of 22nd April, 2013. On the same date application was made to Clark J. for an injunction restraining the respondents from deporting the applicant until the proceedings were disposed of. Clark J. stated that she was of the view that the Supreme Court was seized of the matter and stayed the motion so that application could be made to the Supreme Court for relief.

12. An application was made to the Supreme Court on 10th May, 2013, seeking an interim or interlocutory injunction restraining the execution of a deportation of the applicant until the hearing of the subsidiary protection appeal. The Supreme Court declined to entertain the application stating that it was more appropriate that application be made to the High Court for injunctive relief in respect of the deportation proceedings. On the afternoon of 10th May, 2013, application was made to this Court to re-enter the interlocutory injunction application for a hearing on Monday 13th May.

13. In the judgment of the court delivered on 26th June, 2012, in respect of the subsidiary protection issue, Clark J. identified the sole ground argued before the court at the substantive hearing as follows:-

"as no credibility finding had been made against the applicant by the Refugee Appeals Tribunal, then it falls on the Minister to evaluate the facts pertinent to the claim, if necessary in cooperation with the applicant at an oral hearing."

Clark J. stated that the applicant's case depended upon there being new material evidence or information which was presented to the Minister in the claim for subsidiary protection and on the absence of credibility findings made previously by the Refugee Applications Commissioner or the Refugee Appeals Tribunal. The learned judge then examined the claim for subsidiary protection to establish "whether a new claim or new evidence capable of vitiating the previous decisions was put before the Minister" and concluded that there was no new material evidence. Clark J. summarised the background to the case. The applicant was a 32 year old man from Bangladesh. His application for asylum failed before the Refugee Applications Commissioner and on appeal to the Refugee Appeals Tribunal. It arose from a land dispute between his father and another man who was alleged to be a corrupt local politician. The applicant claimed that his father, a businessman of integrity and repute, borrowed money from this local politician which was secured on a parcel of land. The corrupt politician allegedly forged documents which purported to demonstrate that his father had actually sold the land to him. This forgery was aided and abetted by another corrupt politician, an MP and a member of the government, who had witnessed the forged instrument. These two men were said to be well known for their corruption and criminal activity. The applicant claimed that he and his father and a large group of supporters sought to re-enter and take possession of the lands in issue and in a confrontation the politician's son was attacked and killed. It was claimed that the applicant was innocent of any wrongdoing but was sought for the murder and went into hiding. He learned that the politician had filed a false murder accusation against him. After eighteen months of travelling around, he decided to come to Ireland with the aid of a trafficker who made all of the travel arrangements and supplied him with a false passport which he used to pass through immigration at Dublin Airport. His parents moved from Bangladesh to India for safety. A number of documents were produced in support of his claim.

14. Having examined the Commissioner's decision and the later decision of the Refugee Appeals Tribunal which upheld the negative recommendation of the Commissioner, Clark J. determined that both decisions were based on legal grounds rather than strictly negative credibility findings. The Tribunal concluded that there was "much about this narrative which raises many questions. Even if one could accept all that was said, in the final analysis this remained a land dispute between two people. There is nothing which could impute a political opinion to the applicant". The court found that the Tribunal had provided detailed reasons for a finding that the applicant had not sought state protection and assistance. It further concluded that the applicant was not a member of any particular social group, and that there were other features that caused concern including the issue of credibility, s. 11B of the Refugee Act 1996, and internal relocation.

15. In the application for subsidiary protection the same case relating to a land dispute and the false accusation of murder was submitted on behalf of the applicant. It was alleged that if returned to Bangladesh the applicant would be at risk of torture and subjected to inhuman and degrading treatment and that he had already been subjected to such treatment in the past. These submissions did not go beyond what had been described previously. It was claimed that the applicant would be in serious danger at the hands of the police under the instructions of the local MP and the corrupt politician, and that there was no part of Bangladesh where he would not be at risk of suffering serious harm. The court considered that the final statement in the submissions on subsidiary protection on behalf of the applicant was important in that it stated:-

"The general credibility of the applicant has been established, and we refer to the decisions of the ORAC/RAT etc - quote from decisions if there are useful parts."

16. Clark J. came to the following conclusion:-

"10. No "useful parts" were quoted and indeed it would be difficult to find any in either decision. To concur with the applicant's submission that his credibility was established would in the view of this Court require the suspension of logic and intelligence. While neither the Commissioner nor the Tribunal actually spelled out that they did not believe the applicant's narrative, it is clear that the story was found to have many non-credible features which were outlined in the RAC and RAT decisions. This is therefore not one of those extremely rare and unusual cases where a new claim or new documents were being considered by the Minister and rejected on credibility grounds and where fairness would mandate an opportunity to the applicant to first be heard at an oral hearing.

11. At the risk of repetition, no new evidence was put before the Minister. In any event the decision of the Minister refusing subsidiary protection to the applicant was not in fact based solely on the previous rejection of the same claim. A reading of the cumulative findings establishes that the Minister's refusal was also grounded on the strong legal basis that there was nothing to prevent the applicant from seeking protection from the authorities in Bangladesh through the judicial system, the Human Rights Commission and / or the police and further that the applicant had not demonstrated that he was previously subjected to serious harm. A person who can avail of effective state protection is not in need of subsidiary protection.

12. The Minister's reasoning cannot be faulted and the application must fail."

17. The applicant appealed this judgment to the Supreme Court by notice of appeal of 11th July, 2012. The appeal is based on four

grounds. Briefly summarised they were:-

- (1) That the learned trial judge erred in fact in determining that the Refugee Applications Commissioner and the Refugee Appeals Tribunal had found the applicant's account was not credible;
- (2) The applicant was entitled to an oral hearing of his application for subsidiary protection in accordance with Articles 47 and 51 of the Charter of Fundamental Rights and by reason of the principles of equivalence in European Union law and by reason of Council Directive 2005/85/EC;
- (3) The trial judge erred in fact in finding that the refusal of the application for subsidiary protection was based on a separate finding that state protection in Bangladesh was adequate and that the applicant was not previously subject to serious harm;
- (4) Any findings made by the first named respondent that state protection in Bangladesh was adequate to protect the applicant was made in the context of a decision that the applicant's account lacked credibility and so was not an independent ground of refusal of the applicant's application.

18. The principles to be applied in this case are set down in the Supreme Court judgment in *Okunade & Ors v. Minister for Justice, Equality & Law Reform & Ors* [2012] IESC 49 as formulated by Clarke J.:-

9.42 As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

- (a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;
- (b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-
 - (i) Give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;
 - (ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and
 - (iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;but also
 - (iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.
- (c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available...
- (d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

19. The court has considered the examination of file carried out under s. 3 of the Immigration Act 1999, as amended, in this case. The facts as outlined in the judgment of Clark J. were fully reviewed in the examination of file. It was noted that there was said to be a warrant for the applicant's arrest. There was no complaint that the applicant faces the death penalty on return to Bangladesh, though there was a claim that those with whom he was in dispute had associates who were armed. Indeed, the claim made in the application for leave to remain is that he fears he will be killed if returned to Bangladesh but not on the basis of the application of the death penalty by the state.

20. The applicant's claim for judicial review in respect of the deportation order is primarily based on the fact that subsidiary protection proceedings are pending in the Supreme Court for hearing. The High Court has already rejected the application for judicial review in the judgment already quoted above. In order to succeed in applying for leave to apply for judicial review in respect of the deportation order, the applicant would have to establish substantial grounds for the granting of such leave in accordance with the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. It is difficult to consider on the basis of the grounds advanced before Clark J. how this Court could now conclude that there is any substance in the application for subsidiary protection which was determined by the Minister for Justice and Equality and the lawfulness of which has been upheld by the High Court following a full hearing on all the issues.

21. The applicant seeks an interlocutory injunction restraining the respondents from executing the deportation order "until the applicant's subsidiary protection application has been determined in accordance with law or until the within proceedings have been concluded, whichever is the later". The applicant was permitted to remain in the state until the subsidiary protection application was concluded. The deportation order followed the refusal of the subsidiary protection application. The court is not satisfied that there is anything unlawful about the sequence of the making of these orders which was in accordance with the sequence notified to the applicant in the three options letter. It is clear that there is no challenge made to the lawfulness of the form or substance of the deportation order or the examination of file submitted in respect of the applicant. The case is not made that any part of the order is fundamentally flawed.

22. In *Okunade* Clarke J. stated that significant weight must be attached to the implementation of decisions made in the immigration process which are, *prima facie*, valid. He noted that it would be an insufficient recognition of the legitimate entitlement of the state to ensure the orderly conduct of the immigration and asylum process not to place a high weight on the need to respect orders and decisions made in that process unless and until they are found to be unlawful. He added that the importance to be attached to the exercise by the state of its right to control its borders and implement an orderly immigration policy required that appropriate weight be attached to the orderly implementation of immigration policy in determining where the balance of justice lies on an interlocutory application. He stated:-

"10.4 However, in the absence of any additional factors on either side, it seems to me that, if faced simply with an assertion on the part of the Minister that it is desired that a deportation order be enforced unless and until it be found invalid and an assertion on the part of an applicant that the applicant in question does not wish to run the risk of being deported only to be readmitted if the relevant proceedings are sufficiently successful, the position of the Minister would win out. It should also be taken into account that, at least in many cases, the result of a successful judicial review challenge will not necessarily lead to the applicant in question being entitled to remain indefinitely in Ireland or if already out of Ireland to be entitled to come back to Ireland for the purposes of remaining here indefinitely. In very many cases the only consequence of a successful challenge is, as has been pointed out, that issues of substance will require to be considered again or that some further process will need to be engaged in before a final decision is made. That too is a factor to which appropriate weight should be attached and which favours, in the absence of material countervailing factors, the implementation of a deportation order...

10.5 The default position is, therefore, that an applicant will not be entitled to a stay or an injunction."

23. Of further relevance to this case is the following observation by Clarke J.:-

"10.7 Where, as will frequently be the case, such a person has had the opportunity to have the facts underlying their claim to such a risk analysed by a series of administrative and judicial bodies, then the court will, as the trial judge in this case was, be in a much better position to form a judgment on the question of whether there is a real risk of serious harm should a deportation order be implemented. Where, on an arguable grounds basis, the situation with which a judge of the High Court is faced when considering an interlocutory injunction application in this field is one where there is a credible basis for suggesting that a real risk of significant harm would attach to the applicant on deportation, then it would require very weighty considerations indeed to displace the balance of justice on the facts of that case, certainly if what was intended was a deportation back to the country in which the relevant applicant would face those risks... While, therefore, important and fundamental rights can be involved it does not necessarily follow that, in each case in which an interlocutory injunction is sought, there is any credible basis for suggesting that truly fundamental rights are, in fact, involved. Where such rights are involved a very heavy weight indeed needs to be attached to them."

24. The first issue to be determined is whether the applicant has established a fair question to be tried which, in this case, means whether there are substantial grounds upon which to seek leave to apply for judicial review of the deportation order. No substantial ground is advanced which challenges the form or substance of the deportation decision in this case. The only issue is its timing. Section 3 of the Immigration Act 1999, is a domestic provision and applies following the making of a determination refusing subsidiary protection to the applicant. The refusal of subsidiary protection has been the subject of a full judicial review hearing before the High Court and a reserved judgment which is now on appeal to the Supreme Court. This Court must give respect to other judgments of this Court and the findings and conclusions reached on matters of law and fact. As matters stand, the High Court has determined that the subsidiary protection decision made by the Minister in this case was entirely lawful. This Court is also obliged to regard as correct in law and fact the determination of the Refugee Applications Commissioner and the Refugee Appeals Tribunal in this matter, since they have never been the subject of a judicial review application (see *Smith & Smith & Ors v. the Minister for Justice and Equality* [2013] IESC 4). Further, the court notes that no further facts were adduced in the course of the subsidiary protection application and, indeed, it would appear that no new facts were put before the Minister in respect of the deportation order made nor is any complaint made in respect of the manner in which facts were determined by the Minister when making that order.

25. Further, though credibility issues played some part in the determination of the subsidiary protection issue, the clear basis for the Commissioner's and the Tribunal's determination related to the absence of a Convention reason on which to ground a claim for asylum. What was in issue was a local land dispute followed by the alleged killing of the son of one of the protagonists and the issuance of a warrant for the arrest of the culprit – the applicant in these proceedings. It was determined that there was adequate state protection in Bangladesh available to the applicant in respect of these matters. These are all matters that were again considered in the examination of file. I am satisfied that there is no substantial ground upon which to challenge the deportation order in this case. I do not accept that the fact of an appeal to the Supreme Court without some additional evidence or new material offers a substantial ground to challenge the deportation order which, in its form and substance, is unchallenged.

26. If the applicant could establish a substantial ground, the court would be obliged to consider where the greater risk of injustice lay in considering injunctive relief. A number of factors have to be considered. I must give all appropriate weight to the orderly implementation of measures which are, *prima facie*, valid. I am satisfied that the public interest of the administration of the immigration and asylum system requires that lawful determinations be implemented fully and that the implementation be not unnecessarily delayed.

27. I am also obliged to give appropriate weight to any additional factors arising upon the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of proceedings. There is no specific element of the case that falls for consideration under this heading over and above the normal public policy considerations.

28. Finally, I am obliged to give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful. Since the High Court has already determined that the subsidiary protection decision is lawful, I must accept as a matter of fact and law that it is to be regarded as a lawful decision as matters presently stand. If the applicant succeeds in his Supreme Court appeal that, of course, will change matters and the deportation order will necessarily not be implemented. The applicant apprehends that he may be deported prior to that occurrence. If he succeeds on his appeal, he may obtain a rehearing of some kind in respect of the subsidiary protection claim that he makes.

29. In that regard, the court must ask itself whether there is a credible basis for suggesting that there is a real risk of significant harm attaching to the applicant if deported, having regard to the claims that he makes in respect of the subsidiary protection claim. Having regard to the fact that his claim for asylum failed on the basis that he could not establish a convention reason because the dispute upon which the claim was based was a localised land dispute and state protection was found to be available to him, and the fact that capital punishment did not appear as part of his claim in the deportation process or in his application for subsidiary protection, I am satisfied on the evidence available on this application that there is no credible basis for suggesting that there is a real risk of significant harm attaching to his deportation. Indeed, that very issue was considered in the examination of file. It was determined that having regard to the serious credibility issues identified by the Refugee Appeals Tribunal in respect of the applicant's claim and the country of origin information considered, that the applicant would not be at a real risk of torture or inhuman and degrading treatment in his country of origin. It should be noted that neither in the application for subsidiary protection nor in the application under s. 3 of the 1999 Act, was a threat of capital punishment claimed, although a threat that he might be killed was but at the hands of the other protagonist in the land dispute.

30. I am not satisfied that there is any sufficient countervailing factor to alter what was referred to by Clarke J. as the default position that the deportation order should take its course. I take account of the fact that the matter in relation to subsidiary protection is pending before the Supreme Court, but I am considering this matter on the basis of the facts before me and the criteria set out in the *Okunade* decision and I am not satisfied on any of the principles set out in that case that it is appropriate to grant the interlocutory relief claimed in this application. I am not satisfied that the applicant has established a fair case to be tried on the basis of substantial grounds of challenge to the deportation order and, even if he had, I am satisfied that there are no countervailing factors of the kind identified in *Okunade* which would justify the balance of convenience interfering with the execution of the deportation order for any of the reasons advanced on behalf of the applicant.

31. The complex features of the Irish asylum system which involves a separate application for subsidiary protection subsequent to the determination of an application for asylum, present considerable procedural difficulties which have been recognised by the Supreme Court. The very problem presented in this case was anticipated by Clarke J. at para. 2.11 of the *Okunade* decision. Here, the application for asylum has been refused, the application for subsidiary protection has also been refused and the High Court has determined that the subsidiary protection decision by the Minister was lawful. In the meantime, the deportation order was made. No new facts were advanced. Pending the determination by the Supreme Court of the applicant's appeal against the decision of Clark J., the undertaking previously available not to deport the applicant is no longer available. The applicant now seeks to challenge the deportation order primarily on the ground that the Supreme Court has not yet determined the appeal from the order of Clark J.

32. It is not for this Court to make any observations in relation to the merits or otherwise of the Supreme Court appeal. I may only have regard to the evidence and materials placed before the court in the course of this application including the judgment of Clark J. It is not the function of this court to anticipate how that appeal will be determined ultimately. This application is refused.