Neutral Citation Number: [2012] IEHC 34

THE HIGH COURT

2011 147 JR

BETWEEN/

P. M.

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND (No.2)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 31st January, 2012

1. The applicant, Ms. M., is a Botswanian national who was notified on 5th February 2011 that she was now subject to a deportation order which had been made by the Minister. A few weeks earlier the Minister had refused her applications for refugee status and for subsidiary protection. On 6th December, 2009, the Refugee Appeal Tribunal had affirmed the recommendation of the Office of the Refugee Applications Commissioner that she be refused refugee status. Neither the decision of the Tribunal nor that of the Commissioner have ever been challenged in judicial review proceedings.

2. Following the delivery of my judgment in respect of Ms. M's application whereby I refused to grant her leave to apply for judicial review (save that, as we shall presently see, I adjourned one aspect of that application), Ms. M. has now applied for a certificate for leave to appeal to the Supreme Court pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act"). In that judgment (*M v. Minister for Justice and Law Reform* [2011] IEHC 409) I rejected the argument that the Refugee Act 1996 ("the 1996 Act") was *ultra vires* the provisions of Article 39(1) of the Procedures Directive 2005/85/EC on the basis that no effective remedy has been provided against the decision of the Minister to refuse the applicant a declaration of refugee status.

3. The essence of the applicant's case is that she has been denied an effective remedy by reason of (i) the lack of institutional guarantees in respect of the independence and impartiality of the Refugee Appeal Tribunal and (ii) the inadequacy of the remedy of judicial review as means of challenging administrative decisions in relation to international protection.

Lack of institutional guarantees

4. The essence of Ms. M.'s claim in respect of the lack of institutional guarantees is that she has been denied an effective remedy in respect of her appeal from the Office of the Refugee Applications Commissioner to the Refugee Appeal Tribunal on the ground that the latter body lacks the basic institutional guarantees of independence and impartiality. It is clear from the decision of the Court of Justice in *Wilson* Case C-506/14 [2006] E.C.R. I -8613 that an appeal to a body which lacked such guarantees might well involve an infringement of the right to an effective remedy.

5. This, however, is perhaps just another way of expressing the point which is the subject of a reference from this Court (Cooke J.) to the Court of Justice pursuant to Article 267 TFEU in *D and A v. Refugee Applications Commissioner* [2011] IEHC 33. As I indicated at the conclusion of the first judgment, I adjourned this aspect of the application pending the outcome of the reference. Even if the Court of Justice finds for the applicants in that case, it does not necessarily follow that this applicant will be entitled to avail of that decision given in particular that she did not raise the point at the time.

Conclusions

6. Beyond noting this point, it would be premature to offer any further views one way or the other. This aspect of the case will simply have to await the outcome of the reference in *D and A*. As this aspect of the leave application remains adjourned, the question of a certificate simply does not arise at this juncture. We can now proceed to consider the other aspect of the case.

The adequacy of judicial review proceedings

7. This application for a certificate effectively obliges the Court to consider afresh the implications of Article 39 of the Procedures Directives for present judicial review practice and the asylum process so far as the adequacy of the remedy of judicial review is concerned. There has been one extremely important development since the initial application for leave was first argued, as the extent of a Member State's obligations under Article 39 has been subsequently fully examined by the Court of Justice in Case C-69/10 *Diouf* (2011). It seems appropriate to examine the implications of that decision in a little detail.

8. In that case, the applicant, a Mauritanian national without a legal right of residence in Luxembourg, had found that his application for asylum had been rejected under an accelerated procedure. The relevant Luxembourg law at the time had provided that the Minister's decision to invoke the accelerated procedure rule could not be challenged in judicial proceedings. The applicant maintained that the existence of such a provision was contrary to the effective guarantee requirement contained in Article 39 of the Procedures Directive.

9. The Court stressed (at paragraph 29 of the judgment) that the procedures guaranteed by the Procedures Directive were minimum standards and that:

> "the Member States have, in a number of respects, a margin of appreciation with regard to the implementation of those provisions in the light of the particular features of national law."

10. The Court proceeded to hold that procedural decisions - such as the decision to invoke the accelerated procedure - were not themselves directly within the ambit of Article 39 itself. The Court added, however, the following important provisos (at paragraphs 56-58):

> "56. Accordingly, the absence of a remedy at that stage of the procedure [i.e., to invoke the accelerated procedure] does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application.
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> 57. As regards judicial review within the framework of a substantive action against the decision rejecting the application for international protection, the effectiveness of that action would not be guaranteed if – because of the impossibility of bringing an appeal under Article 20(5) of the Law of 5 May 2006 – the reasons which led the Minister for Labour, Employment and Immigration to examine the merits of the application under an accelerated procedure could not be the subject of judicial review. In a situation such as that at issue in the main proceedings, the reasons relied on by that Minister in order to use the accelerated procedure are in fact the same as those which led to that application being rejected. Such a situation would render review of the legality of the decision impossible, as regards both the facts and the law (see, by analogy, Case C 506/04 *Wilson* [2006] ECR I 8613, paragraphs 60 to 62).
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> 58. What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum. It would not be compatible with EU law if national rules such as those deriving from Article 20(5) of the Law of 5 May 2006 were to be construed as precluding all judicial review of the reasons which led the competent administrative authority to examine the application for asylum under an accelerated procedure."

11. What is vital, therefore, is that - as the foregoing passages from *Diouf* make clear - an applicant denied international protection has an effective remedy before an independent court or tribunal in respect of the refusal to grant such protection.

12. So far this State is concerned, as I pointed out in *Efe v. Minister for Justice* [2011] IEHC 214, Article 40.3.2 of the Constitution is dedicated to securing effective redress for the individual whose rights have been infringed ("The State shall....in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."). This is complemented by Article 40.3.1 which obliges the State "to vindicate the personal rights of the citizen". One of those personal rights is the right of access to the courts and the Supreme Court has expressly held that non-nationals such as Ms. M. have such a constitutional right of access to the courts for the purposes of enforcing their legal rights: see *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 385, per Keane C.J. This very right also flows from the provisions dealing with the administration of justice (Article 34.1) and the full original jurisdiction of the High Court (Article 34.3.1).

13. It was against that general background that it has been held that the common law rules of judicial review provide an effective remedy for any litigant wishing to challenge the validity of an administrative decision: see, *e.g., ISOF v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457 and *Efe.* It is clear, moreover, that the adequacy of the reasons for a particular administrative decision relating to international protection can be challenged in judicial review proceedings: see, *e.g., Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701.

14. The suggestion, therefore, that the State has failed to provide litigants with access to an effective remedy - a common argument advanced in so much contemporary litigation - is unfounded and artificial. The scope of the obligations imposed in this regard by Article 39 of the Procedures Directive have, moreover, been amply clarified by the decision of the Court of Justice in *Diouf*. Nor, indeed, has the applicant explained *how* it is contended any of the existing judicial review remedies are inadequate.

Whether a certificate should be granted

15. We may now proceed to examine whether a certificate of leave to appeal to the Supreme Court should be granted. Section 5(3)(a) provides:

> "The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

15. As I pointed out in *U. v. Minister for Justice (No.3)* [2011] IEHC 59 the principles governing the granting of certificates in cases of this kind have been clarified by a series of decisions of this Court:

> "At the risk of repeating points already well ventilated in a series of judgments in these and other cases which have been decided by this Court, a number of salient principles can nonetheless be briefly set out. First, the decision must involve a point of law, so that the point of law in question arises directly from the judgment sought to be appealed. Second, the point of law must be one of *exceptional* public importance and this is a "significant additional requirement": see *Glancré Teo. v. An BordPleanála* [2006] IEHC 250, per MacMenamin J. Third, it must be *desirable in the public interest* that the appeal be taken to the Supreme Court. The Oireachtas has clearly signalled via the 2000 Act that finality of litigation in the asylum area is in the public interest and, as MacMenamin J. put it in *Glancré Teo*., the power to certify should be exercised "sparingly." This suggests that the power to certify should be confined to those cases where it is desirable that, for example, some uncertainty in the law should be clarified for once and for all by the Supreme Court. Fourth, while the statutory requirements overlap to some degree, they are cumulative and these statutory requirements each call for individual consideration."

16. We can now proceed to apply these principles to the case at hand.

Does the Decision involve a Point of Law?

17. It is plain that the proper construction of Article 39 of the Procedures Directive and the application of these requirements so far as the Irish legal system involve points of law, the resolution of which was the central feature of the original judgment in respect of the leave application. The first of the three statutory requirements is thus satisfied.

Is the Point of Law one of Exceptional Public Importance?

18. On the question of whether the point of law involved is one of exceptional public importance, I might again venture to repeat what I said on this point in *U (No.3)*:-

> "The very fact that s. 5(3)(a) of the 2000 Act requires that the point of law be one of exceptional public importance underscores the expectation of the Oireachtas that the power to certify would be confined to special and unusual cases. While the use of the term "exceptional" speaks for itself, in my view, the purpose of this provision is to confine the power to certify to those cases where the point of law is of such intrinsic importance that it merits adjudication by the Supreme Court. It is thus possible, for example, to envisage an unusual or novel point of law affecting only a small number of litigants which nonetheless presented a point of law of exceptional public importance: see, *e.g.*, the comments of Finlay Geoghegan J. in *Raiu* to this effect.
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> 10. Quite obviously, the point of law must "transcend well beyond the individual facts of the case": see *Irish Press plc v. Ingersoll Irish Publications Ltd.* [1995] 1 I.L.R.M. 117, 120, per Finlay C.J. But, as Finlay Geoghegan J. noted in *Raiu*, this *in itself* is not sufficient to meet the requirement that the point be "exceptional", since the same could be said of most points of law which arise in almost any application for judicial review."

19. One could not but conclude that the question of the proper interpretation of the requirements of an effective remedy in Article 39 as applied in our legal system did not raise a question of exceptional public importance. The issue is not only one of intrinsic importance, but it also impacts on the operation of the entire system of international protection. The resolution of this question could potentially affect hundreds (if not, indeed, thousands) of administrative decisions taken in the immigration area.

20. In these circumstances, I consider that the second statutory requirement is thus satisfied.

Whether it is Desirable in the Public Interest that an Appeal be taken to the Supreme Court

21. There remains for consideration the question of whether it is desirable in the public interest that a certificate be granted. On this point, I would again apply the criteria which I applied in *U. (No.3)*:-

> "Of course, as Finlay Geoghegan J. noted in *Raiu*, it is not the function of the Court to assess the question of the strength of the potential grounds of appeal. Nevertheless, as Clarke J. pointed out in *Arklow Holidays Ltd. v. An Bord Pleanála (No. 3)* [2008] IEHC 2, these comments must be understood in their proper context, since it would not be appropriate to certify a point of law which involved the application of clear and established principles:
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> > '….this court's view as to the strength or weakness of the argument in favour of the intending appellants point of view on the issue concerned, is not relevant in determining whether it is an important point of law or not. Subject to the caveat that no certificate could be given where the law is clear and the intending appellant has, therefore, lost on the basis of an application of clear and established legal principles to the facts of his case, I agree that the court should not attempt to consider what the chances of the intending appellant on appeal might be.'
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> Given the burden of work which the Supreme Court is required to discharge, it cannot be regarded as being desirable in the public interest that that Court should be expected to adjudicate upon an issue which is clear-cut almost to the point of being beyond argument. If (as here) the issue of the construction of the sub-section is straightforward and determined by the plain meaning of the relevant statutory words, then it is not in the public interest that the Supreme Court should be required to determine this point."

22. It may be that the question at issue here was not as straightforward as the question of statutory construction was in *U*. Nevertheless, in the light of *Diouf*, the implications of Article 39 have been fully clarified by the Court of Justice. It is now clear that Article 39 merely requires that an effective remedy is available before a court or tribunal in respect of any decision to refuse international protection and that the reasons for that decision can be challenged.

23. It is abundantly clear from cases such as *ISOF* and *Efe* that the judicial review procedure provides an effective remedy for this purpose. It is equally clear from decisions such as *Meadows* that the adequacy of the reasons for any such administrative decision can be scrutinised and examined in judicial review proceedings.

24. In these circumstances, it is really impossible to avoid the conclusion that the law in this point has been clarified by a series of judicial decisions, not least by the judgment of the Court of Justice in *Diouf*. Given that the law is now clear beyond any real argument, it would not accordingly be in the public interest that the point should be referred to the Supreme Court.

Conclusions

25. While I am of the view that the decision involves a point of law concerning the construction of Article 39 of the Procedures Directive (and the application of the requirements of Article 39 in the context of the Irish legal system) and that this point of law is one of exceptional public importance, nonetheless, given that the point in question have been fully clarified by a series of judicial decisions, I have concluded that it would not be desirable in the public interest that an appeal should be taken to the Supreme Court.

26. It is for this reason that I have concluded that it would not be appropriate that I should grant the certificate sought so far as it concerns the adequacy of the judicial review remedy as an effective remedy for Article 39 purposes. The remaining aspect of the case remains adjourned pending the outcome of the reference in *D and A*.