Neutral Citation Number: [2011] IEHC 472

THE HIGH COURT

JUDICIAL REVIEW

2011 474 JR

BETWEEN

N. O.

APPLICANT

AND
THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Sean Ryan delivered the 14th December 2011.

This is an application for leave to bring judicial review proceedings to quash (a) a decision of the Minister refusing to grant the applicant subsidiary protection which was made on the 28`h March, 2011 and (b) a deportation order issued in respect of the applicant and dated the 21st April, 2011.

The standard of examination of the two applications is different. In order to get leave to challenge the deportation order the applicant is required to establish substantial grounds, pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The ordinary standard for obtaining leave under 0.84 applies to the refusal of subsidiary protection, namely, to establish a stateable case, an arguable case in law. The factual background to the case may be summarised as follows. The applicant left Nigeria on the 24th June, 2006, and arrived in the State on the Is' September, 2006. She was accompanied by two of her children and she was pregnant at the time. The applicant gave birth to triplet boys on the 24th September, 2006. She applied for asylum. Her application for refugee status was refused by the Commissioner on the 23rd January. 2007. She appealed against that refusal to the Refugee Appeals Tribunal which recommended on the 12th January, 2010, that the refusal decision should be affirmed. The applicant was duly noted of the result and was informed of her entitlement to apply under s. 3 of the Immigration Act 1999, for leave to remain on humanitarian grounds. The applicant applied through her solicitors on the 1st March. 2010. for subsidiary protection and she also applied for humanitarian leave to remain. The application for subsidiary protection was refused in a decision dated the 28`h March, 2011. A deportation order was signed on the 21st April. 2011, a deportation order the applicant and her legal representatives were notified of the making of the order by letter of the 27th May, 2011.

By notice of motion dated the 4th July, 2011, the applicant applied to this Court for leave to apply by way of judicial review for the following reliefs:

> "1. *Certiorari* to quash the refusal to grant subsidiary protection dated the 28th March, 2011.
>
> 2. *Certiorari* to quash the deportation order dated the 21st April. 2011.
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> 3. An injunction restraining the deportation of the applicant pending the determination of the proceedings.
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> 4. A declaration that s. 3 of the Immigration Act 1999, is disproportionate and therefore unconstitutional and/or incompatible with the European Convention on Human Rights and/or in breach of EU law because the deportation order is indefinite and, it is submitted, therefore lifelong.
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> 5. A declaration that the common law rules governing judicial review as they apply to a deportation order are unconstitutional.
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> 6. A declaration that the European Communities (Eligibility for Protection) Regulations 2006/SI 518/2006 fails to transpose the provisions of EU Directive 2004/83/EC properly into Irish domestic law.
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> 7. A declaration that the applicant's claim was not considered in accordance with Article 5(2) of Sl 518/2006.
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> 8. A declaration that the unavailability of an effective remedy under the impugned decisions renders the decisions invalid.
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> 9. A declaration that the State is in breach of its positive obligations to protect the fundamental rights of applicants under the Constitution and/or the European Convention on Human Rights and/or the Charter of Fundamental Rights of the European Union. 10. Further and other relief.
>
> 11. Costs."

The statement required to ground the application for judicial review repeats theses reliefs and furnishes the following grounds for the reliefs:

> 1. Article 4.1 of EU Directive 2004/83/EC of the 24th April, 2004, (the Qualification Directive) was not properly transposed into Irish law by SI 518/2006. Specifically, there is no reference in the Statutory Instrument to "the requirement to co-operate with an applicant in the assessment of the relevant elements of the application". Co-operation in the sense used in the Qualification Directive means:
>
> (a) a duty to communicate with the applicant during the course of the assessment of an application,
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> (b) a duty to make an applicant aware of any doubts in the mind of the decision maker,
>
> (c) it may mean that there is a duty to interview an applicant,
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> (d) it comprises a duty to permit an applicant to attempt to refute or rebut any findings or intended findings of the decision maker.

(e) a duty to involve an applicant and the decision maker in an interactive process until a final decision is arrived at,

(f) a duty to provide an applicant with a copy of any proposed decision prior to its being finalised to afford the applicant an opportunity to address any aspects that might suggest a negative result.

2. The Minister failed to co-operate with the applicant and was thereby in breach of the minimum standards mandated by the Qualification Directive.

3. SI 518/2006 failed to transpose the Qualification Directive properly into Irish law by omitting significant portions.

4. The failure to provide an effective remedy renders the subsidiary protection decision and the deportation order invalid.

5. The failure to provide an appeal mechanism in respect of a subsidiary protection decision breaches the principle of equivalence when compared with asylum claims.

6. The decision to make the deportation order was not proportionate or reasonable.

7. The representations made and the country information consulted were read selectively against the applicant's interests and the conclusions reached were irrational.

8. The respondent failed to consider the interference with the private and/or family life of the applicant in a reasonable and proportionate manner.

9. This repeats the complaint as to effective remedy and the principle of equivalence.

10. The decision to deport is invalid under s. 4 of the Criminal Justice (Convention against Torture) Act 2000.

11. The respondent failed to consider the representations made in a proper or appropriate manner.

12. The respondent took into account irrelevant considerations and failed to take into account relevant considerations.

The applicant's affidavit grounding the application was sworn on the 9th June, 2011. It complains that no co-operation took place between the applicant and the first named respondent in relation to the application for subsidiary protection.

Paragraph 5 is as follows:

> "I say that no engagement or co-operation took place between myself and the first named respondent in relation to my application for subsidiary protection. I say that no proper regard was had to fair procedures, natural and constitutional justice or to the provisions of EU law (including but not limited to EU Directive 2004/83/EC and the Charter of Fundamental Rights of the European Union). I say and believe that rather than engaging in a consideration of the application that I made, the first named respondent had regard to documentation and information which I was unaware of until I received the refusal of my application for subsidiary protection. I say that owing to the manner that my application was considered as aforesaid that I had no proper opportunity to respond to or comment on the information and documentation that the first named respondent chose to rely upon. I say and believe and am advised by my solicitor, Mr. Brian Burns that the first named respondent failed in his duty to co-operate with me in the assessment of my claim."

The applicant also complains that her applications for leave to remain in this State on humanitarian grounds and for subsidiary protection were not properly considered, in accordance with the grounds stated in the application for leave.

A replying affidavit was filed by Chris Carroll, Assistant Principal Officer in the Department of Justice and Equality. Mr. Carroll sets out the sequence of events in relation to the applicant's various applications and the correspondence and enclosures that were received and sent. Mr. Carroll exhibits the application for subsidiary protection and the decision. Similarly with the application for humanitarian leave, which was considered successively by an Executive Officer of the Department who made an initial recommendation, a Higher Executive Officer who agreed with the recommendation, an Assistant Principal Officer who in turn examined the case before the matter was considered by the first named respondent, who signed the deportation order on the 21st April, 2011,

At para. 20 of his affidavit, sworn on the 8t" July. 2011, Mr. Carroll says:

> "I say that the first named respondent gave due consideration to the representations in the application for subsidiary protection, and also to the representations for leave to remain pursuant to s. 3 of the Immigration Act 1999. 1 say and believe that the first named respondent's decision was made in a fair and proper manner, and that fair procedures were applied throughout the processing of the applicant's application. I say and believe that the applicant was given ample opportunity to make representations and present her case."

In outline written submissions filed on behalf of the applicant on the 6th October, 2011, it is stated that the main thrust of the claim in regard to subsidiary protection is that the application was not dealt with in accordance with law because it was not carried out in co-operation with the applicant. That procedural requirement is an obligation under the Qualifications Directive. Second, the applicant submitted that the common law rules applicable to judicial review are inadequate and accordingly unconstitutional insofar as they apply to subsidiary protection applications. Thirdly the applicant proposed that there is no effective remedy because of the absence of an appeal mechanism: this is required so as to ensure that there is equivalent legal protection in respect of subsidiary protection applications as there is for asylum applications. Fourthly, it argues that this Court ought to refer the question whether the subsidiary protection regime, insofar as it does not provide for an appeal, is deficient in point of effective remedy and/or equivalence to the Court of Justice of the European Union.

Further points argued in the outline submissions are that this Court is obliged to consider *non-refoulement* in the same way as the first respondent was: without this the applicant would not have an effective remedy. In those circumstances, if a refusal of an injunction were to be considered by the court, it would have to carry out an investigation as to the likely treatment the applicant might now receive if she and her children were to be removed to Nigeria.

The applicant also submits that she is entitled to an injunction to restrain deportation from the State pending the judicial

determination of her claim.

The outline legal submissions on behalf of the respondent first addressed the procedural challenge to the subsidiary protection decision. The respondents cited four decisions of this Court namely, *MMA*, (Unreported. Birmingham J. High Court, 24th March, 2011), *IMM*, (Unreported, Cooke J. High Court, 27th July, 2011), *SL* (Unreported, Cooke J. High Court, 6th October, 2011). and *BJSA* (Unreported, Cooke J. High Court, 12th October, 2011).

In response to the argument that the respondent relied selectively on country of origin information, the submission is that while the applicant submitted general information, the first named respondent extrapolated the material that was actually relevant.

The submission cites cases decided by this Court and the Supreme Court for the following propositions:

- Save for exceptional cases. the Minister has not inquired into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the Department.

- Where new or altered facts or circumstances are not adverted to, so that the subsidiary protection application is in substance the same as the asylum application. "the role of this Court in reviewing the decision of the Minister not to grant subsidiary protection is necessarily limited".

- The Minister is entitled to place weight on the failure of the applicant to succeed in the asylum process.

- The fact that Article 3 of the European Convention on Human Rights also prohibits torture or inhuman or degrading treatment does not require a separate and distinct analysis to be made in respect of the same facts.

- The objective of subsidiary protection is not to provide a further or parallel appeal against a conclusion reached after due deliberation that the applicant was not, in fact, at risk of serious harm.

In respect of s. 3(6) of the Immigration Act 1999. the submission emphasised the very limited role of this Court when appropriate opportunities have been given to an applicant to put forward grounds for consideration.

It was submitted that consideration was given to the applicant's rights under Article 8 of the Convention.

As to *non-refoulement*, it was submitted that the Minister's decision was made within the legal parameters of the statutory framework.

Discussion
The arguments put forward by Mr. Paul O'Shea, Barrister, for the applicant in relation to the co-operation requirement of Article 4.1 of the Qualifications Directive, effective remedy and equivalence have been considered and rejected by this Court in cases decided by Birmingham J: *MAA* 24th March 2011; , Cooke J: *IMM* 27th July 2011, *SL* 6th October 2011, *BJSA* 12th October 2011; and Charleton J: *FN* [2009] 1 IR 88.

Mr. O'Shea did not cite any particular fact or material that the applicant would have been able to comment on or contradict in the consideration by the Minister of the subsidiary protection application. The applicant's arguments in this respect are general and theoretical and not related to the facts of her particular case. The objection is thus made on a conceptual basis unrelated to any finding of fact that might have been answered by the applicant. It is not suggested that the Minister acquired some information that the applicant had not had an opportunity to rebut.

The submissions on the deportation order were also couched in general terms, with one exception. In the course of his argument Mr. O'Shea suggested that there was inadequate consideration of female genital mutilation in the decision. Counsel for the respondents, Ms. Cindy Carroll, Barrister, protested that FGM was not an issue in the case. She was correct. It is true that in the s. 8 interview with the applicant that was conducted prior to the ORAC decision, there is a reference to female circumcision. However, it was never part of the applicant's case that she was entitled to asylum because she was at risk of FGM. She did not make the case at the ORAC hearing, nor was it part of her appeal to the RAT. It did not feature in the submissions made to substantiate the subsidiary protection application and neither was it in the humanitarian case application under section 3(6).

The Supreme Court has made clear that the obligation of the Minister is to consider the case that is presented by the applicant or on the applicant's behalf as in this case, subject of course, to exceptional cases that may arise from time to time. Since the applicant did not make this case to the Minister he was not obliged to consider it. But it is clear that this was no mere oversight on the applicant's part, because it was never part of the case and but for the passing reference to the subject in the s. 8 interview, there would not be any basis whatsoever even for mentioning the matter. I think it is abundantly clear in the circumstances that the Minister cannot be faulted in this respect and there was no foundation for the submission that he could be. It is noteworthy that there was no mention of this point in the notice of motion or in the grounds on which relief was sought or in the affidavit sworn by the applicant or in the written submissions on her behalf.

The main part of the case was, as the applicant's written submissions make clear, the argument about the subsidiary protection procedure. Mr. O'Shea's argument is that the Qualification Directive imposes on the State an obligation to process the application for subsidiary protection by means of a dialogue with the applicant and that S.I. 518 of 2006 does not properly incorporate the directive. I have set out above what the applicant contends are the essential elements that are required by the provision in the Qualification Directive as to cooperation between applicant and Member State. The applicant envisages that if any issue arises during the consideration of an application for subsidiary protection that might be decided contrary to the applicant, the State is under an obligation to go back to the applicant and to present it to him or her for comment. When that has been done, the matter has to be reconsidered and obviously there may be further stages of consideration.

Was the Directive properly adopted into Irish law? In *BJSA*-12th October 2011- Cooke J held as follows (para 17ff). (1) There is no deficiency in the 2006 Regulations because of the absence of the words "in co-operation with the applicant". (2) The relevant elements of the application for international protection in Article 4.1 are defined by 4.2 to 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'". (3) These basic facts and documents relating to the applicant's personal history and to the basis of the claim are primarily considered and assessed in the asylum process in which the co-operative nature of the assessment phase is evident. Although in an appeal to the Tribunal the onus lies with the appellant, there is a

continuing investigative and co-operative character to that second phase: note s. 16(6). (4) The applicant's submission that "cooperation" requires that a draft determination be submitted for comment before it is adopted is unfounded, as Cooke J. pointed out in *I.M.M. v Minister for Justice & Equality* (Unreported, 27th July 2011,) 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 co-operation 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.

In *IMM* - 27th July 2011, the same judge held that "Article 4(1) is not concerned with the imposition of a specific procedural obligation on the process for examination of claims for international protection as a whole but is an introductory description of the character of the common process for examination of a claim." Para. 13.

Article 4 of the Qualification directive reads as follows:

> "1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.
>
> 2. The elements referred to in paragraph 1 consist of 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."

My interpretation is that Member States may consider it the applicant's duty to submit - as soon as possible-- statements and documents with biographical, travel and other information needed to substantiate the application for international protection. In the assessment of facts and circumstances, it is the duty of the Member State to assess all **such** statements and documents in cooperation with the applicant.

This meaning of the Article stems from considering the impact of para 2, on the cooperation obligation in paragraph 1. It makes sense to impose an obligation to assess certain information and documents in cooperation between the State and the applicant. These include biographical information and circumstantial material as to where the applicant lived previously and what his or her nationality is."

Birmingham J. and Cooke J, have drawn attention to Article 4(2) and it seems to me that the applicant's submission takes no account of this paragraph. I share the views of Birmingham and Cooke JJ. It seems to me that the section means that certain information and documents are to be produced and analysed in cooperation in the course of the investigation of the claim. This makes obvious sense when one looks at the list of materials in para. (2) that consists of biographical and other information about the applicant in addition to some documents that may be relevant to the consideration of the case. What it does not do, however. is to impose on the investigator a general obligation to conduct the whole investigation in cooperation with the applicant. This is where the applicant's argument falls down. In reading the Article in this way, I am echoing what my colleagues have said in the judgments mentioned above.

The point that Mr. O'Shea makes about Article 4 is made in a vacuum. It does not relate in any specific way to the case made by this applicant. He makes no attempt to identify any particular information about which consultation or cooperation would have been required or desirable. The argument is thus entirely theoretical. Mr. O'Shea argues that because there was an alleged failure which is not shown to have any particular relevance to this applicant's case, it nevertheless necessarily follows that the decision on subsidiary protection was flawed and that judicial review ought to be granted in order to quash it and that leave should now be given for the purpose of arguing this point.

I share the views of my colleagues that this is a misunderstanding of Article 4 and of the principles of judicial review. I do not believe that this remedy is available as a matter of theoretical discussion without any particular reference or application to the case in question. I think this is a fatal flaw in the application because judicial review is not concerned with theoretical matters but with practical impingement on the rights and privileges of persons affected by administrative decisions. As Cooke J said in BJSA above at para 22

> "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."

With regard to effective remedy against a refusal of subsidiary protection, Cooke J has explained in the above cases that the Procedures Directive is designed to ensure common standards of consideration for asylum applications throughout the Union. Ireland is alone among the Member States in not having the process of asylum and subsidiary protection in a unitary system. Subsidiary protection was bolted on to the asylum system in the other countries but not here. The requirement in the Procedures Directive as to effective remedy applies to the asylum process. And Article 3.3 provides that if there is a unitary system, the rules apply to all procedures. Since there is not a unitary system in the State, the argument that the Procedures Directive applies in Ireland to the consideration of subsidiary protection applications is mistaken. As Cooke J observed:

> "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) decisions in a unified procedure. The Procedures Directive was adopted more than a year and a half after the Qualifications Directive, under which Member States have a choice whether to install a unified procedure for asylum and subsidiary protection and/or a single determining authority, Article 39 could have extended the right to an effective remedy to decisions in a separate subsidiary protection process had that been considered appropriate or necessary."

That does not mean, of course, that there are no rules or restrictions or requirements as to proper procedure in consideration of subsidiary protection applications. It merely means that the specific requirement in the Procedures Directive as to effective remedy does not apply. It is possible to envisage circumstances in which consideration of a subsidiary protection application could give rise to a requirement that the Minister should refer back to the applicant for further information or clarification or to provide him or her with an opportunity to contradict material that has come to the attention of the Minister. Nothing I say is intended to exclude that

situation, and this is acknowledged by Cooke J.

There is no reference in this case to any point that might have been referred back to the applicant for any such comment.

Birmingham J in *MAA* and Cooke J in *BJSA* also rejected the claim that there is a breach of the principle of equivalence. Subsidiary protection is an adjunct of refugee status and is only available to a person who is not a refugee. It is not a separate and distinct claim requiring its own appeal from a refusal. In this respect also, the dissimilarity of the Irish system with that of the unitary processes made the suggested precedent of the United Kingdom Supreme Court *(F.A. (Iraq) v. Secretary of State for the Home Department* [2011] U.K.S.C. 22) irrelevant to Irish conditions.

A person who has been refused asylum may be able to make a case for subsidiary protection. For example, a person might be able to show that although exposed to persecution, it might not be for a Convention reason. Subsidiary protection does it is true follow on from a failed asylum application. It is then clear that the resident in the country, the applicant, is not a refugee and so the question is whether the applicant is now entitled to this different form of international protection. Again, Cooke J. has dealt with this matter in detail in the judgments cited above but the general point is that one cannot simply look at asylum on one side and subsidiary protection on the other and compare and contrast the procedures with a view to establishing the failure to make one equivalent to the other.

The high water mark of the applicant's argument is that Hogan J has referred a question on the point as to cooperation in Article 4 of the Qualifications Directive to the Court of Justice of the European Union. Hogan J has not decided the point. Counsel submits that since one judge was satisfied to refer the question that that is in itself a reason for granting judicial review, I cannot agree. It seems to me that I cannot abrogate my responsibility to make a decision on this case on the basis of the argument presented because a colleague has adopted a different course - not a different view as to the legal imperatives but as to submitting a request for a decision. And it is noteworthy that Birmingham J and Cooke J also rejected requests to employ Article 267 of the TFEU and refer. The latter said in *IMM* that the proposed interpretation of Article 4(1) was

> "not well founded and has no prospect of being sustained or of justifying a reference for preliminary ruling under Article 267 TFEU." Para. 7

If I have to make a choice as between the decisions of Birmingham J and Cooke J on the one hand and the decision to refer by Hogan J, I adopt the former and I respectfully dissent from the view of Hogan J insofar as it is necessary.

Ground No. 6 in the applicant's Statement of Grounds is an allegation that the deportation order was not proportionate or reasonable. This is not a ground but merely an assertion of objection. It is not justified by any facts or allegations or arguments that arise from the process of decision making and the applicant in his grounds does not even attempt to do anything of that kind.

In regard to Ground (7), the same point arises. Ms. Carroll points out that the applicant submitted a large volume of country of origin material without selecting specific parts of it and did so in conjunction with the application for subsidiary protection. In those circumstances it was reasonable and proper for the Minister to examine the material and to select relevant parts and draw attention to them. My view is that unless it was obviously an irrational approach, then I do not see how the Minister can be criticised. It is not for the Court to say which parts of the material the Minister is to rely on and which parts not.

> (8) This point is factually incorrect. The file consideration report refers to the impact on family life.
>
> (9) This complains again of effective remedy and equivalence.

In regard to para. (10), (11) and (12) of the grounds, these are again no more than statements of objection rather than grounds of objection and Mr. O'Shea advanced no argument in support of these propositions by reference to any of the documentary material in the case.

The applicant has not made out grounds for leave in respect of either decision.