Neutral Citation: [2014] IEHC 25

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 9 J.R.]

BETWEEN

B. M.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 21st day of January 2014

1. This is an ex parte application for leave to seek judicial review of decisions by the first named respondent dated 18th December 2013, refusing to revoke a negative subsidiary protection decision and refusing to permit the applicant to make a further application for subsidiary protection.

2. The applicant is said to be a national of Cameroon. In May 2008 he was refused asylum because central elements of his claim were not believed. His application for subsidiary protection was refused in March 2012 and a Deportation Order issued. By letter of 9th December 2013, the applicant's solicitors wrote to the Department of Justice and Equality to request revocation of the Deportation Order and of the refusal of subsidiary protection. (The revocation of the Deportation Order is under active consideration by state officials and no complaint is made in respect thereof by the applicant.)

3. The letter of the 9th of December asserts the legal frailty of the subsidiary protection refusal. In addition, complaint is made about certain findings of the Refugee Appeals Tribunal decision dated 20th May 2008. In particular, the applicant submitted in the letter that country of origin information dated 7th February 2013 indicated that certain categories of persons were frequently subject to torture and other maltreatment. The applicant claims to be a member of a group susceptible to such maltreatment and he said that his claim to be such a member has never been determined lawfully. The penultimate paragraph of the applicant's solicitor's letter is in the following terms:

> "In the light of the above, we would respectfully suggest that both the subsidiary protection refusal and the deportation order should now be revoked and our client should be afforded an opportunity to make a fresh application for subsidiary protection in a regime fully compliant with the legal minimum requirements. Please let us know within seven days from the date hereof whether you will agree to revoke as aforesaid, and afford us on behalf of our client an opportunity to make such application on his behalf. This letter should not be construed as such an application, but rather a request to revoke the refusal and deportation order and for permission for us to make a fresh application for subsidiary protection in the first instance."

4. In this letter the applicant repeatedly sought the revocation of the subsidiary protection refusal based, in part, on the decision of the Court of Justice of the European Union of November 2012 in *M.M. v. The Minister for Justice, Equality and Law Reform* (C-277/11) and the subsequent decision of Hogan J. ([2013 IEHC 9]) in the same case dated 23rd January 2013. In addition, revocation was sought based upon information from the UN Human Rights Council dated 7th February 2013.

The relevant part of the reply from the Department of Justice is as follows:

> "Your correspondence is being taken to be an application for the revocation of your client's deportation order, pursuant to the provisions of s. 3(11) of the Immigration Act 1999 (as amended). You will appreciate that such an application has no suspensive effect. Once a decision has been made on that application - to 'affirm' or to 'revoke' the deportation order - this decision, and the consequences of the decision will be notified in writing.
>
> In relation to your client's application for subsidiary protection, this has already been determined with the outcome of that application having been notified to your client by letter dated 5th March, 2012. It was open to your client to challenge that determination at that time but he failed to do so, directly or indirectly. As a result, it is somewhat strange that some 21 months later your client would seek to have that determination revisited. We will not be doing so."

5. The Department of Justice gave a clear answer to the applicant's request that the subsidiary protection refusal be revoked. I interpret the remark by the Department of Justice that the original subsidiary protection decision will not be revisited as a clear refusal to countenance the revocation of the decision, and in addition, a refusal to countenance a fresh application for subsidiary protection. The letter suggests that the reason for both of these refusals is that considerable unexplained delay has ensued since the date of the original decision and in addition, the decision was never challenged either by legal proceedings ("directly") or by revocation request ("indirectly").

6. Counsel for the applicant initially sought to argue that where the law provided for the possibility of re-entry to the asylum system, it must, according to the principle of equivalence, apply a similar remedy in respect of subsidiary protection decisions. I do not understand the principle of equivalence to mean that equal remedies must be available for administrative decisions which have their origins in European law. The principle of equivalence describes the duty on member states of the European Union not to make it more difficult to vindicate EU rights than it is to vindicate purely national rights.

7. During the course of submissions, counsel moved away from this argument and instead sought to argue that as there was no express prohibition on seeking a revocation of subsidiary protection decisions; and no express prohibition on making a fresh application

for subsidiary protection, and that the Department of Justice had therefore acted unlawfully in failing to revoke and refusing to allow a fresh application for subsidiary protection. In my view, this argument, even if no such prohibitions exist, could not be enough to persuade me that any illegality attaches to this refusal to revoke or refusal to permit a fresh application for subsidiary protection. Self evidently, the absence of a prohibition on revocation of, or fresh application for, subsidiary protection does not require such applications to result in a positive outcome. The flaw in the applicant's case is that the respondent did not, as is asserted, refuse the applications because of a general prohibition on such applications. The reasons for the refusals are identified in paragraph 5 above. The applicant has failed to persuade me to the standard necessary on an application for leave to seek judicial review that this ground should be permitted to be advanced.

8. During the course of argument, counsel also sought to persuade me that the principal mischief in the decision was the failure of the first named respondent to address the request for permission to make a fresh application for subsidiary protection. This complaint is not reflected in the intended pleadings. The draft order of *certiorari* presented by the applicant is framed on the basis that the Department of Justice expressly refused to permit a fresh application to be made. If it were the case that there had been a failure to reply to such a request, one would have expected the proceedings to be framed, not in terms of a request for an order of *certiorari*, but perhaps in terms which sought to compel the Minister to answer the request or for declaratory relief that the request made be answered. The applicant's lawyers have not chosen to frame the proceedings in that manner, and in my view, the reason this approach was adopted it because the letter from the Department of Justice of 18th December 2013, express a refusal to permit a fresh application for subsidiary protection to be made. Such a refusal is the logical consequence of the preceding refusal to revoke the extant decision on subsidiary protection. Thus the complaint fails because the respondent did not fail to reply to the request that permission be given for apply for revocation.

9. In addition to the matters addressed to the court by way of oral submission, the applicant has set out a number of grounds in a Statement Grounding Application for Judicial Review which ground the reliefs he seeks in this application. I shall address each in turn. The first ground is as follows:

> "The first named respondent acted unlawfully in purporting to exercise a discretion and/or unlawfully fettered such discretion in applying a policy, that because a previous application for subsidiary protection had been refused, that it was not open to the applicant to seek to revoke the refusal of subsidiary protection and/or to make a further application for subsidiary protection."

This ground fails because that is not the reason which led to the negative decisions in this case. The reasons which led to the negative decisions in this case are set out at para. 5 of my judgment. Therefore, this ground is to be rejected.

10. The second ground advanced is in the following terms.

> "In circumstances where up to date information was furnished to the first respondent in support of the application, it was *ultra vires* and irrational to reject such application without properly considering such materials and the representations made."

The request to consider new material was only required to be addressed if the respondent had decided to engage with the merits of the application to revoke the extant subsidiary protection decision and if it had been decided to permit a new application for subsidiary protection. In the event that the respondent refused to engage with either such application, there was no requirement on the respondent to consider the new material advanced. This would only have been required to have been done if the merits of those applications had been embarked upon and this never happened. Therefore, no illegality attaches to the failing.

11. The third ground advanced is as follows:

> "The first respondent acted irrationality and in error of law in relying on the assertion regarding the refusal of subsidiary protection dated 5th March 2012, that it was open to the applicant 'to challenge that determination at the time but he failed to do so directly or indirectly.' There was no procedure available to the applicant by which he could 'challenge' the refusal of subsidiary protection (on the law and merits) as he should have been entitled to and such procedure was not introduced until the commencement of Statutory Instrument 426/2013."

This ground flies in the face of the application which is currently being made because the applicant seeks to say that the reason he did not make an application to have the decision reviewed on the law and the merits is because there was no procedure available to him. Yet by this application, that is precisely what he seeks to do when he asks the respondent to revoke the earlier decision and to consider a new application. There is no reason why that could not have been done if that is open to him, shortly after, or timeously after the first decision on subsidiary protection. Therefore, this ground must fail.

12. The fourth ground advanced is:

> "The purported refusal of subsidiary protection of 5th March 2013, whether lawful (which is denied) or not, should not have acted as a bar on a further application for subsidiary protection. There is/was no published policy to the effect that further applications could not be made and no law in place prohibiting such further applications. Without prejudice to the above, the content of the application made and the new information provided were such as to oblige the respondent to substantively consider the application made."

13. The respondent did not refuse to entertain the applications for revocation and the application for permission to launch a new application for subsidiary protection on the basis that there was a prohibition on such. The reasons given by the respondent for refusing the applications made are set out at para. 5 in this judgment. Therefore, this ground is misconceived. In relation to the second sentence of that ground, clearly, there was no obligation to consider substantively the new information submitted in circumstances where the respondent had decided in *limine* not to entertain the application for revocation and not to permit a new application for subsidiary protection to be made.

14. The fifth ground advanced is in the following terms:

> "In the light of the new information/materials furnished, the failure of the first respondent to consider substantively the application made was in breach of the obligation of *non refoulement* imposed upon the respondents in domestic and European law in circumstances where a deportation order had already issued and where the first respondent had not considered *refoulement* since March 2012."

15. This ground must fail on the basis that, as I have indicated at the beginning of this judgment, the applicant has successfully applied for a revocation of a deportation order and any question of *refoulement* will be dealt with in the context of that application for revocation of a deportation order which is ongoing and about which no complaint can be made. Therefore, this ground is misconceived.

16. The sixth ground advanced is as follows:

> "In circumstances where there exists a procedure to apply to 're-enter' the asylum process (s. 17.7 of the Refugee Act 1996, as amended) and where such applications must be substantively considered despite a previous lawful refusal having been arrived at, then it is in breach of European law principles of equivalence and/or effectiveness to fail to provide a similar facility to persons wishing to 're-enter' the subsidiary protection process."

I have already indicated my answer to this point in the body of the judgment. My rejection of this ground is based upon the fundamental misconception of the principle of equivalence which underpins this ground.

17. The seventh ground advanced by the applicant is as follows:

"Regard should have been had by the first respondent to the infirmities that must now attach to the subsidiary protection refusal of 5th March 2012, in the light of subsequent CJEU and domestic jurisprudence."

18. This ground must fail because no explanation has been provided why, (notwithstanding the fact that the judgment of the Court of Justice in *M.M.* is dated November 2012, and the judgment of the Irish High Court is dated January 2013) complaint is made for the first time almost 12 months later in respect of matters which should have been readily apparent to the applicant, at least since the date of the decision of the Court of Justice of the European Union in *M.M.*, if not before then, given that the complaints which were agitated in that case were well known to practitioners of asylum law in Ireland.

19. The applicant has failed to make out an arguable legal error in the decisions in suit. No argument has been addressed to me which would persuade me to permit the applicant to challenge the decisions which were taken in response to the applicant's letter of 13th December 2013, and no argument has been addressed to me to persuade me that there was a failure on the part of the respondents to address a request that the applicant be permitted to make a fresh application

20. For those reasons, I refuse leave to seek judicial review.