THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 979 J.R.]

BETWEEN

A.S.B. (GUINEA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of March, 2018

1. The applicant was born in 1978 in Guinea. In 1997 he fled to Guinea-Bissau, after some years went to Portugal, and then arrived in Ireland on 23rd April, 2006. He applied for asylum here on 24th April, 2006. That application was rejected on 5th July, 2006. The rejection was affirmed by the Refugee Appeals Tribunal on 17th February, 2009. On 22nd April, 2009 he applied for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006).

2. On 7th July, 2009 he left the State and applied for asylum in the United Kingdom. On 1st September, 2009 he was transferred back to the State under the Dublin II regulation (Council Regulation (EC) No 343/2003 of 18 February 2003). In November, 2011 he left the State again and reapplied for asylum in the United Kingdom. He was moved from Belfast to Wales and on the 13th December, 2011 a second take-back request was made to the United Kingdom under the Dublin II regulation. On 20th December, 2011 that request was accepted under art. 16(1)(e) of the Dublin II regulation. The applicant was due to be transferred on the 20th January, 2012 but brought legal proceedings in the United Kingdom challenging the transfer decision. Those proceedings were dismissed.

3. In the meantime, on 17th December, 2012, the Minister refused the subsidiary protection application. On 17th January, 2013 a deportation order was issued against the applicant. On 26th June, 2013 the Dublin III regulation (Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013) was enacted. On 14th November, 2013 the European Union (Subsidiary Protection) Regulations 2013 came into force. The applicant was transferred back to the State on 20th March, 2014.

4. On arrival he was refused leave to land under s. 4(3)(g) of the Immigration Act 2004. He was detained in Cloverhill Prison for a period of 51 days.

5. On 10th April, 2014 he sought to make a new asylum application but did not have the Minister's permission to do so. In June, 2014 he stated that he wished to return to Guinea. On 23rd October, 2014 he informed the Minister that he had changed his mind and that he intended to apply to re-enter the protection process and seek to revoke the deportation order. On 6th February, 2015 an application under s. 3(11) of the Immigration Act 1999 was made and on 11th March, 2015 he applied for re-admission to the protection process under s. 17(7) of the Refugee Act 1996. On 3rd November, 2015 the s. 17(7) application was withdrawn and the applicant applied for permission to remain in the State.

6. On 30th June, 2017 the Minister notified the applicant that the s. 3(11) application had been refused. On 25th August, 2017 and 16th October, 2017 the applicant sought information from the Minister regarding the applicant's alleged entitlement to appeal the subsidiary protection refusal. The Minister replied to the effect that correspondence in that regard should be addressed to the IPAT. On 1st November, 2017 the applicant's solicitors wrote to the IPAT in that regard. The IPAT replied on 6th December, 2017 indicating that they had no jurisdiction to accept such an appeal and sent a further, more detailed, letter on 19th December, 2017 setting out the position. It should also be noted that the applicant had at one stage received a six- month suspended sentence for using a false passport.

7. On 15th January, 2018, leave was granted, papers having been filed on the 13th December, 2017. I have heard helpful submissions from Ms. Rosario Boyle S.C. (with Ms. Marie Flynn B.L.) for the applicant and Ms. Emily Farrell B.L. for the respondent.

Relief sought

8. The primary relief sought is an order of *mandamus* requiring the respondents to process the alleged appeal against the refusal of subsidiary protection pursuant to the Dublin III Regulation. A related declaration is also sought. There is also a declaration sought that the deportation order is now of no legal effect because the State took the applicant back pursuant to the Dublin process.

Application to amend

9. On the morning of the hearing, Ms. Boyle applied to amend the statement of grounds. I rejected that application because:

(i) there was no sufficient evidential basis for the delay in making the application in the particular circumstances;

(ii) the amendment would have required an amended statement of opposition;

(iii) that would have derailed the hearing;

(iv) the application was made on the day of the hearing itself which put the derailing of the hearing in a more significant context;

(v) it would have necessitated a separate hearing of the injunction and the substantive proceedings which would have nullified the order I previously made that the two be listed together; and

(vi) there was no reason apparent as to why the amendment was not made shortly after 23rd February, 2018 when the grounds for the bulk of the proposed amendments arose.

10. Notwithstanding those factors, I would have facilitated Ms. Boyle in seeking the amendment if it had been moved in a way that

would not have wasted the court's time, namely if the applicant had been agreeable to the injunction application also being adjourned, but Ms. Boyle was not so agreeable; so the only option under those circumstances was to refuse the amendment and to proceed with the substantive hearing.

Primary issues
11. The IPAT position as set out in the disputed letter of December, 2017 is essentially that:

> (i) the applicant is not an applicant within s. 70 of the International Protection Act 2015 or reg. 2(1) of the European Union (Subsidiary Protection) Regulations 2013; and
>
> (ii) insofar as there is any argument that the applicant enjoys rights under art. 18 of the Dublin III regulations, the IPAT cannot expand its own jurisdiction beyond what is provided for by statute.

12. The applicant's primary argument seems to be that:

> (i) the IPAT is incorrect that the applicant is not covered by the 2013 regulations; and
>
> (ii) alternatively, that there is a deficit in the implementation of art. 18 of the Dublin III regulations on which the applicant is entitled to rely.

Does the applicant come within s. 70 of the 2015 Act or the 2013 regulations?
13. Ms. Boyle accepts in submissions that the applicant is not within s. 70 of the 2015 Act as the subsidiary protection application had already been refused before the commencement of the 2013 regulations. The applicant is clearly not an applicant under those regulations either.

Does the applicant have the direct right under Dublin III to an appeal against the subsidiary protection decision?
14. Article 18(2) of the Dublin III regulation provides for a right of "*effective remedy*" where there is a refusal at first instance only in respect of persons whose applications are covered by the take-back procedure under art. 18(1)(d). The Dublin III regulation applies to any request to take charge of an applicant made after 1st January, 2014 (see art. 49). Any prior application is dealt with under the Dublin II regulation.

15. Here the take back request was made before the making of the Dublin III regulation, let alone the effective date of 1st January, 2014, so Dublin III simply does not apply. It is clear that the Dublin II regulation continues to apply – see art. 49, second paragraph, second sentence of Dublin III. A necessary consequence is that the European Union (Dublin System) Regulations 2014 (S.I. 525 of 2014) do not apply.

16. An argument is made on the basis of reg. 14 of the 2014 regulations, but that only applies to a person to whom art. 18(1)(d) of the Dublin III regulation applies, which is not this applicant.

17. The applicant also launched a totally misconceived point based on art. 48 of Dublin III regarding the repeal of Dublin II. Article 48 provides that: "*References to the repealed Regulation or Articles shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.*" That means references in any other EU legislation. It cannot mean references in the repealed legislation itself, which would make absolutely no sense. This is precisely what Hailbronner and Thym say in *EU Immigration Asylum Law*, 2nd edn. (C.H. Beck/Hart/Nomos, 2016) in Part D (vi) by Constantin Hruschka and Francesco Maiani at p. 1604 where they refer to the adaptation "*without the need to change all other EU legislative acts that refer to the repealed Dublin II Regulation*".

Is there a right of appeal under the European Union (Dublin System) Regulations 2014?
18. This point is not pleaded but in case it be thought that I should have dealt with it, it is clear from the wording of reg. 14(2) and (4) of the 2014 regulations that they only apply to someone covered by reg. 14(1) which in turn only applies to someone covered by Dublin III as follows from reg 14(1)(a). As Dublin III does not apply to this applicant, no rights under reg. 14 can apply to him either.

IPAT cannot expand its own jurisdiction
19. Even if I am wrong about all of the foregoing, the applicant is not entitled to relief against IPAT. No basis was made out to show any illogically or illegality in its position that it cannot expand its own jurisdiction contrary to the statute.

Declaration regarding the status of the deportation order
20. The fact that the applicant's wrongdoing required him to be returned to the State under the Dublin System is not a basis on which it can rationally be said that the deportation order is of no legal effect. The validity of the deportation order is not undermined by the reception back of the applicant insofar as that is required by EU law. In any event, even if there was some infirmity in that regard, those grounds arose when the applicant was taken back. The point cannot be raised years later outside of the time limits of O. 84 and s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

Discretion
21. Even if I am wrong about all of the foregoing, I would refuse relief on the basis of discretion based on the applicant's delay and conduct. As regards delay and laches, he failed to take proceedings regarding the alleged right of appeal between his transfer to the State on 20th March, 2014 and the filing of these proceedings on 13th December, 2017. As regards conduct, in that period he lodged an application for readmission to the protection process. That is inconsistent with the claim now made that the subsidiary protection process was ongoing and not finalised at that point. It is not contrary to European Union law to apply discretion in a manner consistent with the principles of equivalence and effectiveness, which is the position here.

Suggested reference to the CJEU
22. At the very close of her submissions, Ms. Boyle floated the possibility of a reference to the CJEU. However, the point at issue here is a very net and indeed a very clear point. It has been complicated significantly on behalf of the applicant in the proceedings; but on examination it is clear that the point has no substance whatsoever. The interpretation I am upholding is consistent with European opinion as set out in Hailbronner and Thym. No basis for any doubt that would warrant a reference has been demonstrated. In European terms it is *acte clair*. The applicant's entire argument is simply fundamentally misconceived.

Injunction

23. The injunction does not arise as the proceedings are being dismissed.

Order
24. For the foregoing reasons the motion and the substantive proceedings are dismissed.

Postscript – application for post-dismissal injunction
25. Following delivery of the foregoing judgment Ms. Boyle applied for an order that the injunction continue. In relation to that application, there is ample authority to the effect that an indirect attack on a deportation order is also covered by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (see *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016) at para. 62 citing the decision of Clark J., as he then was, in *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 142) and insofar as that principle applies to the declaration regarding the deportation order here the applicant would first have to put in motion some form of procedure to apply for leave to appeal, which he has not done.

26. The basis of the injunction seems to be to restrain deportation, so in the absence of demonstration of such an intention to apply for leave to appeal it does not seem to me that I can go down that road, but if I am wrong about that, the point made by the applicant simply has no substance whatsoever and is a complete misunderstanding of the Dublin III regulation. There is simply no ground for an injunction on the basis of an intention to advance this point. In terms of the equitable nature of any injunction I also take into account the extraordinary abuse of the protection process by the applicant who is a person in a very poor position to seek equitable relief. So having regard to those factors, and all of the factors set out by the Supreme Court in *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152, *per* Clarke J., as he was then, it seems to me that the balance of justice is very much against an injunction at this particular point in time.