THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 865 J.R.]

BETWEEN

S.W.I.M.S. (NIGERIA)

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, A.B.S.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of April, 2018

1. The applicant was born in the State in September, 2010. His parents applied on his behalf for asylum in October, 2010. In February, 2011, asylum was refused. In March, 2011, an application for subsidiary protection and leave to remain was made. Those applications were refused in July, 2011 and a deportation order was made on 9th August, 2011. Th applicant was then deported.

2. The present proceedings were filed on 16th September, 2011, although leave was not granted until I dealt with the matter on 9th October, 2017, when I also gave leave to add additional grounds.

3. I have heard helpful submissions from Mr. Paul O'Shea B.L. for the applicant and Mr. Anthony Moore B.L. for the respondent.

Relief sought
4. The primary substantive relief is *certiorari* of the subsidiary protection refusal and the deportation order.

The boilerplate nature of the claim
5. The application re-runs legal points which previously failed in *N.M. v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018) and *F.M. v. Minister for Justice and Equality* (Unreported, High Court, 17th April, 2018) and I follow those decisions here.

6. It seems to me that the entirely boilerplate nature of the grounds advanced was not acceptable even prior to the Rules of the Superior Courts (Judicial Review) 2011. But even if I am wrong about that I consider that the rules do in fact apply here. I note that Mac Eochaidh J. in *M.A. v. Minister for Justice & Equality* [2015] IEHC 287 (Unreported, High Court, 6th May, 2015), indicated at paras. 30 and 31 that vague pleadings might be acceptable if they predated the 2011 rules of court. He, therefore, took a "*generous*" view, but that was in a case where he was minded to grant relief in any event. It seems to me one could possibly take a generous view of infirmities in pleadings in the interests of justice if an applicant has a good point, depending on all the circumstances, and perhaps *vice versa*.

7. Here, however, leave was granted after the 2011 rules came into force. Especially in circumstances where an applicant has taken advantage and benefit of the lapse of time between filing the proceedings and the grant of leave to seek an amendment at the leave stage after proceedings were issued, it is not appropriate to allow the applicant to simultaneously claim exemption from the new rules. Mr. O'Shea makes the jaded submission, rejected on many previous occasions, that domestic law such as rules of court should be disapplied if an EU law point is raised. That submission is misconceived; all domestic rules apply to EU law claims subject only to the principles of equivalence and effectiveness. I do not read Mac Eochaidh J's judgment in *M.A.* as being to the contrary.

Fact-specific grounds
8. Apart from the legalistic points already rejected, Mr. O'Shea says that the fact-specific grounds are ground 8, that country of origin information was read selectively and the conclusions were irrational, and ground 13, that the country material was insufficient, read selectively and not made available until after the hearing, a point already rejected in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109, *per* O'Donnell J.

9. His main point, as he articulates it, is an inadequate assessment of country material regarding State protection in respect of Muslim fanatics. The issue of State protection is specifically dealt with by the Minister in the decision. Mr. O'Shea complains that material regarding police unlawful conduct is not read in favour of the applicant but there is no obligation to read material in the most favourable way for an applicant.

10. Few countries, particularly very large countries, are ones where all police forces are blameless; and indeed Nigeria, having significant internal conflict, is almost bound to have more serious instances of irregularities on occasion. I would follow the approach of Birmingham J. in *G.O.B. v. Minister for Justice & Equality* [2008] IEHC 229 (Unreported, High Court, 3rd June, 2008), where he said at para. 26 "*one must appreciate that the Minister and his officials are not coming to this issue as total novices. A great number of other cases will have raised issues about seeking assistance from the Nigerian police. Those officials who deal with these issues must be considered to have acquired a broad familiarity with the general perception of the Nigerian police force*." He went on to refer to a British-Danish Joint Report which accepted that State protection is available from the police force and "*the principle accepted both domestically and internationally that absent clear and convincing proof to the contrary, a state is to be presumed capable of protecting its citizens"* (para. 28, citing *Canada (AG) v. Ward* [1993] 2 S.C.R. 689, *H.O. v. Refugee Appeals Tribunal& Anor* [2007] IEHC 299 (Unreported, Hedigan J., 19th July, 2007) and *O.A.A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 169 (Unreported, Feeney J., 9th February, 2007)).

11. It seems to me that the Minister and his officials' working knowledge of whether particular countries have an operating rule of law must be taken into account and there must be some reality to the court's review of such matters. There is no obligation on the

Minister or any decision-maker to write a legal or factual essay.

12. The Minister's conclusion in relation to the availability of protection and the availability of a functioning police force and judicial system and the working of the rule of law does not seem to me to be an unreasonable conclusion either in the legal sense or indeed in any other sense I can discern.

Failure to make the points now made to the decision-maker
13. In any event, the applicant's submission seeking subsidiary protection and leave to remain did not argue that there was no functioning police force and judiciary in Nigeria. As Mr. O'Shea puts it "*I accept what was submitted was not the best*". The case illustrates a wearingly familiar attempt by an applicant to retrospectively reprogramme their case and make points to the court that were never made to the decision-maker.

14. I previously called this a gas-lighting of the decision-maker. To mix the metaphor, it is an attempt to send the keeper one way with the application itself and then try to kick the ball into the opposite and open side of the net when before the court. No system could operate on that basis: see *T.M. v. Refugee Appeals Tribunal* [2016] IEHC 469 [2016] 7 JIC 2925 (Unreported, High Court, 29th July, 2016), *Jahangir v. Minister for Justice* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018) at para. 7, *J.M.N. (a minor) v. Refugee Appeals Tribunal* [2017] IEHC 115 [2017] 2 JIC 2710 (Unreported, High Court, 27th February, 2017), *Igbosonu v. Minister for Justice and Equality (No. 2)* [2017] IEHC 748 [2017] 12 JIC 0503 (Unreported, High Court, 5th December, 2017), *H.E. (Egypt) v. Minister for Justice and Equality (No. 3)* [2017] IEHC 810 [2017] 12 JIC 1304 (Unreported, High Court, 13th December, 2017).

15. All the applicant has going for him is para. 66 of the judgment of the CJEU in Case C-277/11 *M.M. v. Minister for Justice & Equality* ECLI:EU:C:2012:744, that if an applicant fails to produce appropriate material, the State must seek all the appropriate elements. That does not mean that a decision must automatically be quashed if there is some shortcoming in the State's efforts to gather or analyse information not put before it by the applicant.

16. Mr. O'Shea submits that if there is a shortcoming in the Minister's analysis, it makes no difference if that shortcoming relates to analysis of the material the Minister had to come up with by himself, or whether it comes from a failure to appreciate a point specifically put before him by an applicant. I'm afraid I cannot agree. That would not lead to a workable system. Such an approach would mean that an applicant would not need to engage with the system at all, could serve up any old rubbish to the Minister and then sit back and pick apart the Minister's efforts to investigate the situation, which efforts would have been conducted without any help or input from the applicant.

17. The Minister must have a margin of appreciation. The extent of that margin of appreciation must be determined having regard to all the circumstances, and the failure of an applicant to make a point that is later relied on is one of those circumstances.

18. It may conceivably be that the Minister's passing reference to protection available from NGOs was not all that focused on the legal issue directly involved (in the sense that protection from NGOs is not to be equated legally with State protection), but given the failure of the applicant to engage, in the course of the application, with the question of State protection at all, it could not be appropriate to quash the decision on that ground even if one took the view that that particular point was somewhat unfocused. Anyway, this specific issue is not pleaded.

19. Various points were also made about internal relocation but that does not seem to be the basis of the decision, and that issue was not pleaded either. Issues that are not pleaded could not be a basis to quash the decision.

20. The case is, to an extent, a melancholy illustration of a number of tendencies that are of almost unholy prevalence in the asylum, immigration and citizenship list. It is a witches' brew of :

(i) making points to the court that were never made to the decision-maker;

(ii) completely boilerplate pleadings that fail to make any fact-specific allegations;

(iii) identical pleadings used in a whole series of cases, one after another;

(iv) reiteration of points previously rejected in case-law, sometimes multiple times;

(v) wide-ranging submissions unharnessed from the points pleaded; and

(vi) a micro-specific critique of isolated sentences in a lengthy decision combined with a failure to situate that critique within the context of the decision as a whole.

21. For the judicial branch of government to indulge any, still less all, of these approaches would lead to perverse results. The interests of a workable legal system would suggest that such indulgence should not be afforded.

Order
22. The application is dismissed.