THE HIGH COURT

[2011 No. 830 J.R.]

BETWEEN

SAMBU SAMUEL LUKOMBO

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered on the 27th day of March, 2012

Background

1. The applicant is a native of the Democratic Republic of Congo (DRC) who apparently arrived in the State on 30th October, 2009 and applied for asylum. This application was ultimately refused by the Refugees Appeals Tribunal (RAT) on 8th May, 2010, and he was duly notified that the Minister was proposing to make a deportation order in respect of him which ultimately issued on 25th August, 2011. Apparently, the applicant was informed of this deportation order around 29th August, 2011, by letter dated 25th August. 2011.

2. The applicant submitted an application for subsidiary protection on 16th July, 2010, along with an application for leave to remain in the State pursuant to s. 3(6) of the Immigration Act 1999. On 10th May, 2011, the applicant received a determination dated 5th May, 2011, refusing the subsidiary protection application.

3. The applicant initiated the judicial review motion by notice dated 8th September, 2011, returnable on 3rd October, 2011.

4. The applicant's claim for protection related to an alleged risk if returned to the DRC of the death penalty of execution, torture or inhumane and degrading treatment or punishment; and/or serious and individual threat to his life or person by reason of indiscriminate violence in a situation of armed internal conflict. His claim for humanitarian relief related to his current medical conditions (he is HIV positive and has Hepatitis B) and the lack of life saving treatment in the DRC.

5. The application for judicial review in respect of the deportation order was issued within the applicable fourteen day period. The application in respect of the refusal of subsidiary protection is subject to the time limit set out in O. 84, r. 21 (1), and it is accepted by the respondent that the application was within the six month period in respect of the subsidiary protection determination which is prescribed in the case of *certiorari* applications.

6. It is accepted by the applicant that the applicant is outside of the three month period for the other declaratory reliefs that he seeks. The respondent claims that the application for leave was not made promptly.

7. In view of the fact that the application herein was brought within the two week period of the deportation decision, the court will not make any finding against the applicant for want of promptness in bringing the judicial review application in respect of his *certiorari* challenge to the subsidiary protection decision. The court is of the view that it was not unreasonable for the applicant to wait until the deportation order in the circumstances.

8. The applicant's grounds seeking relief are based on:-

> A. Alleged breach of Article 4(1) of the Qualification Directive.
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> B. Alleged lack of effective remedy.
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> C. That no consideration was given to the applicant's medical condition and this is claimed as a ground for challenging the subsidiary protection decision as well as in the context of the applicant's application under s. 3 of the Immigration Act 1999.
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> D. The applicant challenges the rationality/reasonableness of the Minister's decision in relation to credibility and the alleged selective treatment of country of origin information.

9. Whereas the applicant makes certain complaints in relation to the deportation order, it is conceded by the respondent and agreed by the applicant that if any of the challenges to the subsidiary protection decision are successful that the deportation order must also be reviewed.

10. The applicant brings the within application for leave for judicial review and it is agreed that in relation to the subsidiary protection decision the applicant need only show arguable grounds.

(A) Breach of Article 4(1) of the Qualification Directive

11. Mr. O'Shea, counsel on behalf of the applicant, concedes that the High Court has in a number of decision conclusively dealt with this argument in relation to leave and substantive points and not withstanding the fact that Hogan J. made a reference on this point to the Court of Justice in *Mujyanama (M.M.) v. Minister for Justice, Equality and Reform, Ireland and the Attorney General* (Unreported, Hogan J., 18th May, 2011). Leave has been refused in a number of cases relying upon the decisions in *Ahmed v. Minister for Justice, Equality and Law Reform* (Unreported, Birmingham J., 24th March, 2011), Cooke J. in *B.J.S.A. (Sierra Leone) (Akhiele) v. Minister for Justice, Equality and Law Reform* [2011] 1 IEHC 38, and this Court in *Jayeola v. MJE & the Attorney General* (Unreported, 3rd February. 2012). Accordingly, Mr. O'Shea formally advanced this proposition in order to maintain the case in a higher court should that be necessary.

12. The court rejects the application for leave on this point.

(B) The Effective Remedy
13. The applicant maintains that the fact that there is no appeal from the Minister's decision in subsidiary protection means that there is no "effective remedy" for such decisions and that, therefore, they are unlawful.

14. This proposition has also been comprehensively dealt with in these courts by a large number of cases, most recently the comprehensive judgment of Cooke J. in *Victor Nendah v. MJLR & RAT* (16th February, 2012) in which he referred to the judgment in the case of *S.L. (Nigeria) v. MJELR* (16th October, 2011) and *B.J.S.A. (Sierra Leone) v. MJELR* (12th October, 2011) [2011] IEHC 381, and *M.A.A. v. MJELR* (Birmingham J.) 24th March, 2011 and Ryan J. in *N.O. v. MJELR* (14th December, 2011), and Hogan J. in *P.I. & E.I. v. MJELR* (11th January, 2012). Cooke J. in *Nendah* (above) went on to state:-

> "In the judgment of this Court all possible nuances of the argument upon which this ground is advanced have been thoroughly considered in those judgments and nothing has been submitted in the hearing of the present application which would justify this Court departing from the conclusion that had been reached in those judgments."

15. Subsidiary protection is a form of international protection introduced by the Qualifications Directives for the explicit purposes of complimenting refugee status under the Geneva Convention. It is a procedure for persons who are not refugees.

16. The scheme for subsidiary protection cannot, however, be understood in the absence of a short analysis of the refugee scheme. This procedure is a fact finding and evaluation process of the applicant's claim made by in the means at the first instance of interview, report and determination by, in this jurisdiction the ORAC, and subsequently by a possible appeal in the asylum procedure to the RAT. In all Member States except Ireland a single application is made both for refugee status and subsidiary protection on the basis of the facts and circumstances of the claim as established at that point.

17. In Ireland, subsidiary protection has been implemented in a manner whereby a new application is made and examined after a proposal to deport has been notified and the Minister, as decision maker is obliged to take into account the findings of credibility made in the asylum process because an application for subsidiary protection can only be made by someone who has been declared not to be a refugee (see *BJSA (Sierra Leone) v. MJELR* (above)). In this case, the applicant accepts the previous judgments of this Court in relation to judicial review of the Minister's decision re subsidiary protection as an effective remedy. However, the applicant now seeks to reopen this argument on the basis of the judgment of the Supreme Court in *Donegan v. Dublin City Council & Ors* (McKechnie J., 27th February, 2012), which is allegedly a further "nuance" and an authority not previously considered.

18. It is important to remember what issues were being decided by the Supreme Court in *Donegan* in particular the impact of Articles 6, 8, 13 and 14 and Article 8 of the ECtHR upon the provisions of the Housing Act 1966. In that case, the Supreme Court held that the remedy of judicial review was not an effective remedy to Proceedings under the Housing Act when the local authority was seeking an order for possession of their property from tenants. Under the Act, the occupier or tenant has no right or entitlement to raise any defences in an application for possession other than challenge the housing authority on formal proof i.e. that the dwelling was provided by the housing authority that no tenancy exists in respect of such dwelling. notwithstanding a demand for possession the dwelling remains occupied by the individual to whom the demand is addressed and that within the demand there is contained a statement of the housing authority's intention to invoke s. 62 of the Act.

19. The Supreme Court commented:-

> "In addition, the absence of judicial discretion means that the personal circumstances of such occupier must be disregarded as being irrelevant; equally so if questions regarding the reasonableness or fairness of making the order: these simply have no part in the statutory procedure. It is not surprising therefore to find this session has attracted much judicial attention."

The Supreme Court considered a number of cases including the *Connors* case determined by the ECtHR and McKechnie J. said of the *Connor* case that "it identified the family's real complaint as being unable to have determined by an independent body, the clear factual dispute regarding the anti-social acts complained of, and those responsible for them."

20. McKechnie J. went on to state concerning the adequacy of judicial review:-

> "It is immaterial whether the primary aim or principal focus of the remedy lies elsewhere; and even therefore, if judicial review is directed to such matters as *ultra vires*, the control of statutory and other powers or duties, discretionary or otherwise, it would not matter. Once there is a mechanism available within the process which is adequate and which affords fairness and independence, such will suffice for Article 8 purposes.''

In the *Donnegan* case possession was being demanded because the occupier's son was alleged to be a drug addict or drug pusher and the Supreme Court stated:-

> "What has been lost sight of in this submission is the very simply and straightforward conflict which requires resolution. Was Mr. Donnegan's son a drug addict or a drug pusher? It is purely a question of fact simple I even dare to say to resolve."

21. The Supreme Court in *Donnegan* concluded that even with the obligations in relation to proportionality as established or re-emphasised in the *Meadows* case, that judicial review was not an adequate remedy to show that respect for one's home within Article 8 of the Convention had been established.

22. Counsel for the applicant relies upon the statement by McKechnie J.:-

> "136. Insofar as it is contended that Article 30 of the Convention has been breached, it is suggested that there is no effective remedy for the protection of rights under Article 8 given that there is no mechanism to challenge findings of fact. Whilst it is arguable that this may be the case..."

23. In the opinion of this Court the findings of the Supreme Court in *Donnegan* in no way affect the overwhelming jurisprudence to the effect that judicial review is an adequate and effective remedy to the decisions of the Minister in subsidiary protection. The credibility issues in matters of fact have been the subject of a decision of the ORAC and subsequently by a direct appeal to the RAT.

24. The Minister's obligations of subsidiary protection in this jurisdiction is not to make any new determination and. in particular, he must not determine whether or not the applicant is a refugee (as he has already been found not to be one and has accepted that he is not one when he makes the application), but rather to come to a determination as to whether or not on the facts as given the applicant is entitled to subsidiary protection and the court is not of the view that the issue of subsidiary protection is one of the "some rare cases in which such remedy (judicial review) will not be suitable" (McKechnie J. in *Donnegan* above).

25. In any event, the case of *Donnegan* (above) has no application to cases in relation to subsidiary protection where there has been a full opportunity for a review of all the facts in the previous refugee applications and in circumstances where if an applicant has new information not before the Tribunal he can apply to the Minister to re-enter the asylum process under the provisions of a different section of the Act.

26. Accordingly, the applicant must fail in his application for leave under this heading.

(C) The Medical Status of the Applicant
27. The applicant maintains that no consideration was given to this medical status in the application for subsidiary protection. He made no submissions in relation to his medical status in his subsidiary protection application and he concedes that the applicant's medical status was considered in the leave to remain. The respondent has objected that there has been no plea in the notice of motion or grounds seeking leave for judicial review on this point and the applicant has sought leave to amend his grounds and to bring this application out of time.

28. In order to ascertain whether the court should concede the amendment, which is considerably out of time, an examination of the merits of the claim should be made.

29. It is the view of the court that the claim does not have merit and the applicant should not be entitled to the amendment of his grounds and had he brought grounds claiming this relief in the first place, they should not be allowed.

30. The applicant claimed that of itself his HIV and Hepatitis B status is a "well founded fear of being persecuted or at real risk of suffering serious harm".

31. Consideration of the applicant's medical condition was given by the respondent in his determination of the applicant's claim under s. 3 of the Immigration Act 1999.

32. The applicant claims he is entitled to rely upon *D v. United Kingdom* (30240-96) (ECHR) ("in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St. Kit's would amount to inhuman treatment by the respondent state in violation of Article 3").

33. The case of *D v. United Kingdom* is an exception to the general rule that differences in medical treatment do not engage Article 3 and *D* was someone who was literally on his deathbed who had formed a close relationship with his carers and who would if returned to St. Kit's for his final days or weeks, have received what was conceded as being no care at all.

34. The applicant in this case is in effect claiming that the care in the Congo which was considered full) by the Minister in the s. 3 decision was not as good or comprehensive as that available within the State.

35. Such differential in care has been frequently held in courts not to be good grounds for challenging decisions and the court is not of the view that just because the applicant is making a subsidiary protection claim that he has any extra rights over and above someone who is not making such an application. The fact that the applicant is HIV positive and has hepatitis falls to be considered not under "real risk of serious harm" in the subsidiary protection application but rather in the s. 3 application when the case and submissions were made dealing with the applicant's medical condition. If the applicant's medical condition were to be determined in a subsidiary application then the applicant would indeed have potentially greater rights than someone who is not making a subsidiary protection application. The entire framework of the protection given to persons in Irish law must he considered generally together and not in isolation. Indeed "serious harm" whether or not it is inflicted by an "actor of serious harm" does suggest that the "serious harm" is being, or has been, inflicted upon the applicant by an outside force. My judgment in *JTM* (1st March, 2012) [2010 No 1492 J.R.] does nothing to suggest otherwise.

36. In the view of the court the applicant's medical condition was fully considered by the respondent when considering the s. 3 application and the respondent was not obliged to give consideration to the applicant's medical condition, especially when in his subsidiary protection application when no reference was made to his condition by the applicant's solicitors.

37. Accordingly, the court would not allow the proposed amendment and had the application been made in time would dismiss the applicant's claim for leave on those grounds.

(D) The Applicant's Challenges to the substance of the Decision based on Credibility and Consideration of COI.
38. The RAT made adverse findings of credibility against the applicant. These findings have not been challenged and the applicant cannot collaterally do so.

39. The Minister was entitled to rely upon the same credibility findings as the RAT and. indeed, as has been stated by Cooke J. and others, was obliged to do so. No challenge to the credibility decisions of the Minister in the subsidiary protection can arise.

40. The applicant through his counsel has claimed that the treatment of the country of origin information was selective and irrational. It did not flow from the country of origin information as furnished.

41. The respondent in its analysis considered four points:-

> 1. Whether there are substantial grounds for believing that the applicant would face a real risk of death penalty of execution in his country or origin.
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> 2. Whether there are substantial grounds for believing that the applicant would face a real risk of torture or inhuman or degrading treatment in his country of origin.
>
> 3. Whether there are substantial grounds for believing that the applicant would face a real risk of serious and individual threat to civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict

in his country or origin.

4. Whether the applicant can avail of state protection against such threats.

42. It is the view of the court that the decisions of the Minister in relation to the alleged real risk of death penalty or execution or inhuman or degrading treatment are unimpeachable and materially relate to country of origin information. The Minister's conclusion that in the Kinshasa region where the applicant could be sent, that there is no armed conflict pertaining is also, on its own unimpeachable. The Minister's decision as to whether there was a real risk of serious and individual threat by reason of indiscriminate violence in situations of armed conflict of itself may also seem unimpeachable.

43. It is the view of the court however, that when the Minister went on to consider the issue of state protection that the Minister's conclusions give rise to at least arguable grounds of irrationality.

44. It is submitted by counsel for the respondent that the Minister's consideration of state protection was, given his earlier conclusions that there was no risk of indiscriminate violence *etc.* superfluous. That may well be the case.

45. It is the view of the court however, that the conclusions in relation to state protection if they are upheld as being irrational/unreasonable may have been said to have affected the earlier conclusion as to indiscriminate violence etc.

46. The Minister cannot be accused of selecting and reviewing and setting out in his decision only reports that might produce the decision that he came to. The Minister lists a large number of quotations mainly for the *US Department of State Country Report on Human Rights Practices 2008* dealing with the situation in Congo. These reports consist of what are frequently damning indictments of the situation in the DRC concerning corruption and abuses by the security forces "near total immunity for grave violations of international humanitarian law". "Government securities forces sometimes used the pretext of state security to arbitrarily arrest individuals and frequently held those arrested on such grounds without charging them ..." "Impunity remains flagrant. The persistence of impunity has resulted in a failure to initiate judicial investigations into serious human rights violations, lack of progress on cases that have been opened ... or even sham trials". And having analysed the information which was set out at length and which the Minister is to be congratulated for detailing in such a comprehensive way, the Minister comes to what on the fact of it is a strange and, indeed, an illogical conclusion:-

> "Country or origin information indicates that there is a functioning police system in operation in the Congo. While it is acknowledged that corruption and human rights abuses remain a problem within the police force. efforts are being made to improve the situation including efforts made by the United Nations Peacekeeping Missions in the country ... in consideration of country of origin information, there is nothing to suggest that the applicant could not return to Kinshasa where the rule of law exists and the authorities, with the help of many foreign countries and organisations are trying to implement change, stability and security in the City." (Emphasis added)

47. It is not the function of this Court at leave stage to determine the ultimate rationality or reasonableness of the Minister's conclusions. Neither it is the function of this Court to reach any conclusion whether or not the Minister's conclusions under the issue of state protection are superfluous, rather in the terms of the Meadows judgment one has to consider whether or not the conclusions reached by the Minister at this point actually rationally flow from the documents considered. It is the judgment of this Court that it is at least arguable that the conclusions reached in relation to the country of origin information and in particular in relation to the availability of state protection are irrational.

The Deportation Order
48. It follows that from the above that the applicant is also entitled to relief in respect of the deportation decision.

Conclusion
49. The court will grant the reliefs claimed at paras. 1, 2 and 15 of the notice of motion on the grounds set out at para. 8 of the grounds claimed.

50. The costs will stand reserved for the hearing of the application.