Neutral Citation: [2013] IEHC 447

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 758 J.R.]

BETWEEN

E. D-N, L. D. S. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND E. D-N) AND M. D. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND E. D-N)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 20th day of September 2013

1. This is an application for judicial review of a refusal by the Minister for Justice and Equality to grant subsidiary protection to the applicant (and her minor children). Leave to seek judicial review was granted on 22nd August 2011, by Hedigan J. The grounds of complaint advanced on behalf of the applicant can be summarised as follows:

> a. The Minister failed to consider in any way an arrest warrant issued by the authorities of the Democratic Republic of Congo which the applicant says supports her account of the circumstances which caused her to flee her home country.
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> b. The Minister ought to have conducted his own assessment of the credibility of the applicant, not only because the borrowed findings from the RAT are marginal, but because the application for subsidiary protection is a freestanding process.
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> c. The Minister accepted that State protection was not available and concluded that UN sanctioned forces stationed in the Democratic Republic of Congo, could protect the applicant. It is argued that protection by an international organisation not in control of the territory is insufficient for the purposes of the Directive and the Protection Regulations.

Background

2. The applicant was born in 1968 in the Democratic Republic of Congo. She married the father of her children in 1999. She says that he is a high level member of the Movement for the Liberation of Congo, an important political group. She said that serious unrest occurred in Kinshasa on 22nd and 23rd March 2007 and the first named applicant was arrested on 24th March 2007. She says that she has had no contact with him since that day. She does not know if he is still in custody or if he has been released. Following the arrest of her husband the Congolese authorities harassed the applicant and put a gun to her head and to the head of one of her children. She decided to leave her country on 31st May 2007.

3. She applied for refugee status on the 6th June 2007. She completed the application for refugee status questionnaire on 14th June 2007 and a Memorandum of Interview with the Refugee Applications Commissioner was completed and dated 13th September 2007. A report of the Refugee Applications Commissioner into her claim for asylum is dated 18th September 2007. Such status having been refused, she appealed to the Refugee Appeals Tribunal which delivered a decision on 18th December 2008.

4. The Refugee Appeals Tribunal affirmed the recommendation of the Refugee Applications Commissioner declining refugee status to the applicant. Significant credibility findings are given as the reason for the negative outcome. The conclusion is stated as follows:

> "Having observed the applicant giving her evidence and witnessing her attempts at explaining the contradictions and inconsistencies contained m her application and taking into consideration her overall demeanour, the Tribunal is satisfied that she is not credible."

5. The RAT decision was not challenged. Application for subsidiary protection was made on 9th March 2009 on grounds indistinguishable from those advanced in the failed asylum claim. The negative decision of the Minister was sent to the applicant on 7th July 2011.

The Minister's Decision

6. The legal context in which a decision for subsidiary protection is taken is defined by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518/2006), which says that a person eligible for subsidiary protection means a person in respect of whom substantial grounds have been shown for believing that he or she, if returned to his or her country of origin, would face a real risk of suffering serious harm. 'Serious harm' is defined in the Regulations as:

> "(a) death penalty or execution,
>
> (b) torture or inhuman or degrading treatment or punishment... or
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> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal am1ed conflict.".

7. The structure of the Minister's decision follows closely the scheme of Regulation 5 of the 2006 Regulations. Regulation 5 is entitled

'Assessment of Facts and Circumstances'. There are three sub-articles within Regulation 5. The Minister's decision, in relevant part, is also entitled 'Assessment of Facts and Circumstances'. The Minister's decision is divided in sections (i)-(viii) and the sections (except section vii) follow the scheme and sub parts of Regulation 5. This is not surprising because the Regulation provides:

> "The following matters shall be taken into account by a protection decisionmaker for the purposes of making a protection decision."

8. Regulation 5(l)(a) provides that the first matter to be taken into account is:

> "(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied."

9. The first section of the Minister's decision is entitled:

> "(i) - relevant facts relating to the country of origin, including laws and regulations and the manner in which they are applied (Reg. 5(1)(a)) including the availability of protection against serious harm as defined in (Reg. 2(1)".

10. As the applicant had advanced two grounds for seeking international protection - risk of torture or inhuman or degrading treatment and risk of indiscriminate violence- this section appears to be sub-divided to address both grounds.

11. Having set out some quotations from the country of origin information, the author says:

> "The preceding country of origin information indicates that, *inter alia*, torture and ill-treatment of prisoners is rife amongst sections of the State Authorities in the Democratic Republic of Congo. However, further country of origin information (see below) indicates that the applicant may be able to seek protection from MONUSCO for the purposes of Regulation 2(1)."

12. Having set out further country of origin information, the author says:

> "The preceding country of origin information indicates that an apparatus is in place which seeks, *inter alia*, to prioritise the protection of civilians in the Democratic Republic of Congo, and constitutes the taking of 'reasonable steps' to provide protection, per Regulation 2(1). State is actively seeking to make improvements in how the police force operates and there are also a number of human rights organisations, as well as MONUSCO to assist the authorities in ensuring the rule of law. It is considered, therefore, that State protection in the Democratic Republic of Congo is a viable option for the applicant."

13. Further, and based on other country of origin information, the author says:

> "In any event, internal relocation within the Democratic Republic of Congo may be a viable and reasonable option for the applicant, as the following country of origin information, sourced from the United States State Department indicates."

14. The overall conclusion expressed by the author and therefore by the Minister in relation to the claim by the applicant that she will face torture or inhuman or degrading treatment is in the following terms:

> "Having considered country of origin information, and that abuses have been committed by elements of the State Authorities in that country, nevertheless, it is not accepted that the applicant would be without protection there, and nor would she be without the remedy of internal relocation within the country, were she to attempt to employ same. Further, it is not considered that the applicant would be at risk of any persecution by the State Authorities in Democratic Republic of Congo, on account of her alleged imputed political opinion. Therefore, it is not accepted that the applicant faces a real risk of torture or inhuman or degrading treatment in her country of origin."

15. Having reviewed the Minister's decision on the applicant's first claim that she would suffer inhuman or degrading treatment or torture, it is clear that no finding in respect of her credibility is made. The clear decision is that there is adequate protection or the possibility of internal relocation as an answer to her fears.

16. The Minister's decision then proceeds to deal with the second basis on which international protection is sought - fear of indiscriminate violence arising from armed conflict. Country of origin information is examined in connection with the claim. The Minister's response is that no such circumstances pertain and that state protection and/or internal relocation is available. The Minister's conclusion is that it is not accepted that the applicant runs a real risk of serious and individual threat by reason of indiscriminate violence in a situation of armed conflict.

17. The next paragraph of the decision is significant, stating:

> "However, notwithstanding the applicant's claim regarding abuse by the State forces, I have taken into account the credibility issues raised by the Refugee Appeals Tribunal (see section (viii) below) and country of origin information.
>
> Overall, and having regard to all the facts on file, I am not satisfied that the applicant has demonstrated that she is without protection in DR Congo and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by torture or inhuman or degrading treatment in DR Congo if she returned there."

18. As we shall see, section (viii) of the decision is a lengthy quotation from the negative conclusions of the RAT in respect of the applicant's credibility and is followed, in the Minster's decision, by the phrase:

> "Because of the doubts surrounding her credibility, the applicant does not warrant the benefit of the doubt."

19. Whilst the Minister and his officials appear (in section (viii) of the decision) to have regard to what they refer to as 'the doubts' about the applicant's credibility, in the part of the decision under review, the Minister and his officials say they take into account "the credibility issues raised by the RAT". My view is that the Minister meant that he was adopting the Tribunal's negative views as to the applicant's credibility.

20. The next section of the Minister's decision is described as follows:

"(ii) - relevant statements and documentation pertaining to the application (Reg. 5(1)(b))".

21. This part of the decision is in one line of text as follows: "Numerous documents have been submitted. All documents submitted and referred to have been read and given consideration".

22. Section 5(1)(c) of the Regulations is a rule which requires the Minister to take the following into account:

> "The individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm."

23. The personal circumstance relied on by the applicant as the basis of her fear of persecution is her marriage to a man whose politics attracted negative attention. In the short analysis at section (iii) of the decision this circumstance is not described. In addition, having set out a very brief précis of ethnicity, religion, language and number of children, the decision does not, as required by Regulation 5(1)(c), analyse whether the applicant has been or could be exposed to acts which would amount to persecution or serious harm, as defined. Instead, the decision, contains the following statement:

> "I have considered this information and find that on the basis of the applicant's personal circumstances, there is nothing that would prevent the applicant in this case from seeking protection from the authorities in DRC."

But the issue for decision under Reg. 5(1)(c) is whether the acts complained of constitute persecution or serious harm, not whether, if the acts complained of constitute persecution or serious harm, protection might be available. That is a separate question. The matters required to be considered by Reg. 5(1)(c) have not been considered in this section of the decision.

24. The next section of the decision is entitled:

> '(iv) - any activities since leaving the country of origin relevant to the claim'.

Nothing appears to turn on this part of the decision. There were no relevant facts about any activity on the part of the applicant since she left her country. Section (v) of the Minister's decision, which accords with Reg. S(1)(b), is entitled:

> 'Has the applicant already been subjected to 'serious harm' (as defined in Reg. 2(1))? (Reg. 5(2))'. This section of the decision is apparently addressed to take account of the provisions of Reg. 5(2) of the Regulations which provide as follows:
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> "The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

25. The Minister and his officials describe, in this section of the decision, the visits by the Presidential Guard to the applicant's home and the threats made to her. For the purpose of these proceedings, the response or analysis of the applicant's past persecution is in the following short sentence:

> "E. D-N is claiming that she has suffered treatment in DR Congo that would come within the definition of 'serious harm' as defined in Regulation 2(1). However, there are credibility issues as outlined at section (viii) below."

26. Section (vii) of the Minister's decision is entitled:

> '(vii) - Refugee status application, assessment and determination including any appeal therefrom.'

Unlike every other part of the decision under review, this section is not referable to any statutory provision and contains one line whereby the history of the applicant's application for refugee status is described.

27. Section (viii) of the decision is entitled:

> '(viii) - applicant's credibility and whether benefit of doubt should be given (Reg. 5(3)).'

28. As this section of the decision appears to be based upon Reg. 5(3), reference must first be made to that provision. One immediately sees that Reg. 5(3) is applicable only in limited circumstances. Its terms are as follows:

> "Where aspects of the protection applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met."

29. The Regulation then sets out the circumstances in which aspects of a claim do not need "confirmation". Section (viii) of the decision does not refer to the absence of documentation and circumstances in which aspects of the applicant's statements might not need confirmation. Instead, section (viii) of the Minister's decision, stated to be prompted by the requirements of Reg. 5(3), is merely a recitation of the decision of the RAT dealing with the applicant's credibility. About 50 lines from the RAT decision are quoted and one line of analysis then appears as follows:

> "Because of the doubts surrounding her credibility, the applicant does not warrant the benefit of the doubt."

That sentence represents the adoption by the Minister of all of the credibility findings of the RAT. It is difficult to see how this part of the decision achieves its stated purpose - weighing absence of documents and examining whether aspects of the applicant's narrative do not need confirmation.

The Effect of M.M. v. Minister for Justice

30. During the course of these proceedings it became clear that the decision of the European Court of Justice ("ECJ") in the case of *M.M. v. minister for Justice, Equality and Law Reform* (Case C-277/11) was directly relevant to the case herein. The case was

adjourned pending the delivery of the decision of Hogan J. in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9. Supplemental submissions in respect of the decision of Hogan J. in *M.M.* were usefully provided to the court by counsel and that remaining aspect of the case was heard on 2nd May 2013.

31. Counsel for the applicant, Mr. Hanrahan B.L., submitted that in this case it is indisputable that the Minister's assessment of the applicant's credibility is based entirely on the assessment made by the Refugee Appeals Tribunal and that he "relied completely on the adverse credibility findings which had been made by the Tribunal...and...made no independent and separate adjudication on these claims" as per Hogan J. in *M.M.* The applicant submits that this case is on 'all fours' with the *M.M.* judgment and points to the fact that in his assessment of the credibility of the applicant the Minister simply quoted verbatim from the Tribunal decision.

32. Further, the applicant claims that the Minister failed to make any reference to the documentary evidence produced in the form of an "Assignment Notice" which purported to show that she was at risk of arrest and detention in DR Congo. It was submitted that this was a failure to assess the evidence independently and separately and that no "completely fresh" assessment of credibility was made.

33. Finally, the applicant asserts that this court should not depart from the findings of Hogan J. in making its assessment in this case and refers to the dicta of Clarke J. in *Re Worldport Ltd* [2005] IEHC 189 in respect of the instances in which this court may overrule itself. Similarly, the applicant submits that despite the fact that the decision of Hogan J. in *M.M.* is currently under appeal to the Supreme Court, this court is nonetheless bound to follow the law as it stands "unless and until the Supreme Court were to decide otherwise" (*SZ (Pakistan) v. Minister for Justice* [2013] IEHC 95).

34. The respondent submits that Hogan J. erred in law and misapplied the decision of the ECJ. It is argued that Hogan J. failed to have regard for the legislative context in which the Qualification Directive sits and made incorrect findings as to how subsidiary protection applications should be determined. Counsel for the respondent submits that the subsidiary protection procedure is seen as being "complementary and additional" to the protection afforded under the Convention and that this is reinforced by the fact that a person is not eligible for subsidiary protection unless their asylum application has been assessed and refused. It is claimed that Hogan J. erred in deriving three obligations from the decision of the ECJ without noting that the ECJ expressly stated that the Qualification Directive doesn't seek to prescribe procedural rules applicable to the examination of an application for international protection. It is submitted that where a person's application for asylum is found to be fundamentally lacking in credibility and is thereby refused, an application for subsidiary protection based on the same assertions which underpinned the asylum claim is likely to fail for the same reasons. As such, it is argued that the Minister is not precluded, before rejecting an application, from relying in whole or in part of the findings made by the Tribunal. The respondent contends that Hogan J.'s interpretation of the ECJ decision has the effect of converting an application for subsidiary protection into a *de novo* appeal.

35. The respondent points out that the applicant in this case, making her claim for subsidiary protection, based it on the same assertions which underpinned her asylum claim which failed for lack of credibility. The Minister found the claims to be, once again, incredible and went further to consider that state protection and internal relocation were viable options for her. As such, the respondent claims that even if the Minister's approach to credibility was found to be flawed, his decision would remain valid on a severable basis. The respondent also claims that the Minister had regard to country of origin information which he concluded did not support the applicant's assertions that she would suffer serious and individual threat to her life. The respondent submits that in making his decision, the Minister was entitled to have regard to the findings of the Tribunal and to adopt those findings in respect of the application for subsidiary protection.

36. It is the view of this court that the decision of Hogan J. in MM is a clear enunciation of the requirements imposed on the Minister in assessing an application for subsidiary protection. I agree with the proposition that I am bound by the decision of Hogan J. in *M.M.* and that I could only depart from that decision if I formed the view that the decision resulted from error. While the court accepts that the bifurcated nature of the process in this State means that the subsidiary protection procedure is "complementary and additional" to that afforded under the 1951 Convention, it is clear that the procedure itself is distinct from the asylum process. It is not an appeal from the asylum decision of the Tribunal. The fact that an applicant for subsidiary protection must first have been refused refugee status demonstrates that while the separate procedures complement each other, they must be dealt with separately. It is my view that this is a case which is on 'all fours' with the *M.M.* decision, where Hogan J. states:

> "46. 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 and effective hearing at subsidiary protection stage, precisely because he relied *completely* on the adverse credibility findings which had been made by the Tribunal...and because he made *no independent and separate* adjudication on these claims.
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> 47. 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."

37. It would be a peculiar result if I were not to follow Hogan J. in MM given that he cites my own judgment in *Barua v. Minister for Justice and Equality* [2012] IEHC 456 stating that it had anticipated the decision of the ECJ in *M.M.* Adopting the same approach as Hogan J., I find that that the Minister failed to afford the applicant an effective hearing at the subsidiary protection stage. There was no independent and separate adjudication on the applicant's claims because the Minister relied completely on the adverse credibility findings which were made by the Tribunal. Further, it is the court's view that the Minister's findings in respect of the credibility of the applicant cannot be severed from his findings in relation to state protection and internal relocation in this instance so as to rectify the perceived flaw in the decision making process. For these reasons, I hold that the decision of the Minister must be quashed. In view of that finding it is unnecessary to address the other grounds of complaint advanced ably by counsel for the applicant.

38. I have concerns about the manner in which the decision sets out to follow the scheme of Regulation 5 but fails to do so. Decisions such as these ought to be clearly structured, easy to follow, logically argued and accord with the minimum standard described by Murray C.J. in *Meadows v. Minister for Justice* [2010] IESC 3 that: "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." and should not be "so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced." Between paragraphs 6 and 30 above I have commented on the decision and found it deficient for the reasons stated. But I do not condemn this decision because of these frailties, not least because they were not pleaded.

39. Finally, I question the utility of analysing country of origin information and the availability of state protection or internal relocation where the applicant's credibility is rejected. If officials believe that there is good reason to make additional decisions concerning state protection or internal relocation that might be prudent in an appropriate case. I agree with the dicta of Clark J. in *S.I.A. (Sudan) v. The Refugee Appeals Tribunal* [2012] IEHC 488 when she said:

> "18. The experience of the Court is that there is a tendency among protection decision makers to consider the availability of internal relocation even when the applicant's narrative is found implausible. In general, such abundance of 2006 (S.I. No. 518 of 2006) and Regulation 7(1) thereof, only works if the decision maker also adds words to the effect '*Even if I am wrong about my assessment and what the applicant says could be true, then moving to another area to escape her persecutors would be an option rather than seeking international protection*' or '*even if I had not made adverse credibility .findings and I accepted all that she says ...* ' Without words to that effect, the exercise is illogical in a claim which has been rejected on credibility grounds. No such qualifying words were used in this case."
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> "20...In the view of this Court, internal relocation has no logical part to play in a decision on protection if the claim is rejected on credibility grounds. If however, the decision maker wishes to go on to consider the option of internal relocation as an additional or alternative ground for refusing protection, then the decision maker must consult information on the relocation area identified and on the personal circumstances of the applicant. In the absence of such information, the availability of internal protection cannot properly be considered."

40. The Minister's decision is quashed because of the reliance placed on the credibility findings of the RAT.