[2012]IEHC 251

MR JUSTICE COOKE
APPROVED TEXT

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 734 J.R.]

BETWEEN

W. A. [DRC]

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 25th day of June 2012

1. In the motion before the Court the applicant seeks leave to apply for judicial review of a decision of the first named respondent of the 1st April, 2011, refusing the applicant's application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006, ("the 2006 Regulations") and of a deportation order subsequently made in respect of the applicant on the 15th July, 2011.

THE ASYLUM PROCESS.

2. The applicant is a national of the Democratic Republic of Congo (DRC) who arrived in the State in November 2009, and claimed asylum. In a report dated the 8th March, 2010, under s. 13(1) of the Refugee Act 1996 (as amended) the Office of the Refugee Commissioner gave a negative recommendation upon the asylum application. This recommendation was based upon the primary conclusion that the account given by the applicant as the basis of his fear of persecution lacked credibility. The authorised officers also concluded that, were his claim considered

credible, internal relocation within the DRC might not be a viable option for him by way of protection.

3. On appeal the negative recommendation of the Commissioner was affirmed by the Tribunal in a decision of 30th June, 2010. The applicant's claim to a fear of persecution was based upon his membership of and activities in a political organisation called the MLC and particularly his involvement in a demonstration in March 2007, following the national elections when the President of the MLC, Bemba, was considered to have won, but the incumbent, President Kabila, refused to hand over power. He claimed that he had been arrested following the demonstration and was detained for nearly two years in a prison camp where he was interrogated and tortured. He claims he escaped only because his sister was able to sell a house and give part of the proceeds to an army general who arranged his escape and introduced him to a Nigerian who brought him to Ireland through the United Kingdom. In a detailed consideration of the evidence given by the applicant, the Tribunal member also concluded that, while there was country of origin information confirming that such demonstrations had taken place, the applicant's claim to have been involved, to have been detained for two years and to have escaped in the manner described, lacked credibility.

4. In response to the Minister's letter under s. 3 of the Immigration Act 1999, the applicant applied for subsidiary protection on the 6th September, 2010, and made representations for leave to remain by letter dated the 30th August, 2010.

THE GROUNDS FOR REVIEW

5. In the statement of grounds dated the 11th August, 2011, a total of thirteen grounds are relied upon, some of which are directed at the refusal of subsidiary protection and others at the deportation order, while some appear to be common to

both. As counsel for the applicant accepted when moving the application, a number of these grounds raising issues of law have already been the subject of a number of judgments of the High Court and cannot, accordingly, be considered to raise either an arguable case or a substantial ground (as the case may be) for the grant of leave to seek judicial review of the subsidiary protection and deportation decisions respectively.

6. Thus, grounds 1, 2 and 3 are based upon the proposition that there has been a defective transposition of Council Directive 2004/83/EC of the 29th April, 2004, ("the Qualifications Directive") by the 2006 Regulations in the failure to stipulate that the assessment of an application for subsidiary protection by the first named respondent should be made "in cooperation" with the applicant. This argument has been rejected in a series of judgments including, for example, *Mayie v. The Minister for Justice* (Unreported, Cooke J. High Court, 27th July, 2011); *N.O. v. Minister for Justice* (Unreported, Ryan J. High Court, 14th December, 2011) and *O.J. v. Minister for Justice* (Unreported, Cross J. High Court, 3rd February, 2012). Furthermore, although the proposition was considered unfounded by Hogan J. in the case of *M.M. v. Minister for Justice* (Unreported, High Court, 18th May 2011), he referred a question for preliminary ruling by the Court of Justice in what has become case C-277/11 *M.M. v. Minister for Justice*. In that case the opinion of the Advocate General was given on 26th April 2012 and, while this is obviously not the definitive ruling of the Court on the reference, it is a clear indication that "cooperation" as used in Article 4 of the Directive does not require that a draft of a refusal decision be furnished to an applicant for comment. This Court pointed out in the above judgment in *Mayie*, in appropriate circumstances the basic principle of *audi alteram partem* will always apply even in the absence of a mention of "cooperation" in the Regulations. In the

present case no particular point or issue has been identified by reference to the decision on subsidiary protection which would have attracted the application of that principle.

7. Grounds 4, 5 and 11, raise issues based upon the proposition that the procedure for adjudicating upon applications for subsidiary protection in this jurisdiction fail to provide an "effective remedy" to an applicant contrary to Article 47 of the Charter of Fundamental Rights and Freedoms of the European Union, Article 13 of the European Convention on Human Rights; that the absence of a "full appeal" against a refusal decision infringes the principles of equivalence and/or effectiveness in European Union Law and is contrary to provisions of Articles 34 and 40.3 of the Constitution.

8. Again, these arguments have been considered in further case law of the High Court. (See, *inter alia, B.J.S.A. v Minister for Justice* [2011] IEHC 381, *N.O. v Minister for Justice* [2012] IEHC 472, *M.A.A. v Minister for Justice* (Unreported, High Court, Bimingham J. 24th March 2011 and *V.N. [Cameroon] v Minister for Justice* [2012] IEHC 62).

9. Ground 10, is based upon the proposition that as the application for subsidiary protection had been made "without prejudice" no decision on the application should have been made or at least not made without forewarning, until "judgments were available in the cases of *Dokie* and *Ajibola*". The exact basis for this proposition is by no means clear. The cases referred to are *H.I.D. v. The Refugee Applications Commissioner and Others* and *B.A. v. The Refugee Applications Commissioner and Others* which were decided by this Court in judgments given on the 9th February, 2011. As such, the judgments are available. Insofar as there is any matter outstanding in those cases, it arises from the fact that for the purpose of ruling on an

application for a certificate to appeal those cases to the Supreme Court, this Court made a reference for preliminary ruling to the Court of Justice of the European Union, under Article 267 TFEU and that case is currently pending before the Court of Justice as Case C-175/11 *H.I.D.* and *B.A. v. Refugee Applications Commissioner and Others*. The questions raised for ruling before the Court relate to the use of an accelerated procedure in determining asylum applications made by Nigerian applicants and, secondly, the status of the Refugee Appeals Tribunal in Irish law for the purposes of Article 39 of Council Directive 2005/85/EC of the 1st December 2005.

10. The first of those questions has no bearing upon the present case as the applicant is not a Nigerian national and his asylum application was not dealt with in an accelerated procedure. The second question is also immaterial to the present case, because its relevance, if any, goes to the validity of the appeal decision of the Tribunal and not to the decisions sought to be challenged in this proceeding. No application for judicial review of the appeal decision of the Tribunal in this case was sought at the relevant time.

11. Ground 13, argues that the decision makers "have taken into account irrelevant considerations and have failed to take into account relevant considerations" but no particular considerations have been identified for this purpose. The ground is therefore wholly lacking in the particularisation of the alleged flaw necessary to constitute a basis for the grant of leave.

12. Ground 7, claims that the decisions to refuse subsidiary protection and to issue the deportation order "were not proportionate or reasonable". So far as concerns the subsidiary protection decision, the Court is of the view that an issue of proportionality cannot be said to arise. Subsidiary protection is not a privilege which is in the gift of the respondent to be accorded or denied at his discretion. A quasi-judicial decision

can be bad in law as unreasonable because it is disproportionate where the measure adopted or step taken by the decision maker goes clearly beyond what is necessary or justifiable in order to secure the particular objective or policy envisaged in the relevant legislation. (See for example in the judgment of Keane J. (as he then was) in *Radio Limerick One Limited v. I.R.T.C.* [1997] 2 I.L.R.M. 1 at p. 20 and the judgment of Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701). Subsidiary protection is a form of international protection which, like the status of refugee, accrues to an individual who is found to be in one of the situations coming within the definition of "serious harm" in the 2006 Regulations. The conditions which determine whether the applicant is in such a situation are either found to be fulfilled or not. The question of the proportionality of refusing recognition of the existence of the situation does not arise.

PRELIMINARY OBSERVATIONS.

13. The remaining grounds are directed in various ways at the content of the analysis made and the reasons given in each of the decisions and particularly in relation to the refusal of subsidiary protection at the manner in which reliance has been placed upon "country of origin information" in discounting the risk which the applicant claimed he would face if repatriated to the DRC. The Court will deal with the remaining grounds taken together for that reason. Before doing so, however, it is necessary to make some preliminary observations.

14. The Court entirely accepts that when the first named respondent is required to process very large numbers of applications invariably made in narrative form and often accompanied by substantial amounts of documentation and information, it is not only permissible and desirable but necessary, that there should be in place efficient procedures designed to ensure that each application is thoroughly examined and that

the decisions reached are consistent. Such a system may involve a degree of standardisation of the decision-making process including a similarity in the format and layout used in setting out the analysis of applications and the statement of reasons for the conclusions reached.

15. Where, however, large numbers of applications are made requiring quasi-judicial decisions and are dealt with systematically using a standard form of approach to analysis and reasoning, it becomes all the more important that decision-makers take care to ensure that a reliance upon the system does not result in sight being lost of the individual and particular circumstances of each application and in a consequent failure adequately to address details of the specific case being made by each applicant. Routine and repetition in administrative decision making, as in judicial adjudication, heightens the risk that inadequate regard may be had to the unique circumstance of the individual case. Where the routine involves the repeated answering, seriatim, of the same questions, there is a danger that the decision maker may, even inadvertently, slip into the habit of treating each question, condition or heading to be considered in isolation and fail to stand back and assess the overall basis and cogency of the case as made in the application and to examine the adequacy of the overall response given to those separate elements when taken as a whole.

16. The Court feels it is appropriate to make these preliminary observations because it appears to be a characteristic of the determinations made on applications for subsidiary protection that applications are analysed and assessed systematically by reference to the matters required to be examined under the various sub-headings of the 2006 Regulations. Thus, the format of the determination follows the structure of the headings of matters to be taken into account by the decision maker as set out in sub-paras. (a) – (e) of para. (1) of Regulation 5 followed by by paragraphs (2) and (3).

Invariably too in the experience of the Court, although the determination always commences with a summary of the application made under the heading "Serious Harm Claimed" it is frequently difficult to avoid the impression that decision makers treat the obligation to take into account each of the matters covered by the headings (a) – (e) as adequately discharged by having recourse to country of origin information alone. Extensive quotations from such sources can be set out followed by a conclusion phrased in general terms along the lines that the information shows that there "is a judicial system in place" or that "there is a functioning police force" without any direct reply given to the specific detail of the precise threat alleged.

THE REMAINING GROUNDS

17. In the present case, taking first the decision on the subsidiary protection application, the remaining grounds directed at the analysis and conclusions and at the use made in them of country of origin information, as the case was argued in the course of the leave hearing, maintain in substance that the decision-makers in the case have fallen into this error of relying upon the mechanical provision of material relevant to the various sub-headings of Regulation 5, without actually addressing and providing responses to the precise basis upon which the applicant claimed that he would be exposed to a real risk of serious harm in the DRC.

18. It is necessary, therefore, to consider the particular terms upon which the application for subsidiary protection was made in the light of the analysis and assessment given in the determination dated the 1st April, 2011. The application was made on the form provided for in Schedule 1 to the 2006 Regulations, which sets out eleven headings of details or information to be supplied which were numbered in the form actually used as ss. 1.1 to 1.11. The material particulars for present purposes are those set out in headings ss. 1.7 to 1.11.

19. In section 1.7 all three types of "serious harm" as defined in the Regulations were invoked: death penalty or execution; torture or inhuman or degrading treatment or punishment; and serious and individual threat to a civilian's life or person by reasons of indiscriminate violence in situations of international or internal armed conflict.

20. In section 1.8 the applicant provided "All of the grounds relating to your circumstances upon which you are relying in support of your application for subsidiary protection" extending over eleven pages and comprising extensive quotations from various sources of country of origin information. Under the heading "Torture, inhuman or degrading treatment, or punishment" the applicant first reiterated the essentials of the personal history he had relied upon in claiming asylum and directed the Minister to "the evidence previously given in respect of the applicant's case and in particular to his notice of appeal and submissions in support of same". It was then asserted that the fear of risk of serious harm requiring international protection "pertains to his fear of the death penalty by the government of the DRC". This is said to be based upon his fear that if repatriated he would be again exposed to the risk of serious harm because of his involvement in the demonstrations in March 2007: "The applicant has stated his grave concerns regarding further periods of detention and incarceration in prison in the DRC should he be returned".

21. There then followed a series of quotations from reports describing the dire conditions prevailing in prisons in DRC, including the frequency with which women are raped in prisons, the numerous deaths of inmates that occur and the prevailing conditions of neglect and under-funding. These quotations, however, do not appear to contain any material which would substantiate the particular risk to the plaintiff in respect of which they are invoked namely, that he would be at risk of being