THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 512 J.R.]

BETWEEN

S.H.M.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2015

1. The applicant arrived in the State from the Democratic Republic of Congo in October 2006. His application for asylum was rejected by the Refugee Applications Commissioner in February 2007.

2. He then appealed to the Refugee Appeals Tribunal, which rejected his appeal in July, 2007. This was followed by a proposal to deport him from the Minister in October, 2007, following which he sought leave to remain.

3. On 22nd November, 2007, he applied for subsidiary protection. This was refused on 8th March, 2011.

4. A deportation order was made against the applicant on 15th July, 2011.

5. On 23rd July, 2012, the applicant applied for a revocation of the deportation order under s. 3(11) of the Immigration Act 1999, primarily on the ground that his return to the Democratic Republic of Congo would be unsafe. He also applied, on similar grounds, for readmission to the asylum process under section 17(7). While the section 3(11) application has yet to be determined, the s. 17(7) application was refused on 14th August, 2012.

6. On 24th August, 2012, he sought a review of that decision. This was refused on 4th September, 2012.

7. On 3rd September, 2013, he made an application to revoke the subsidiary protection decision. This application is also outstanding. My attention has not been drawn to any legal basis for this application and it would seem not to be a proper or available course. Where an asylum or subsidiary protection decision is alleged to require revocation, the appropriate course would appear to be an application under s. 17(7).

8. On 8th August, 2014, he made a second application for subsidiary protection, which was made in duplicate to the Minister and the Refugee Applications Commissioner. The application was acknowledged by the department on 19th August, 2014. On 22nd August, 2014, the Refugee Applications Commissioner replied refusing to process the application on the grounds that ministerial consent was required.

9. On 27th August, 2014, the present proceedings were filed.

10. On 3rd September, 2014, the application was moved in court before Cross J., who granted leave for a declaration sought at reliefs 1 and 2 in the grounding statement and also granted an injunction until the matter was next in court on 13th October, 2014.

11. On 13th October, 2014, the injunction was replaced by an undertaking not to deport the applicant which has been continued up to the date of the present judgment, when it expires.

12. By further correspondence dated 22nd January, 2015, and 15th June, 2015, the Chief State Solicitor on behalf of the Minister confirmed that a second application for subsidiary protection can only be considered in the context of a s. 17(7) application. This was reiterated by the department in a letter to the same effect on 25th November, 2015. Thus if there was any doubt about the matter, this amounts to a rejection of the "application" for re-admission to the subsidiary protection system.

Relief Sought

13. The applicant seeks two reliefs pursuant to the order granting leave. Firstly, a declaration that the Minister is under a duty to consider his application for subsidiary protection made on 8th August, 2014. The applicant does not have a subsisting application under s. 17(7) in being. Therefore he can only pursue this relief if he demonstrates that the Minister is required to entertain a free-standing reapplication for subsidiary protection, rather than requiring such an application to be made in the context of an application for readmission to the asylum process.

14. Secondly, the applicant seeks a declaration that it is unlawful to remove him from the State pending the determination of that application.

Right to remain in the State

15. Article 7(1) of the Procedures Directive 2005/85/EC provides that:-

> *"Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III."*

16. Chapter III of the Directive is headed "*Procedures at First Instance*" and covers Articles 23 to 36. Chapter III is divided into a

number of sections, one of which is Section IV (unheaded) which contains Article 32 which is headed "*Subsequent application*". It is clear from the scheme of the Directive that a re-application for asylum is nonetheless a first instance decision for the purposes of the Directive including Article 7. Appeals procedures are dealt with in an entirely different part of the Directive, Chapter V, which consists of Article 39.

17. It is clear from Article 7(2) that this right remain is also capable of applying to a re-application: *"Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined"*, or where international criminal law arises.

18. It is clear that the right to remain applies while a "*first instance"* decision is being made, but the term "*first instance*" decision does not mean the first decision, it means a decision at the initial rather than appellate level. Crucially the phrase "*first instance*" decision includes a re-application. There is no right to remain pending an appeal against a first instance decision, as is clear from Article 39(3)(a) of the 2005 Directive. Mr. David Conlan Smyth, S.C., who appeared (with Ms. Maeve Brennan, B.L.) for the respondent submitted that this Article applies to the original refugee application and any re-application, but on a reading of the scheme of the Directive, as set out above, it is clear that his submission in this regard is misconceived. Article 39 refers only to appeals, not applications or re-applications.

19. However, does an applicant necessarily secure a right to remain by making an abusive, or a repeated, re-application? This question is not specifically answered in the 2005 Directive, but considerable guidance can be had from the re-cast Procedures Directive, Directive 2013/32/EU of the European Parliament and of the Council of 26th June, 2013. While the State is not a party to this Directive, I consider that it may shed light on the proper interpretation of the 2005 Directive (see my judgment in *F.I. v. Maher* [2015] IEHC 639 at para. 14).

20. It is clear from the 2013 Directive that suspensive effect only applies in relation to a first application which is not abusive, and therefore does not apply to either a second or subsequent re-application (Article 41(1)(b)), or even to a first re-application if that first application is made "*in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State*" (Article 41(1)(a)).

21. Taking the 2013 directive as declaratory as to the intent of the 2005 directive, as I do, I consider, therefore, that where, as here, the applicant has already made both an application for asylum for an application for protection and a re-application to the protection system, there is no basis in European law for a right to remain.

22. Aside from EU law, there could not be a basis under domestic law, the Constitution or the ECHR for such a right to remain following a rejection of a protection decision without a fundamental change of circumstances. Nothing significantly new has been demonstrated since the applicant's previous application for admission to the protection process was made on 23rd July, 2014.

23. There is, therefore, no legal right to remain in the State by virtue of the matters canvassed in these proceedings, and a declaration sought in that regard must be refused in any event, independently of whether the Minister was entitled or required to consider a re-application to the subsidiary protection process separately from an asylum claim.

Principle of Equivalence

24. I turn now to the arguments based on the principles of equivalence and effectiveness, which derive from jurisprudence of the Court of Justice including Case C-255/00 *Grundig Italiana Spa v Ministero delle Finanze* [2002] ECR I-8003:

> *"…it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)"*

25. Mr. Paul O'Shea, B.L., for the applicant submits that the applicant is entitled to rely on the "*principle of equivalence*". He submits that while subsidiary protection is entirely an EU remedy, asylum is a mixed remedy being based partly on EU law and partly on domestic law. Therefore, he is entitled to equivalent protections within the subsidiary protection process to those that apply to the asylum process, one of which must be the right to make an independent free-standing application for re-admission to the subsidiary protection system. In this regard, he relies on the decisions in *F.A. (Iraq) v. Secretary of State for the Home Department* [2011] UKSC 22, a case which was subsequently settled, and *E.D. v. Minister for Justice Equality and Law Reform* [2014] IEHC 456 and [2015] IECA 118, where this issue was referred to the Court of Justice.

26. However, this argument is incompatible with the decision of the Supreme Court in *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, in which it was held both that an asylum application must be treated as a wholly EU remedy and that the appropriate comparator in terms of the principle of equivalence is the limitation period for judicial review (see para. 57 of the judgment of Murray J. and para. 50 of the judgment of Fennelly J.). That approach cannot support a re-writing of the legislative scheme where asylum is re-cast as a domestic remedy which in turn gives rise to a springboard equivalence for a subsidiary protection remedy.

27. However, even if the applicant is entitled to an equivalent process for readmission to the subsidiary protection system as applies for re-admission to the asylum system, such a process already exists in substance. Section 17(7D) of the Refugee Act 1996, provides criteria for consent for readmission to the asylum process. These are equivalent to those provided in s. 17(7E) of the Act for those applying to a new subsidiary protection application, in each case that being the procedure under s. 17, as amended by S.I. No. 51 of 2011 and S.I. No. 426 of 2013.

28. Mr. O'Shea has not pointed to anything making these procedures lacking in equivalence except for the inherent delay involved in the fact that the asylum re-application must be considered first. This seems to me to be a matter of effectiveness rather than equivalence.

29. There is, therefore, no merit to any complaint that the subsidiary protection system is subject to the principle of equivalence, or if it is, that it is lacking in equivalence in the sense argued.

Principle of Effectiveness

30. Mr. O'Shea also relies on the general EU law principle of effectiveness. He relies on the decision of the Court of Justice in *H.N. v. Minister for Justice and Equality* (Case C-604/12). In that case, the Court of Justice held that the EU Qualification Directive (2004/83/EC) permits a Member State to adopt a system whereby subsidiary protection is considered after the question of asylum,

provided that this does not give rise to a situation where the application for subsidiary protection is considered after an unreasonable length of time.

31. It is clear that if a two stage system for the initial application is permissible, as was held in *H.N.*, then a two stage procedure for a re-application must also be permissible.

32. Insofar as a certain amount of delay is inherent in the two stage system, as accepted in *H.N.*, any inherent delay within the two stage process for a re-application must also be regarded as acceptable. The reference to delay relied on by the applicant in *H.N.* related to undue delay between the asylum decision and the subsidiary protection decision, not to mere inherent delay involved in a two-stage procedure which *H.N.* found to be permissible on the first application, and by extension which must be permissible on a re-application.

33. In any event, it appears to me that the applicant cannot raise this issue because not only has he not made an application under s. 17(7) which was live as of the time of issuing the proceedings, but he has not demonstrated any basis for doing so by reference to a change of circumstances since his previous s. 17(7) application. The principle of effectiveness does not assist an applicant who has no grounds.

34. It seems to me that this case is essentially an attempt to rerun the *H.N.* case in a different context. The complaint that a re-applicant should not have to re-apply for asylum before re-applying for subsidiary protection has no merit in the light of *H.N.* Even if circumstances could arise (which have not been demonstrated here) where an re-applicant was going to encounter serious delay, the applicant is not entitled to rely on such an argument because he has no valid pending application for re-admission to the protection process, nor has he demonstrated grounds for such re-admission that have arisen since his previous application in that regard.

35. I have regard to the fact that in an ex parte application in *B.N. v. Minister for Justice and Equality* (29th July, 2014, not circulated), the Supreme Court decided *ex tempore* to grant leave to argue that there was a failure to provide for a facility to re-enter the subsidiary protection process separately. The fact that the Supreme Court granted leave *ex parte* on this point does not prevent this Court from, having heard argument on the point on notice to the respondents, deciding that it is lacking in merit.

36. The fact that the applicant has already made an unsuccessful s. 17(7) application only weakens, rather than enhances, his argument under this heading.

37. Mr. O'Shea was also critical of the handling of the previous s. 17(7) refusal by the Minister on 14th August, 2012. However, these are not matters that I can be concerned with in the context of this application. Not only is no challenge to the s. 17(7) refusal pleaded, but any such challenge would be hopelessly out of time. Mr. O'Shea suggested that an unchallenged decision is not necessarily valid for all purposes. To a very limited extent, it is true that caselaw has demonstrated that a court may have jurisdiction to restrain the enforcement of a valid order because of a significant change in circumstances. However, no such circumstances have been demonstrated in this case, and in any event, the case, as pleaded, does not allow Mr. O'Shea to go down that route.

Order

38. For the foregoing reasons, I will order as follows:-

(i) that application be dismissed;

(ii) that the Respondent be released from any undertaking regarding the non-deportation of the applicant by reference to his claim to be re-admitted to the protection process, or by reference to his maintaining these proceedings (although I would add that it would appear to be inappropriate to seek to deport the applicant prior to determining his s. 3(11) application as the ground for that application would seem to be a matter that is at least capable of being a significant change of circumstances that has arisen since the making of the deportation order and would appear to require express consideration and decision, the absence of which is likely to give rise to grounds to enjoin any such deportation); and

(iii) that the matter be adjourned to allow any consequential applications; and

(iv) that a party intending to make such an application shall give prior written notice of particulars in that regard.