Neutral Citation [2016] IEHC 737

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 412 JR]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, SECTION 5

AND IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)

BETWEEN

WJF

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

IRELAND

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 24th day of November, 2016

Introduction

1. This matter came before the Court on 1st November, 2016 on the basis of a telescoped application seeking:

> 1. an extension of time within which to make the application, together with
>
> 2. an order of *certiorari* quashing two decisions of the first named respondent, namely the decision not to grant subsidiary protection and the decision to make a deportation order.

Background

2. The applicant is a native of Cameroon and arrived in Ireland on 2nd July, 2010 and immediately applied for refugee status. The applicant is single and has two children residing with his parents in Cameroon.

3. No personal documents were ever produced by the applicant although some country of origin information was supplied by him.

4. The Commissioner made a recommendation that the applicant would not be declared a refugee and this recommendation was appealed to the Refugee Appeals Tribunal which upheld the Commissioner's decision by a ruling of 6th April, 2011.

5. Following the foregoing, the Minister communicated with the applicant indicating an intention to deport him and inviting him to apply for leave to stay in Ireland and/or subsidiary protection. The applicant processed both such applications on 3rd June, 2011. A decision as to subsidiary protection was made on 4th October, 2012 and advised to the applicant under cover letter of 5th October, 2012. A decision to deport the applicant was made on 19th October, 2012 and advised to the applicant under cover letter of 2nd November, 2012.

6. The application before the Court is grounded upon an affidavit of the applicant of 22nd May, 2013 and brought by way of notice of motion of 24th May, 2013 which was ultimately filed on 4th June, 2013.

7. Because the application for certiorari engaged the jurisprudence covered by the *M.M. v. Minister for Justice* [2011] IEHC 547 decision *et seq* the matter was adjourned until final determination of the *M.M.* matter. However, in or about July, 2016 the applicant resolved that he wished to proceed with his application. To this end a letter was dispatched on behalf of the applicant to the respondent bearing date 5th July, 2016 indicating that the applicant wished to proceed with his application and was prepared to exclude from same:

> 1. the matter of *M.M.*,
>
> 2. the case of *Junca* and all related legal arguments;
>
> 3. the EU Directive, the Charter and the Convention.

The respondent agreed. Accordingly an amended statement of grounds issued bearing date 22nd July, 2016.

8. Both parties made written submissions, however, in the applicant's written submissions considerable emphasis was laid on EU law whereas in the respondent's replying submissions, the respondent indicated that it had been agreed that this EU law was not to be relied upon, and so the respondent did not make any submission in respect thereof but rather made submissions relative to domestic law.

9. When the matter commenced, the issue as to whether or not EU law formed a portion of the applicant's claim was discussed and the applicant argued that the import of the letter of 5th July, 2016 dispatched to the respondents was for the purposes of excluding the *M.M.* case and the *Junca* case together with all EU directives, charters and conventions relative to those cases but not otherwise. Having indicated to the applicant that I felt that the respondent's view of the letter of 5th July, 2016 to the effect that the EU Directive, Charter and Convention would not be relied upon was not limited to the *M.M.* decision or the *Junca* matter was understandable in the circumstances, the applicant gave instructions that nevertheless he wished to proceed with the judicial review application immediately. Accordingly the matter proceeded on the basis of the respondent's understanding of the letter of 5th July, 2016.

10. It was further agreed between the parties that the issue of an extension of time could await a decision on the application for certiorari as the extension of time would only be relevant if the Court held the view that one or both of the subsidiary protection or the deportation order should be quashed – in other words if both the subsidiary protection decision and the deportation order were to stand there would be no need to entertain the extension of time application.

The applicant's submissions
11. The applicant's submissions might be generally summarised as follows:-

> i. Both orders were unlawful as both adopted without reason the prior RAT decision.
>
> ii. Both orders were unlawful because both the finding and content of the RAT decision were used without notice to the applicant.
>
> iii. The deportation order is unlawful as the Minister did not conduct her own independent view of *refoulement*.
>
> iv. The deportation order was unlawful as it was a disproportionate response and the issue of proportionality was not considered.

The issues between the parties
12. The applicant argues that the Minister effectively blindly followed the RAT decision without reason. The Minister's finding quotes the RAT decision extensively and thereafter paraphrases a considerable portion thereof relative to the subsidiary protection decision. Included in the paraphrasing is the following:-

> "The member of the Tribunal stated that there are other inconsistencies, too many to mention, but suffice to say that the applicant's account is lacking in credibility and overall found his account to be inherently lacking in credibility."

Insofar as credibility is concerned the decision went on to state:-

> "In light of the foregoing, it is reasonable to consider that the applicant's statements in relation to his claimed fear of returning to Cameroon are not credible. As a result, I am satisfied that the applicant's claim is not credible."

13. In the recommendation to deport the applicant, again, the RAT decision is quoted extensively and is followed by a paraphrasing including the statement quoted above as to various other inconsistencies and the discussion concludes with:-

> "As a result, I am satisfied that Walters Jingwa Fohba's claim is not credible. I have considered all the facts of this case and the facts that Walters Jingwa Fohba's general credibility has not been established. As Walters Jingwa Fohba's claim has been found not to be credible, I am satisfied that repatriating Walters Jingwa Fohba to Cameroon is not contrary to s. 5 of the Refugee Act, 1996, as amended, in this instance."

14. Thereafter there was a consideration of Art. 8 of the European Convention on Human Rights incorporating reference to the House of Lord's decision in *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 AC 368 and this discussion concluded with a submission that a decision to deport the applicant would not constitute an interference with the right to respect for family life under Art. 8(1) of the ECHR.

15. The respondent's response is to the effect that the applicant was found by the RAT to be lacking in credibility on certain grounds and the circumstances thereof did not change between the RAT decision and the Minister's decisions. No fresh submissions were made to the Minister by the applicant. The respondent argues that it is clear from the Minister's communications that, in the round, she did not find the applicant credible and by looking at the entirety of the decision there would be no difficulty in ascertaining the rationale thereof. The respondent argues that the applicant was not surprised by the user of the RAT finding and content and no such surprise is expressed in the applicant's grounding affidavit. The respondent further argues that there is no evidence that the Minister did not know that she had an option to reject the RAT finding as suggested on behalf of the applicant and further argues that it is for the applicant to provide evidence in this regard aside from a mere statement that it is not clear from the decision that the Minister knew she had such option. The respondent further argues that the issue of proportionality did not arise in the circumstances.

16. The applicant argues that in or about analysis of the Supreme Court decision in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, the case of *T.K. v. Minister for Justice* [2011] IEHC 99 has adopted the correct analysis and the applicant urges the Court to follow the *T.K.* analysis as opposed to the analysis in the case of *A.W v. Minister for Justice* [2016] IEHC 111. The applicant also refers to the final number of pages in the judgment of MacEochaidh J. in the case of *Barua v. Minister for Justice* [2012] IEHC 456.

Relevant case law
17. In the case of *Meadows* the issue which the court was considering was as to whether or not to afford the applicant leave to bring judicial review proceedings relative to a deportation order where the applicant's fear concerned female genital mutilation if returned to her country of origin. The application was refused in the High Court. The majority judgment was to the effect that the applicant should be afforded leave to bring judicial review proceedings. In my view the following quote from Murray C.J. encompasses the ratio of the case:-

> *"[93] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *[94] Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.*
>
> *[95] In my view the decision of the first respondent in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced.*
>
> *…*

> *[98] The fact remains that it is not possible to properly discern from the first respondent's decision the actual rationale on foot of which he decided that s. 5 of the Act had been "complied with". Accordingly in my view there was a fundamental defect in the conclusion of the first respondent on this issue."* (Emphasis added)

18. Insofar as the applicant urges the Court to follow the analysis of Hogan J. in the case of *T.K.* the applicants are relying on para. 25 of this judgment when he states:-

> *"One common theme, however, of all the majority judgments appears to be that in cases of this kind the Minister is obliged to give a coherent reason or reasons justifying the conclusion that the prohibition in s. 5 is satisfied and that this is so even where parallel claims of this kind arising in the asylum process were rejected on credibility grounds. This would seem to be the ultimate ratio of the majority judgments in Meadows and, it may be noted, this was one of the principal reasons why Hardiman J. dissented from the majority."*

19. Humphreys J. in the case of *A.W.* at para. 18 of his judgment made reference to the judgment of Hogan J. in the *T.K.* case aforesaid and in particular to para. 26 thereof (where Hogan J. stated "*To start with, it is irrelevant that both the Commissioner and the Tribunal rejected the applicant's account on credibility grounds…"*) and effectively opined that this was not a correct statement of the law following Meadows. Humphreys J. stated at para. 20:-

> *"I am inclined to the view that simply because the applicant's credibility was rejected during the asylum process in Meadows does not mean that such findings are not relevant. Meadows requires reasons to be given by the Minister. It does not mean that the decisions in the asylum process are "irrelevant"."*

20. I am of the view that Hogan J.'s analysis does not appear to cater for that portion of the judgment of Murray C.J. which states (at para. 93):-

> *"That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context."*

21. I have considered the judgment of MacEochaidh J. of 9th November, 2012 in the case of *Barua v. Minister for Justice.* That case concerned an application for *certiorari* in respect of a subsidiary protection application and humanitarian leave to remain. The application was based upon the fact that the respondent had failed to address documents and during the course of his judgment the judge noted that the relevant documents were not referred to even casually by the decision maker. At para. 20 it is stated:-

> *"Not every document submitted needs separate and microscopic examination. However, in a case such as this, where the documentary evidence is apparently corroborative of the applicant's story, this is an issue which the decision maker ought to address."*

22. The Court went to state at para. 22:-

> *"Given that the findings of lack of credibility - which I am not invited to disturb - are marginal, it seems to me that there was a duty upon the respondent to weigh those credibility issues with the corroborative documentary evidence and to balance the two. If that documentary evidence was dismissed, it should have been dismissed for a reason stated."*

23. At para. 26 and para. 31 the conclusion of the Court is stated:-

> *"I find that if the subsidiary protection decision maker decided that the documentation at issue was tainted then she should have said so. Merely stating that, "[a]ll documents submitted and referred to have been read and given consideration" or quoting passages from country of origin information relating to forged documents is not enough to communicate such a view.*
>
> *In essence I cannot discern from the decision why the applicant's corroborative documents were seemingly dismissed, discounted or rejected. The decision in suit does not meet the standard described by the learned Chief Justice in Meadows and must therefore be quashed."*

24. In addition to the foregoing, at para. 42 the Court states:-

> *"I am unwilling in this case to count the frailties of this unsatisfactory situation against the applicant. I reject the case made for the respondent that the failure of the applicant to challenge the decision of the Tribunal or to criticise the Tribunal in the subsidiary application process acts as a quasi estoppel or has the effect of disbarring the applicant from relief."*

25. Prior to the views expressed at para. 42 aforesaid, the Court made reference to a number of cases including the case of *Dibisi v. Minister for Justice* [2012] IEHC 44 and the case of *H.M. v. Minister for Justice* [2011] IEHC 16 being a judgment of Hogan J. before stating the following at para. 39:-

> *"The jurisprudence of the High Court says that the application for subsidiary protection is not an appeal from the decision of Tribunal. That jurisprudence also makes plain that findings of the Tribunal must be considered by the Minister and that the Minister is entitled to adopt those findings."*

The Court goes on to find an effective anomaly – the subsidiary protection application is not an appeal of the failed refugee application which implies that the subsidiary protection application will not involve a review of the earlier decision and yet the Minister is entitled to adopt the findings of the failed refugee application according to the jurisprudence.

26. In the application before me the respondent has not made an estoppel issue – if such a claim was made, same would have to fail based upon the jurisprudence of *Barua* and the principle mentioned at para. 25(ii) hereof. That having being said I do not believe that Barua either overturns or reviews the *Dibisi* decision.

27. In *Dibisi v. Minister for Justice* [2012] IEHC 44 Cooke J. stated at para. 14:-

> *"…where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks credibility such that the events described or the facts relied upon are considered not to*

have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection into a form of a second appeal against the refusal of a declaration of refugee status."

28. In Hogan J.'s judgment in the case of *H.M. v. Minister for Justice* [2011] IEHC 16 the Court found that relying on the RAT reasoning on credibility issues is acceptable subject to the rider that, regardless of whether or not the Tribunal decision has been challenged, if the reasoning of the RAT is open to objection then the Minister's decision will also be open to objection. MacEochaidh J. in the *Barua* decision, having quoted the *Dibisi* case and the case of *H.M.* says that:-

"This principle places an obligation on the Minister if adopting the findings of the Refugee Appeals Tribunal to ensure all findings were reasonable."

29. The applicant also relies on the case of *K.O.* [2016] being a judgment of Faherty J., however both parties ultimately agree that jurisprudence relative to the point at issue before Faherty J. was not addressed to the Court and for this reason I will not be relying on that judgment in coming to my decision. The respondent relies on McDermott J.'s judgment in the case of *L.K. v. Minister for Justice* [2014] IEHC 521. The following are quotations from paras. 36 and 38 of McDermott J.'s judgment:-

"If it is thought that the underlying rationale cannot be properly or reasonably deduced from the decision as evidenced by the examination of file, the order and the letter, I am satisfied that the previous decisions and the materials upon which they are based give a clear understanding of the reasons for the making of the s. 5 decision when read in the context of the materials and conclusions set out in the examination of file.

…

The court is, therefore, not satisfied that the rationale or reasons for the s. 5 determination in this case are not to be found in the body of the decision or to be inferred from its terms and context."

30. From the foregoing case law the following principles emerge:-

i. The rationale for the decision must be patent or capable of being inferred from its terms and context.

ii. The Minister is entitled to adopt the RAT findings, however, if so adopting, the Minister must ensure that the findings were reasonable as, if unreasonable, the Minister's decision will be infected with the unreasonable portion of the RAT finding.

iii. Subject to the foregoing, there is no obligation on the Minister to reconsider the same facts and events to decide whether they are plausible or credible in the absence of new evidence, information or other basis capable of demonstrating the original findings were vitiated by material error.

31. Applying the foregoing in the instant matter, in circumstances where no new facts or evidence was adduced to the Minister to demonstrate that the original findings of the RAT were vitiated by material error, the Minister was entitled to adopt the RAT findings and in or about the adoption of such findings I am satisfied that the Minister clearly found the findings to be reasonable and I am further satisfied that the rationale for the decision in both the subsidiary protection matter and the deportation matter was patent or at the very least capable of being inferred from their respective terms and context. The Minister's decisions clearly considered the RAT findings and found them to be reasonable.

Proportionality

32. The applicant argues that as the deportation order did not incorporate a statement to the effect that there is no less restrictive process available which would achieve the legitimate aim of the State, the decision has not complied with the principles of proportionality.

33. The applicant makes this argument based upon the judgment of Denham J. (as she then was) in the case of *Meadows v. Minister for Justice* [2010] 2 I.R. 701 when during the course of her judgment she stated:-

"When a decision maker makes a decision which affects the rights then, on reviewing the reasonableness of the decision:-

(a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational consideration;

(b) the rights of the person must be impaired as little as possible: and

(c) the effect on rights should be proportional to the objective."

34. In response the respondent relies on the case of *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 AC 368 where Lord Bingham identified five questions to be considered in a resistance of a deportation order namely:

i. Will the removal interfere with the applicant's right to respect for his private or family life?

ii. If so, will such interference have consequences of such gravity as potentially to engage the operation of Art. 8?

iii. If so, is such an interference in accordance with the law?

iv. If so, is such interference necessary in a democratic society?

v. If so, is such interference proportionate to the legitimate public end sought to be achieved?

35. The respondent also relies on the case of *C.I. v. Minister for Justice* [2015] IECA 192 where the relevant deportation order was

being resisted on grounds of educational and social ties to Ireland. The Court of Appeal did not find educational and social ties sufficient. Finlay Geoghegan J. in the course of her judgment stated:-

> *"It is the individual's right to respect for his or her private life which is guaranteed by Article 8. The prohibition against interference by a public authority is with the exercise of this right. Where the relevant aspect of the right to private life is the right of the individual to establish and develop relationships with other human beings … then it appears to me that what an adjudicator must consider is the gravity of the consequences for the individual of deportation including the inevitable rupture of relationships and social ties formed whilst in the State."*

36. The Court of Appeal was satisfied that the Minister was correct to find that Article 8 was not engaged and therefore was not necessary to consider the proportionality of the impact.

37. In the circumstances of the present case where the applicant's two and only children reside in Cameroon with his extended family of origin, he having no family in this jurisdiction, the Minister's decision was reasonable.

Conclusion
38. I am not satisfied that the applicant has discharged the onus of establishing that the two decisions in question were fundamentally flawed and the applicant is not therefore entitled to the relief claimed. The application is refused.