Neutral Citation Number: [2012] IEHC 222

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 762 J.R.]

[2011 No. 783 J.R.]

BETWEEN

A. A. [Iraq]

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke dated the 24th day of May 2012.

1. For reasons which are not entirely clear to the Court, these applications for judicial review of decisions made by the respondent come before it in two separate proceedings although the first relief sought in each is in respect of the same decision of the Minister refusing the applicant's application for subsidiary protection on the 12th July, 2011, under the European Communities (Eligibility for Protection) Regulations 2006. The first of the two cases, No. 762 J.R., is before the Court as an *ex parte* application for leave to apply for an order of certiorari in respect of that decision and on notice to the respondents insofar as it seeks to apply for an order for certiorari quashing the Minister's decision of 14th July, 2011, to refuse humanitarian leave to remain under s.3 of the Immigration Act 1999 and the consequent deportation order dated 15th July 2011. In the second case, No. 783 J.R., an *ex parte* application for leave to seek judicial review of the subsidiary protection decision was made to and granted by Hogan J. on the 29th August, 2011. In these circumstances the hearing before the Court has proceeded as the substantive application for judicial review of the refusal of subsidiary protection in case No. 783 J.R. and as an application for leave to seek judicial review and the other reliefs sought in respect of the decision to make the deportation order dated the 15th July, 2011, which was communicated to the applicant under cover of a letter dated the 9th August, 2011.

2. The above order of the Court in case No. 783 J.R. granted leave to apply for an order of *certiorar*i in respect of the subsidiary protection decision of the 14th July, 2011, upon the grounds set out in section E of the statement of grounds, at paragraphs 1 - 5. In effect, the legal basis for the challenge to the decision is that stated in para. 4 as follows:-

> "The respondents and each of them, their servants or agents failed to provide the applicant with a public hearing of the applicant's claim for subsidiary protection before an independent and impartial tribunal previously established by law as is required by Articles 47 and 51 of the Charter of Fundamental Rights of the European Union and by the principle of equivalence in European Union law."

3. In the statement of grounds dated the 23rd August, 2011, in case No. 762 J.R., on the other hand, a total of twenty grounds are set forth in section E and they are formulated as directed at both of the decisions sought to be quashed namely the refusal of subsidiary protection and the decision to deport. On the 24th August, 2011, an application was made to the Court (Hedigan J.) in case No. 762 J.R. but the order made on that occasion was confined to the grant of an injunction restraining the respondents from deporting the applicant. Counsel for the applicant confirmed that while the *ex parte* application for leave to seek judicial review of the subsidiary protection decision was moved on that occasion, no order had been made in that regard.

4. In these circumstances the Court is satisfied that it is not open to the applicant now to seek to rely upon any of the grounds set out in section E of the statement of grounds in case No. 762 J.R. in challenging the subsidiary protection decision. Having decided, following the moving of the *ex parte* application on the 24th August, 2011, to embark upon an entirely new proceeding by way of judicial review of the same decision and having obtained leave on the 29th August, 2011, the applicant is, in the view of the Court, confined to the ground quoted above in case No. 783 J.R. so far as concerns the challenge to the subsidiary protection decision.

5. It is appropriate, therefore, to deal first with case No. 783 J.R. given that the lawfulness of a deportation order is dependent upon an application for subsidiary protection having been validly rejected before the deportation order is made.

6. As expanded upon in argument at the hearing by counsel on behalf of the applicant, the essential ground advanced here is that because there is said to be a contradiction between the conclusion reached by the Minister that the applicant would not face a real risk of suffering serious harm if returned to Iraq on the one hand, and passages quoted by the Minister from the country of origin information relied upon to the effect that levels of violence in Iraq are unacceptably high on the other, there was a factual dispute which can only be resolved by means of an appeal against the determination including the opportunity for a public hearing. When it was pointed out that this was not, on the face to it, an issue involving the personal credibility of the applicant, but a matter for the Minister's assessment as to current security conditions prevailing in Iraq, counsel accepted that the applicant might not be in a position at an oral hearing to provide direct testimony as to conditions in Iraq given that he had been living in this country for several years. It was said, however, that he should be entitled to call other unspecified witnesses who might be in a position to give evidence as to the security situation in Iraq.

7. The Court is satisfied that this ground is untenable and has not been made out. In the first place, the submission is based upon what the Court considers to be a misapprehension as to the nature of the process for adjudicating upon applications for international protection under the Refugee Act 1996, combined with the 2006 Regulations. The point has been the subject of a number of judgments of the High Court including, most recently, the judgments of this Court in *Wafula v. Minister for Justice* (Unreported, High Court, Cooke J. 30th March, 2012) and *N.D. (Nigeria) v. Minister for Justice* (Unreported, High Court, Cooke J. 28th February, 2012).

In these, as in other judgments of the High Court, the Court has pointed out that, notwithstanding the use of a two-stage procedure for considering applications for asylum on the one hand and subsidiary protection on the other, the process remains a continuing and coherent examination of the status of the applicant in international and European Union law. It is based upon applications made by the seeker of international protection and the issue for the decision makers is whether the conditions for the recognition of the need for international protection are shown to be met. The essential fact-finding element is provided for by the Commissioner's investigation under s.11 of the Act and the interviews of the applicant in the asylum process combined with, where appropriate, an oral hearing on appeal before the Refugee Appeals Tribunal. Where it is determined that an applicant is not at risk of persecution for a Convention reason and refugee status is refused, an applicant is invited to make a separate application for subsidiary protection and is at large as to whether the grounds put forward are simply a repetition of the grounds for asylum (as is usually the case) or are based upon new facts, events or information designed to show that the applicant is quite separately at risk of serious harm as covered by the Regulations of 2006. Thus, in comparison with the "one-stop shop" process employed in all other Member States, an applicant for subsidiary protection has an enhanced opportunity of being heard in that the application for subsidiary protection is made when the applicant knows why his application for asylum has not been successful and is in a position to adduce up-to-date information, evidence or documentation.

8. Where the application for subsidiary protection is based upon the same facts, events and personal information as the asylum claim, the Court has repeatedly pointed out that there is no obligation upon the Minister to reassess the claims. It is only where the subsidiary protection application is based upon entirely new material not hitherto considered that the possibility arises that there may be an obligation upon the Minister to arrange the interview of the applicant or at least to put to the applicant for comment or rebuttal, countervailing evidence, information or other material which contradicts or negates matters essential to the subsidiary protection application as made by the applicant. (See the Court's judgment of the 2nd February, 2012, in *N.D. (Nigeria) v Minister for Justice* at paras. 14 - 16).

9. It should be made clear however, that this obligation does not arise where the only issue before the Minister is effectively that of the current state of political, military, social, security or other conditions in the country of origin. In the present case the application for subsidiary protection was based upon a claim of risk of serious harm, both for reasons of "torture or inhuman or degrading treatment or punishment" and "serious and individual threat to a civilian's life or persons by reason of indiscriminate violence in situations of international or internal armed conflict". No factual basis was asserted as to the relevance of the first of the two limbs of the definition. Essentially, the argument advanced is that country of origin information might be available to show that, contrary to the material to be relied upon by the Minister, there was such a serious situation of continuing internal armed conflict and violence in Iraq as exposed the applicant to a risk of serious harm. In that regard it is not disputed that the threshold of risk is that identified by the Court of Justice of the EU in case C-465/07 *Elgafaji*, namely that the conflict as such has reached such a high level "that substantial grounds are shown for believing that a civilian, returned to the relevant country or ... relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat".

10. The issue before the Minister was whether the country of origin information submitted by the applicant demonstrated that such a level of violence existed and, given the lapse of time between the making of the application and the taking of the decision, whether such a level of violence obtained in July 2011. The Minster was not only entitled, but obliged, to have regard to the best information available as to the up-to-date situation in Iraq in the first half of 2011. That is what he did. Pages 2 to 11 of the Determination set out extensively the sources of information consulted by the Minister and, as counsel for the applicant accepted, the choice of passages appears to be devoid of any obvious "cherry picking" on the Minister's part. It is important to bear in mind that in this particular case, the Minister was concerned with assessing the general security position for the civilian population in Iraq. It was not a case in which, as occasionally occurs, the original claim was based upon a particular political or military situation in a given area or the predicament of an ethnic or religious minority where the Minister's researches disclose some specific event or material change which might require to be put for comment to an applicant if it contradicts the fundamental basis upon which the claim had originally been made.

11. It must also be pointed out that insofar as it has been submitted that the passage of time between the making of the application in 2007 and the adoption of the decision in 2011 created an obligation on the part of the Minister to give the applicant an opportunity to provide new evidence at a hearing, there was nothing to prevent the applicant and his legal advisers submitting such material at any stage. As counsel for the Minister has correctly underlined, the applicant's advisers had written several letters requesting information as to the making of the decision and a letter of 23rd July 2010 asking when it would issue was replied to on 3rd August 2010 indicating that it was hoped to issue the decision before 31st August of the following year. Thus, if the advisers considered it relevant to bring any evidence of deteriorating conditions to the attention of the Minister there was ample opportunity for them to do so.

12. In this case the Minister, having consulted the information set out on those pages, has reached the conclusion upon which the determination is based namely, that while it is not possible to give any absolute guarantee of the protection of the civilian population, he, (the Minister) concluded that the applicant had no substantial grounds for believing that the applicant would be at personal risk of serious harm. If that conclusion is unlawful, it is because it is irrational or does not flow from the material relied upon to support it. On that basis it is susceptible of judicial review. It is not, however, unlawful because it was arrived at without a public hearing.

13. Accordingly, insofar as the right guaranteed by Article 47 to an effective remedy before a tribunal where rights and freedoms guaranteed by Union law are violated is applicable to the processes for international protection it is, in the view of the Court, applicable at a stage of the first instance determination. As such, the entitlement is respected by the availability of an appeal to the Refugee Appeals Tribunal. What is being argued for here is something different namely, the necessity for a form of oral hearing in public upon a further review of what has been, in effect, a follow-on decision on the subsidiary protection application. So far as applications for international protection are concerned, the guarantees of Article 47 of the Charter are implemented by Article 39 of Council Directive 2005/85/EC ("the Procedures Directive") which provides for the right to an effective remedy. Secondly, it is clear from the recognition in Article 39.3 that even where a unified procedure for asylum and subsidiary protection is employed, it is for the Member States to decide whether the appeal remedy is to carry with it an entitlement to remain in the Member State pending the outcome of the appeal, that the remedy in question can be effective in the absence of the personal presence of the applicant and accordingly, without an oral hearing in which the applicant participates.

14. Where reliance is placed upon the right to an effective remedy in Article 47 of the Charter, it is important to bear in mind the field of application of the Article as defined in Article 51. The provisions of the Charter are addressed primarily to the institutions and bodies of the European Union. The rights and principles are thus to be reflected in the structures of the Union and are to inform the institutions in their legislative and administrative activities. Because of the nature of the constitutional and political relationship between the Union and the Member States, many of the functions of the institutions and bodies can only be implemented or executed by or through the legislative institutions and administrative authorities of the Member States whether in transposing legislation not directly applicable or in providing the regulatory measures and executive operations necessary to apply Union laws and regulations.

For that reason the rights and principles of the Charter must also be applied and respected by the Member States when so engaged or, in the words of Article 51.1, "when they are implementing Union law".

15. This does not mean however, in the view of the Court, that Article 47 in conjunction with Article 51 constitutes the source of a stand-alone right in favour of individuals against Member States independently of the terms and contents of the law being implemented. Where, as in the case of the Procedures Directive, the Union legislator has given effect to the requirement of Article 47 by obliging, in Article 39, the Member States to provide for an effective remedy against specific decisions and has defined its scope in paragraph 1 of that article, Article 51 does not, in the view of the Court, provide a legal basis upon which an applicant can require a Member State to provide a different or more extensive remedy which goes further than the law in question requires. A Member State must respect relevant rights and principles of the Charter when adopting the national rules, conditions, time limits and other matters which Article 39 requires. Otherwise, however, the extent of the respect for the right to an effective remedy required by Article 47 is that defined by the Union legislator in the Procedures Directive and in Article 39 thereof in particular. Because the Charter is addressed primarily to the institutions, including especially the legislating institutions of the Union, it falls to the Union legislator when adopting a law, the implementation of which may affect the rights and freedoms of individuals, to ensure that a relevant right such as that of Article 47 is adequately safeguarded by the manner in which the scope and application of the law is defined.

16. This Court pointed out in its judgments in, amongst other cases, *S.L. [Nigeria] v. Minister for Justice* (Unreported, High Court, 6th October 2011) and *B.J.S.A. [Sierra Leone] v. Minister for Justice* (Unreported, High Court, 12th October 2011), that the minimum procedural standards of the Procedures Directive apply to the national processing of applications for subsidiary protection only in those cases where the Member State has adopted a unified or "one-stop-shop" process for both forms of application. (See Article 3.3 of the Directive.) This definition of the scope of that Directive has recently been acknowledged in the opinion of the Advocate General of 26th April 2012 in Case C-277/11*, M v Minister for Justice*. (See paragraphs 24 to 27.)

17. For all of these reasons the Court is satisfied that the ground for which leave was granted in case No. 783 J.R. has not been made out and the application must be dismissed.

18. In case No. 762 J.R. as already mentioned, a total of twenty grounds were set out in the statement of grounds. However, in moving the application for leave and in the written submissions, counsel for the applicant effectively concentrated on a single issue directed essentially at an alleged inadequacy of the Minister's assessment of the risk the applicant would face from prevailing violence in Iraq if returned. The challenge is directed principally at the assessment made in the "Examination of File" note under the heading of prohibition of *refoulement* under s. 5 of the Act of 1996. Counsel points to the fact that the Minister quotes extensively from the decision of the Tribunal including the comment by the Tribunal member: "Civilians are being killed left, right and centre and it is apparently not uncommon for someone to have experienced the death of a close relative as a result of the civil war that is raging in that country". Counsel then points to conclusions reached by the decision maker based upon the cited country of origin information to the effect that the security situation in Iraq has improved and that the security forces are growing in confidence and that "the applicant could thus seek protection from the police or security forces in Iraq if the need arose". The Minister comments that there is a functioning police force and judicial system in Iraq and that state protection would be available. It was then argued that the Minister has applied the wrong test and that, "The question is not whether the security forces are better (and more confident) than they were at some point in the past". The question is said to be whether the life or freedom of the applicant is at risk because of a failure of state protection and therefore, the Minister is said not to have addressed the fundamental question. It is submitted that the assessment is inadequate for the purposes of s. 5 having regard particularly to the judgment of Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 at paras. 97 and 98, it is said that the analysis and assessment set out in the file note is open to multiple interpretations so that, as in the *Meadows* case, it is not possible to discern properly from the file note the rationale of the conclusion.

19. The Court cannot agree. It will be recalled that in the *Meadows* case there was a conclusion in respect of s. 5 contained in a single sentence "*refoulement was found not to be an issue in this case*". The position in the file note here is materially different. In the analysis under s. 5 of the Act of 1996, the writer first summarises the original claim to a fear of persecution made by the applicant and the particular personal circumstances he relied upon. The note then quotes the entire of the Section 6 "Analysis of the Applicant's Claim" from the Tribunal decision and particularly the findings of lack of credibility reached having regard to the discrepancies in the account given by the applicant and the lack of explanation as to the documentation produced. The writer then says "notwithstanding the credibility concerns, the following country of origin information is relevant with regard to analysing whether the applicant could avail of state protection in his county of origin". This clearly demonstrates that the writer was discounting the existence of any specific personal risk to the applicant himself as he had originally claimed and then proceeding to consider whether the general situation from the point of view of violence and security in Iraq is such that he would, irrespective of his personal circumstances, be at risk on repatriation. There then follow five pages in which the writer looks at information gleaned from various Government and agency reports on the situation in Iraq with particular regard to the status of the security forces, their effectiveness and the operations of the police. The general thrust of the quotation is to the effect that while there are widespread problems such as a of lack of training for police and security forces, delays in Iraqi forces assuming full control and some infiltration of units by counter insurgents; the police and security forces are nevertheless getting to the stage where operational capability is being achieved and internal security is being provided.

20. It is on that basis that the conclusion reached to the effect that, while there is no absolute guarantee of protection, there is an established functioning police force and security forces which are improving in capability to maintain public order and to investigate crimes and arrest suspects, such that protection from police or security forces would be available to the applicant if the need arose. The writer then proceeds to consider the availability of protection in the form of relocation in Iraq away from any source of risk of harm and points out that freedom of movement within Iraq is available and, indeed, that before the Tribunal the applicant had not experienced difficulties travelling within Iraq.

21. In the judgment of the Court this assessment could not be said to be inadequate nor could the conclusion reached be faulted as irrational or unreasonable. The correct issue for the purpose of the prohibition in s. 5 of the 1996 Act has addressed and a view reached which is not inconsistent with the information relied upon.

22. For all of these reasons, the Court is satisfied that no substantial ground is made out in case No .762 JR for the grant of leave to challenge the deportation order on the basis that the conclusions reached in the file note are either unintelligible or irrational. Leave is accordingly refused.