Neutral Citation [2013] IEHC 271

THE HIGH COURT

[2011 No. 147 JR]

BETWEEN/

PM (BOTSWANA)

APPLICANT

AND

MINSTER FOR JUSTICE AND LAW REFORM, ATTORNEY GENERAL AND IRELAND (No.3)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 14th June, 2013

1. How should this Court respond to a judgment of the Court of Justice in separate proceedings which might be thought to present an applicant with new grounds to challenge an administrative decision when that new ground of challenge has not heretofore properly been advanced or perhaps even pleaded before the national court? This is a difficult issue presented by this application for leave to amend existing judicial review proceedings in order to raise this new issue. What is the national court to do when the applicant now indicates in the wake of the judgment on the reference that he or she wishes to rely on this new point? This is essentially the dilemma which, as we shall see, now confronts the Court following the delivery of the judgment of the Court of Justice in Case C-175/11 in *MM v. Minister for Justice, Equality and Law Reform* on 22nd November, 2012.

2. The background to the present application is as follows: the applicant is a Botswanan national who arrived in the State in January, 2009 when she was just thirty years of age whereupon she sought asylum. This is now the third judgment delivered in her case. I propose first to rehearse briefly the facts of her case before setting out the issues which arose in the earlier two judgments. I will then consider the issues which have separately given rise to this judgment.

3. The applicant is a Pentecostal Christian and a pygmy. Fundamental to the applicant's asylum claim was her contention that by reason of her pygmy status she would not be in a position to resist the instruction of her local villagers and family members that she take up a position as a fetish priestess, a position which would be inconsistent with her own deeply personal Christian beliefs. She had contended that the village elders had insisted that she become a fetish priestess at the age of thirty and for that purpose she was abducted and taken to local caves. Ms. M. nevertheless maintains that she was able to escape when she was left unguarded after the induction ceremony had commenced when the elders went to gather some roots.

4. Some time later after she had travelled to Gaborone to stay with an aunt, there was a confrontation with the village elders and other family members who insisted that she return to her local village for training as a fetish priestess. She then travelled to the UK in December, 2008 with a view to travelling on to Ireland. She was, however, refused entry to the UK and returned to Botswana. She then says that she travelled to Ireland with the assistance of a friend via South Africa and Turkey.

5. On 27th March, 2009, the Office of the Refugee Applications Commissioner ("ORAC") recommended that she be refused refugee status on the basis that her claim lacked credibility. This was affirmed by the Refugee Appeal Tribunal by decision of 6th December, 2009. On 22nd January, 2010, the Minister refused a grant of refugee status to the applicant. An application for subsidiary protection was refused on 17th January, 2011. The process culminated in the making of a deportation order by the Minister for Justice, Equality and Law Reform on 26th January, 2011.

6. It may be noted that the following an assessment of the claim, the ORAC made a recommendation pursuant to s. 13(6)(a) of the Refugee Act 1996("the 1996 Act")(as amended) on the basis that, in the statutory language, the application "showed either no basis or a minimal basis for the contention that the applicant is a refugee". As a result of this recommendation, the hearing before the Tribunal proceeded without an oral hearing. It is also, however, important to observe that at no stage did the applicant ever challenge the validity of the Tribunal determination.

7. The ORAC rejected the applicant's account on a variety of credibility grounds. Thus, for example, it was found that she had given few details regarding what is said to have occurred to her in Botswana. On her own account she had been left unguarded and was allowed to escape, yet she nonetheless returned to her home village following the abduction and where she was not abducted again. This narrative was considered by ORAC to amount to "incoherent and implausible testimony". The fact, moreover, that the applicant had not applied for asylum when she transited through South Africa and Turkey on her way to Ireland was regarded as a negative credibility factor, as was the fact that she had not applied for asylum in the UK when she was refused entry there in December, 2008. The applicant moreover appeared to be unfamiliar with the fundamental doctrines of the Assemblies of God, Pentecostal Church of which she claims to have been a member for the best part of then years. This finding was affirmed by the Tribunal decision and the Tribunal member broadly endorsed the negative credibility assessment.

8. Ms. M. then applied for subsidiary protection in March, 2010 and this was then rejected by the Minister in January, 2011. No independent assessment of the applicant's credibility was conducted by the Minister who instead relied on the findings of the Tribunal. The Minister concluded that because of doubts concerning her credibility, the applicant did not warrant getting the benefit of the doubt.

9. When the application for leave to apply judicial review was first heard by me in July, 2011 the applicant sought to challenge the validity of the subsidiary protection decision, the refusal of refugee status and the making of the deportation order. The applicant's case had nevertheless been confined in essence to the single question of whether she had available to her an effective remedy in respect of the decision of the Minister to refuse to grant her a declaration of refugee status under s. 17 of the 1996 Act.

10. In my judgment delivered on 28th October, 2011 ("the first judgment") I noted that the applicant's case was squarely based on the contention that the 1996 Act was *ultra vires* the provisions of Article 39(1) of the Procedures Directive 2005/85/EC (which provision is contained in Chapter V of the Directive) 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. Article 39(1) provides:-

> "Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:
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> (a) a decision taken on their application for asylum..."

11. I also noted that recital 27 of the Directive provides that:

> "It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court to tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also, with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State."

12. I then proceeded to hold that:

> "I am of the view that even if the Minister's decision to refuse to grant the applicant a declaration of refugee status under s. 17(1)(b) of the 1996 Act comes within the scope of Article 39.1 of the Procedures Directive, this will be of little consequence in itself, since the Irish law of judicial review guarantees her an effective remedy. The applicant has not in any event specified how Irish law failed to afford an effective remedy.
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> For these reasons, I will refuse the applicant leave to apply for judicial review on the grounds canvassed in this judgment. Insofar as the applicant seeks to rely on the issues referred to the Court of Justice in *HID*, I will adjourn the balance of that application for leave pending the outcome of the reference."

13. The reference to *HID* was to Case C-175/11 *HID v. Refugee Applications Commissioner*, a case which had been referred by Cooke J. to the Court of Justice and which reference was still pending when that judgment was delivered. The reference in HID effectively asked the Court of Justice to address questions of institutional independence on the part of the Refugee Appeal Tribunal and the guarantee of an effective remedy. In essence, however, I had rejected the applicant's claim save only insofar as it raised issues which were to be governed by the outcome of *HID*.

14. Following the delivery of that judgment the applicant then applied for a certificate for leave to appeal to the Supreme Court pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. On 31st January 2012 I delivered a second judgment in this matter, *PM. v. Minister for Justice and Law Reform (No.2)* [2012] IEHC 34 dealing with the application for a certificate for leave to appeal. Dealing with the institutional independence point I observed:

> "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.
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> 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."

15. I then went on to hold that it would be premature to offer any further comment on that question. I pointed out that this aspect of the leave application remained adjourned, so that the question of a certificate in respect of this question simply did not arise. So far as the balance of the effective remedy point was concerned – namely, whether judicial review provided an adequate remedy - I rejected that argument, holding that the adequacy of judicial review had been already dealt with the decision of the Court of Justice in Case C-69/10 *Diouf* and a series of decisions by the High Court and Supreme Court:

> "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.
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> 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.
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> 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."

16. It was on the basis, accordingly, that I refused to grant a certificate for leave to appeal to the Supreme Court. I held that the balance of the application must await the decision of the Court of Justice in *HID*.

The decision of the Court of Justice in *HID* and its aftermath

17. The reference to the Court of Justice was made in January 2011 by Cooke J.: see *HID v. Refugee Appeals Tribunal* [2011] IEHC 33. In his judgment Cooke J. rejected arguments that the Tribunal lacked sufficient guarantees of institutional independence and, furthermore, that the remedy of judicial review was not an effective remedy for the purposes of Article 39 of the Procedures Directive. When the applicants applied for a certificate of leave to appeal to the Supreme Court under s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, Cooke J. then referred the question of whether the availability of an appeal to the Tribunal constituted an effective remedy for the purposes of Article 39 of the Procedures Directive to the Court of Justice.

18. In its judgment delivered on 31st January 2013 the Court of Justice unequivocally rejected the argument that this right of appeal did not constitute an effective remedy. The Court held (at paras. 103-105):

> "In the present case, under section 5 of the Illegal Immigrants (Trafficking) Act 2000, applicants for asylum may also question the validity of recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court, the decisions of which may be appealed to the Supreme Court. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.
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> In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy.
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> Consequently, the answer to the second question is that Article 39 of Directive 2005/85 does not preclude national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal, and to bring an appeal against the decision of that tribunal before a higher court such as the High Court, or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court."

19. It follows, therefore, that in view of the decision of the Court of Justice in *HID* that the applicant cannot possibly succeed on this point. It might also be observed that when the matter came back before Cooke J. he refused to grant the applicants a certificate of leave to appeal to the Supreme Court. It is clear that the matter has been authoritatively resolved by both the Court of Justice and this Court in a manner which is adverse to the applicant's claim.

20. For good measure, I would also note that this is effectively an application to introduce an entirely new ground in the aftermath of the delivery of the earlier judgments. I would, however, decline to permit this new ground to be advanced for all the reasons set out in my judgment in *SZ (Pakistan) v. Minister for Justice and Law Reform* [2013] IEHC 95, which decision I will presently consider at greater length.

21. I would accordingly refuse to grant leave to apply for judicial review so far as the effective remedy issue is concerned.

The decision of the Court of Justice in *MM* and the applicant's subsidiary protection application

22. As we have already noted, the Ms. M.'s application for subsidiary protection was rejected by decision which was sent to her by letter dated 18th January, 2011. After a standard discussion of the political and legal systems based on relevant country of origin information, the decision-maker found against the applicant on two grounds. First, it was found that Ms. M. had tendered no evidence that she had suffered serious harm in the special manner in which this term is defined by Article 2(1) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). Second, the decision-maker found against the applicant on credibility grounds, but this finding was based entirely on the observations of the Tribunal, which in themselves had been largely based on the similar findings of the ORAC. Having quoted extensively from the Tribunal determination, the decision-maker laconically observed that "because of the doubts surrounding her credibility", the applicant "does not warrant the benefit of the doubt."

23. While the applicant had challenged the validity of the subsidiary protection decision, it is also only fair to observe that by the stage of the first hearing the only remaining issue which was then before the court concerned the proper interpretation of Article 4(1) of the Procedures Directive. Specifically, Ms. M. adopted the argument which had been advanced by the applicant in that case to the effect that this provision imposed an *ex ante* obligation on the deciding authority to supply the applicant in advance with a copy of any draft adverse decision to enable her to comment thereon.

24. It is quite clear from the subsequent decision of the Court of Justice in Case C-277/11 MM [2012] E.C.R. I-000 that this argument was rejected inasmuch as the Court held that the duty of co-operation did not extend so as to require the decision maker to supply the applicant with a draft of any possible adverse decision for comment prior to its formal adoption. In that respect, therefore, the applicant's case based on Article 4(1) must stand dismissed and such is not really in dispute.

25. Somewhat unusually, however, in its judgment the Court of Justice did give more general guidance to national courts concerning the operation of the subsidiary protection system regarding the procedures to be followed and this guidance was over and above the specific question so referred. It is probably unnecessary in this context to revisit this issue which was examined by me in some detail in *MM v. Minister for Justice and Equality* (No.3) [2013] IEHC 9, other than to summarise my essential conclusions based on an examination of the detailed and complex judgment of the Court of Justice.

26. I took the view that the Court of Justice had essentially concluded that in the context of a bi-furcated system of international protection operated by Ireland (*i.e.*, where applications for asylum and subsidiary protection), it was important to ensure that these applications were separately assessed and considered, so that in this context the subsidiary protection decision-maker could not simply endorse without more previous adverse credibility decisions which had been made by other decision makers in the course of the asylum application:

> "In these circumstances, in the light of the guidance given by the Court of Justice on the reference, I must hold that the Minister failed to afford the applicant an effective hearing at subsidiary protection stage, *precisely* because he relied *completely* on the adverse credibility findings which had been made by the Tribunal in respect of the contention that Mr. M. would come to harm if he were returned to Rwanda by reason of his involvement in the office of military prosecutor and because he made no *independent and separate adjudication* on these claims.
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> In order for the hearing before the Minister to be effective in the sense understood by the Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment."

27. It followed, accordingly, that I concluded that the subsidiary protection decision could not stand. Applying the principles in *MM* to the present case, it would be not be easy to see how the subsidiary protection decision could stand since it seems obvious that there was no such independent assessment of the credibility issue by the decision-maker who instead simply invoked the findings of the Tribunal in this regard. In the light of the judgment of the Court of Justice in *MM*, it might be said that the frailty of this approach is underscored in the present case by the fact that the hearing before the Tribunal was not an oral hearing given that the ORAC had

originally made a recommendation under s. 13(6)(a) of the 1996 Act.

28. All of this brings into sharp relief the question of how the Court should approach the question of whether the applicant should be allowed to implead what is essentially a new point, albeit one which is to some degree grafted on to the Article 4(1) issue which was the subject of the reference in the first place?

29. Some of these issues were addressed by me in my judgment in *SZ (Pakistan).* In that case I had previously dismissed the applicant's challenge to the validity of asylum and subsidiary protection decisions, subject to the outcome of the reference in *MM* (and, indeed, the outcome of another decision with no direct relevance to the present case).

30. Subsequent to the decision in *MM* the applicant sought to invoke the principles set out in that judgment in order to quash the subsidiary protection decision. Rather unusually, however, the applicant's subsidiary protection claim had not been dismissed on credibility grounds. The applicant had claimed that he had been threatened in the past by a radical Islamist group, *Sipah e Sahaba*. The applicant's account was found (tacitly) to be credible by the Minister, but the application for subsidiary protection was rejected on the basis that it was found that he was no longer at the threat of serious harm by reason of the fact that this group had been banned by the Pakistani authorities and the fact that the group no longer posed a serious threat.

31. I then concluded:

> "These conclusions have not been directly impeached in the present proceedings. One way or another, however, it is clear that the decision in *MM* has no direct bearing on the applicant's case, precisely because there was, in fact, an independent and self contained assessment of this subsidiary protection application which – unusual though this may be in practice – placed no reliance on the Tribunal's findings. In these circumstances, I would accordingly refuse to grant the applicant leave on this issue."

32. One might pause here to note that the present case is an entirely different one, in that the credibility findings made during the course of the asylum process were heavily relied on in the course of the subsidiary protection decision.

33. I then went on to deal with the argument that Mr. Z. was entitled to extend his grounds to include an entirely new ground not heretofore pleaded related to Article 39 of the Procedures Directive. I first stated:

> "There are several objections to this course of action. While it is said that this application to amend now arises directly from issues canvassed by the Court of Justice in its judgment in Case C-2175/11 *HID* which was delivered on 31st January 2013, it may be recalled that the order for reference in that case had been made as far back as April 2011, several months before these present proceedings commenced in June 2011. Nor can it be said that the judgment of the Court of Justice raises entirely new issues not previously encompassed in the original order of reference. Even assuming that I had a jurisdiction to entertain this application to amend, I am not convinced that any cogent reason has been advanced as to why this application is only being made *now* upon *these* grounds."

34. I then proceeded to deal with the jurisdictional arguments:

> "The jurisdictional objections to this proposed course of action are also considerable. It is true that no perfected order arising from my decision of 31st January, 2012. But the effect of my earlier decision cannot seriously be in doubt: I dismissed the application for judicial review, save that I adjourned two issues pending the decisions in *Sivsivadze* and *MM*. Following the delivery of these two judgments, the matter was re-entered before me for further argument on those two grounds only.
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> Subject to reserving those two issues, I consider that in effect I have otherwise disposed of the case and that I am now *functus officio*. In my judgment, therefore, the question as this presented is in reality indistinguishable from that which arose in *MAU v. Minister for Justice* [2011] 1 I.R. 749, [2011] IEHC 95. In that case I had first ruled in judicial review proceedings brought to challenge the validity of a deportation order (*MAU v. Minister for Justice* [2010] IEHC 492) that, having regard to the wording of s. 3(1) of the Immigration Act 1999 a deportation order had, in principle, lifelong effect, subject only to the right of the Minister to mitigate the effect of this by revoking the order in question under s. 3(11) of the 1999 Act.
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> At that point and subsequent to the delivery of the first judgment – but before the Court's order could be perfected - the applicants then sought to amend their grounding statement to enable them to challenge the constitutionality of s. 3(1). While I accepted that the order remained to be perfected and some ancillary matters (such as costs) remained to be decided, I nevertheless concluded that I had no jurisdiction to entertain this application for the following reasons ([2011] 1 I.R. 749, 753-754):
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> > 'In my view, however, these proceedings are no longer current before me. I accept that the order still remains to be perfected and, as we have noted, the issues of costs and a certificate remain outstanding. But the proceedings so far as they concern the validity of the deportation order have been disposed of by this Court and they cannot be said to be current in any real or meaningful sense. It follows, therefore, that I have no jurisdiction to permit an amendment at this juncture which would bear on the validity of the deportation order given that I am *functus officio* on that very issue. It is true that, in the event that the appropriate certificate for leave to appeal was given and there was an appeal to the Supreme Court, that Court would have a jurisdiction to amend the pleadings, but this power would derive from O. 58, r.2 and not from O. 28, r.1.'"

35. I then proceeded to examine the Supreme Court's decision in *Cox v. Electricity Supply Board (No.2)* [1943] I.R. 231 where it was held that an amendment at this juncture is not permissible where it would it would lead to an entirely new cause of action and possibly a different judgment from that already delivered.

36. I then concluded that the case before me was indistinguishable from *Cox*:-

> "It is true that the order of the Court remains to be perfected, but, in reality, that is a pure formality given that the nature and effect of the January 2012 decision is not in doubt. Insofar as the case remained undisposed of, it was simply for the purpose of determining two remaining issues which awaited other specified legal developments. Now that these issues have been determined, the case has been fully resolved, subject only to ancillary issues such as costs.

The net effect of all this is that the applicant must be refused leave. Yet if the amendment were to be permitted, it would effectively be to admit a new cause of action post-judgment and, in the aftermath of the effective resolution of the case, such an amendment might then possibly lead to a different judgment. As I pointed out in *MAU*, this course of action would simply to be squarely prohibited by the Supreme Court's decision in *Cox v. Electricity Supply Board* [1943] I.R. 231.

It is true that this case-law must be re-evaluated in the light of the Supreme Court's decision in *Re McInerney Homes Ltd.* [2011] IESC 31. That case concerned an examinership proposal which had been opposed as prejudicial to their interests by creditor banks and Clarke J. originally found against the petitioning companies on this very ground. It then came to light that these bank loans were about to be taken over the National Asset Management Agency and it was contended that this very fact now wholly undermined the factual premises from which the High Court had proceeded.

In the light of these new facts, Clarke J. then re-opened the original hearing on the basis that this was an exceptional case with the limited rehearing confined to the question of the potential impact of the acquisition of the creditor bank loans by NAMA. In the Supreme Court O'Donnell J. held that Clarke J. was justified in taking this approach:

> 'Once the trial judge observed that he himself had assumed that there was no longer any prospect of NAMA acquiring the loans, and that that assumption was based upon the somewhat artificial way in which the banks had approached the matter, then, in my view, he was entitled, and indeed arguably obliged, to reopen the matter. If indeed it was the case that the NAMA acquisition of the loans of Bank of Ireland and Anglo was imminent, then it could be said that the hearing, and indeed the judgment, had proceeded almost on a basis of common mistake and that justice required that the matter should be reconsidered.'"

37. As it happens, the decision in *McInerney* also raised the question of whether a judicial adjudication should be re-opened in a separate and different context to that of the NAMA loans issue. The examinership had proceeded on the basis that one potential investor (Oaktree) was willing to invest €25m and no more. Clarke J. had finally adjudicated on this basis in arriving at his conclusion that certain creditors would be unfairly prejudiced. After that judgment had been pronounced, the investor indicated that it was then prepared to make a significantly increased offer, but Clarke J. would not permit this to be done. In the Supreme Court, O'Donnell J. held that he was correct in taking this approach:

> "It is enough that the offer emerged after a final judgment, but before a final order, and indeed after the Court had permitted the reopening of a limited issue. It is only in exceptional circumstances where justice requires that course that the Court should reopen proceedings after the delivery of judgment and before the formal order is made. This, in my view, is not an exceptional situation. Indeed, if it were permitted, it could become a regular event. Nor in my view would the reopening of the proceedings serve the wider interests of justice, or indeed of the legislative scheme.
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> ...Here Oaktree was steadfast in its assertion that €25 million represented its final and last offer. For perhaps good tactical reasons it did not indicate that there were any circumstances in which it might improve that offer. This was perhaps understandable since the dynamic of negotiation makes it much more likely that a person who indicates a willingness to take some step will often be forced to do so. However having taken the course of asserting that this was its last offer, Oaktree cannot complain if it was taken at its word by all the other parties, including the Court."

38. I also quoted this passage from *McInerney Homes* in my judgment in S2 and then continued:-

> "It may be true that *McInerney Homes* approaches this question of a post-judgment application to re-open the decision as a matter of discretion rather than one of jurisdiction in the strict sense. But it is nonetheless clear that any question of re-opening a judgment following its delivery requires compelling and unusual circumstances. Thus, it is plain from *McInerney Homes* that where the court proceeds on critical factual assumptions which have not been dispelled by the parties, any subsequent judgment may be re-opened if its transpires that these factual assumptions are simply wrong and are critical to the decision in question.
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> Unusual cases of this kind aside, however, *McInerney Homes* is in fact an authority for the proposition that the Court cannot lightly and without grave reason re-open a final judgment. In the present case, subject to the two specified matters which stood adjourned for stated purposes, there was a final judgment. The present application to amend the statement of grounds is in effect an application to re-open the original decision by means of canvassing fresh issues which were never previously raised.
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> For my part, I cannot see that any substantial reasons have been advanced justifying this exceptional course of action. In other words, even assuming that I had a jurisdiction to re-open the matter, I would decline to do so absent such compelling reasons."

39. It must be recalled, however, that these later passages in *SZ* address the question of an attempt to raise an entirely new point (*i.e.*, the Article 39 effective remedy issue) post-judgment, whereas the issue sought to be raised here (*i.e.*, reliance on the guidance given by the Court of Justice in *MM*) directly arose out of the reference in respect of which the parties were awaiting a decision, even if the question actually referred was determined adversely to the interests of the applicant. I did, moreover, tacitly allow in my judgment in *SZ* that the position might have been different had the judgment of the Court of Justice raised "entirely new issues not previously encompassed in the original order of reference". It might well be said that this is precisely what happened as a result of the reference in *MM*. Besides, one might also observe that in *MM* itself the applicant had confined himself entirely to the Article 4(1) argument and yet was allowed to take the benefit of the guidance given by the Court of Justice in respect of an issue which he himself not actually raised. If that is so, why, then, should Ms. M. not be similarly allowed to take such advantage of that decision?

40. A further consideration is that the Supreme Court's decision in **McInerney Homes** seems to allow that this Court may re-open an otherwise final judgment in exceptional cases. Given the very unusual circumstances attending the judgment of the Court of Justice in **MM** – where the Court took the step of giving guidance in respect of an issue which was not actually referred – this might well be regarded as coming within this category of exceptional circumstances.

Conclusions

41. For the reasons just mentioned therefore I would give Ms. M. leave to argue that she can rely on the judgment of the Court of Justice in *MM* with regard to the subsidiary protection issue. I would refuse such leave, however, so far as any arguments based on Article 39 of the Procedures Directive and effective remedy are concerned.