THE HIGH COURT

JUDICIAL REVIEW

[2011 751 J.R.]

BETWEEN

F.M. (DEMOCRATIC REPUBLIC OF CONGO)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of April, 2018

1. The applicant applied for asylum on 23rd September, 2008 on the basis of his half Tutsi ethnicity being a ground for his persecution in the Democratic Republic of Congo. The Refugee Applications Commissioner found that that application was lacking in credibility and implausible and even assuming that it was true that the applicant was not on his own account a subject of interest to the authorities. That is set out in a report dated 24th February, 2009. The applicant appealed to the Refugee Appeals Tribunal, which rejected the appeal on 26th April, 2010 finding that there were inconsistencies in the applicant's account, that the account was incredible in a number of respects and that the applicant had submitted a birth certificate with a different date of birth from that originally given. The tribunal also found, having considered the country information, that it had not been established that there was a well-founded risk that the applicant would face persecution if returned to the DRC. The Minister then refused a declaration of refugee status on 25th June, 2010. On 14th July, 2010 the applicant applied for subsidiary protection and also around the same time applied for permission to remain in the State by way of representations under s. 3 of the Immigration Act 1999. On 29th April, 2011 the subsidiary protection application was rejected having regard to country of origin information. It was found that ethnic Tutsis did not face any particular risk of mistreatment and indeed made up a significant percentage of holders of prominent roles in public office in the DRC. Furthermore, the Refugee Appeals Tribunal findings in relation to credibility were accepted and the applicant was held not to be credible. The Minister then made a deportation order against the applicant on 22nd June, 2011.

2. The subsidiary protection refusal and the deportation order are now challenged in these proceedings and I have heard helpful submissions from Mr. Paul O'Shea B.L. for the applicant and Mr. Daniel Donnelly B.L. for the respondent.

Ground 1 – Failure to furnish a draft decision in breach of the requirement to cooperate with the applicant under directive 2004/83/EC
3. Mr. O'Shea accepts that the core of this ground was rejected by the CJEU in Case C-277/11 *M.M. v. Minister for Justice and Equality*, ECLI:EU:C:2012:744 (22nd November, 2012) and subsequently by Hogan J. in *M.M. v. Minister for Justice and Equality* [2013] IEHC 9 [2013] 1 I.R. 370.

4. Mr. O'Shea goes on to seek to interpret ground 1 to mean that the Minister failed to consider updated country material notwithstanding the applicant's failure to furnish such material. It seems to me that allegation is not pleaded and falls outside the scope of the ground (see O. 84 r. 20(3) which now embodies the principle). Thus the point made by the CJEU in Case C-277/11 *M.M.* at para. 66 that the member state must assemble the elements needed to substantiate an application if an applicant fails to do so does not arise.

5. But if it does arise, this does not mean that the State then has to share this additional material with an applicant prior to the decision. It is well- established caselaw that "*mainstream*" country of origin material does not have to be so shared; see *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109. No failure under this heading has been made out.

Ground 2 – Breach of minimum standards set out in the qualification directive
6. As pleaded, this is a repetition of the first ground. Mr. O'Shea argues that there was a lack of attention to the effectiveness of laws in the DRC, as opposed to their existence. Failure to examine the effectiveness of the laws is not pleaded.

Ground 3 – Non-transposition of directive 2004/83/EC
7. Under this heading it is argued that the sentence in the qualification directive regarding the duty to cooperate with an applicant is not transposed in S.I. 518 of 2006. That omission does not necessarily mean the directive has not been transposed effectively. The obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance. Indeed, Mr. O'Shea accepts that language such as "*in cooperation with the applicant*" does not readily lend itself to transposition in a common law system. The State continues to have the EU law duty to cooperate. The applicant is not injured by the wording of the regulations whatever about the decision itself, and therefore is not entitled to relief.

Ground 4 - Failure to provide an effective remedy
8. This argument has been rejected by the Court of Appeal in *N.M. (DRC) v. Minister for Justice and Equality* [2016] IECA 217 [2016] I.L.R.M. 369 and by the Supreme Court in *A.A.A. v. Minister for Justice and Equality* [2017] IESC 80 (Unreported, Supreme Court, 21st December, 2017), *per* Charleton J. What is alleged to be a new point is submitted as arising from the reference to the CJEU in case C-89/17 *Secretary of State for the Home Department v. Banger.* The issue in that case was whether art. 47 of the Charter of Fundamental Rights of the European Union was complied with by the availability of judicial review in the case of entry or residence decisions for family members. Advocate General Bobek at para. 103 of his opinion says that for the purposes of art. 47 the body providing the effective remedy must be able to consider "*all the questions of fact and law that are relevant to the case before it".* That is the case regarding judicial review. He concludes that "*it is for the competent national court to ascertain whether the system of judicial review available under national law complies with that requirement".* Here, judicial review allows for review of all questions of fact and law. Admittedly it does not allow the court to simply substitute its own view as to questions of fact as an appeal by way of re-hearing would. The question, however, is not whether an appeal procedure which did not exist here is desirable or not, but whether judicial review amounts to an effective remedy, which it does. Indeed Charleton J. in *A.A.A. v. Minister for Justice and Equality* [2017] IESC 80 (Unreported, Supreme Court, 21st December, 2017) at para. 38 specifically rejects the argument that a breach of art. 47 arose.

9. Insofar as Mr. O'Shea argues that he is entitled to an *ex nunc* examination of the application, he submits that the recast procedures directive can be useful in interpreting the original directive in certain respects: see *F.I. v. Governor of Cloverhill* [2015] IEHC 639 [2015] 10 JIC 2103 (Unreported, High Court, 21st October, 2015) and *S.H.M. v. Minister for Justice and Equality* [2015] IEHC 829 [2015] 12 JIC 2115 (Unreported, High Court, 21st December, 2015). However, that only applies where a recast directive is declaratory by way of clarifying ambiguities, not where the recast directive introduces positive amendments which are clearly designed to change the procedure. Reliance on declaratory elements of the recast procedures directive to clear up ambiguous questions is not to be equated with the idea that the directive can simply be applied even though the State has opted out of it. The argument is fundamentally misconceived. If there was any entitlement to an *ex nunc* examination, the Supreme Court would have decided *A.A.A.* differently.

10. Mr. O'Shea then raised a related point that because the Irish procedure does not allow the applicant to be granted subsidiary protection by the court and because the court is confined to setting aside any flawed decision he has been denied an effective remedy. I rejected a related argument in *Lingurar v. Minister for Justice and Equality* [2018] IEHC 96 [2018] 2 JIC 0808 (Unreported, High Court, 8th February, 2018). The applicant has not demonstrated that it would be an ineffective remedy, if the decision is found to be flawed, to send it back to the decision-maker with a judgment setting out the parameters for reconsideration. The conclusion of all the foregoing is that judicial review is an effective remedy.

Ground 5 – Lack of an appeal of the subsidiary protection decision breaches the principle of effectiveness
11. Mr. O'Shea has dropped the equivalence argument. Insofar as the effectiveness argument is concerned this is essentially a repeat of ground 4.

Ground 6 – Failure to have regard to representations
12. It follows from the judgment of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] I.L.R.M. 401 that the onus is on an applicant to show that representations were not taken into account, which the applicant has failed to do here. How the decision-maker dealt with the representations as opposed to failing to have regard to them is not covered by this ground as pleaded.

Ground 7 – Disproportionality and unreasonableness
13. Mr. O'Shea is not arguing disproportionality regarding subsidiary protection. Nonetheless, ground 7 as pleaded packs in four fairly massive arguments in the space of one single sentence;

(a) that the subsidiary protection decision was disproportionate, admittedly now abandoned,

(b) that the subsidiary protection decision was unreasonable,

(c) that the deportation order was disproportionate and,

(d) that the deportation order was unreasonable.

14. It is not open to the court to grant relief on the basis of such an extremely vague pleading, where each and every element of those four massive arguments is totally unparticularised. In any event as regards proportionality in the deportation order context, the Minister has a margin of appreciation as set out by Clarke J., as he then was, in *A.M.S. v. Minister for Justice and Equality* [2014] IESC 65 [2015] 1 I.L.R.M. 170 , see in particular para. 7.15: see also *Sivsivadze v. Minister for Justice, Equality and Law Reform* [2015] IESC 53 [2016] I.R. 403 [2015] 2 I.L.R.M. 73.

15. The failure to specify in the pleadings in what respect a decision is alleged to be unreasonable or disproportionate is, as I say, in any event, fatal to granting relief under this heading. In particular, Mr. O'Shea relies on the judgment of McDermott J. in *S.S.L. v. Minister for Justice and Equality* [2013] IEHC 421 (Unreported, High Court, 10th September, 2013), holding that a finding that there was a rule of law in operation in Kinshasa was unreasonable in the context of that case. That point is simply not pleaded here and at one level it is strange that a mass of legalistic generality is served up to the court without any case-specific reference to what he now claims is factual unreasonableness. It seems to me that it is not open to me to grant relief under this heading as sought by the applicant.

Ground 8 – Representations and country material were read selectively against the applicant's interest
16. Insofar as this ground pleads irrationality it is a repeat of ground 7. There is no obligation to read material in favour of an applicant's interest nor is there an obligation to read the material in the most favourable manner for an applicant. The applicant has failed to demonstrate an unlawfully selective reasoning for these purposes.

Ground 9 – Failure to consider representations
17. This is a repeat of ground 6.

Ground 10 – Challenge to limitation period for judicial review
18. Time does not seem to be hugely objected to in the present case, so the point does not seem to arise, but in case I am wrong about it not being an issue I would comment as follows. Insofar as this ground relates to s. 5 that is not relevant to the challenge to the subsidiary protection decision as it was not covered by s. 5 at that time. Two alleged difficulties are identified in relation to the limitation period, either s. 5 or O. 84 of the Rules of the Superior Courts. The first is the allegation that time cannot run until directive 2005/85/EC is implemented. Mr. O'Shea says that only arises if he was out of time in bringing the challenge to the subsidiary protection decision but that does not arise here because the challenge seems to have been initiated within time in relation to that aspect of the case. Secondly, he says s. 5 is not in compliance with the principles of equivalence and effectiveness. He accepts that the deportation order is largely not covered by EU law except, he says, insofar as relates to art. 19 of the Charter regarding *non-refoulement*. However I should clarify by way of postscript that that is a misunderstanding of the Charter. Article 19 does not make deportation decisions by member states into EU law-based actions merely because *refoulement* is considered. Article 19 only applies where the member states are independently applying EU law – see art. 51.1. It is not a boot-strapping provision that turns purely domestic deportation decisions into EU law decisions. Thus art. 19 is only relevant where the expulsion process is itself EU law-based, such as in the EAW, removal order or Dublin system contexts. Common or garden deportation including *refoulement* decision-making remains a purely domestic process entirely outside the realm of EU law.

19. This point has already been rejected by the Supreme Court in *T.D. v. Minister for Justice and Equality* [2014] IESC 29 *per* Fennelly J. Mr. O'Shea relies on the judgment of the CJEU in Case C-429/15 *Danqua v. Minister for Justice and Equality* ECLI:EU:C:2016:789 (20th October, 2016) but that is a totally different situation. The CJEU held in *Danqua;* at para. 46 that a "*particularly short*" period to make an application did not in practice afford a genuine opportunity to submit an application. As usual in

the immigration universe there is an attempt to generalise any fragment of favourable jurisprudence to seek to argue that any short limitation period in any context is automatically a breach of EU law. That unfortunately does not follow. We are not dealing here with time to make an application as in *Danqua*, that has already been done. Having made the application and received a decision we are dealing now with time to challenge that decision. It has not been shown that the time limit in s. 5 deprives applicants of a genuinely effective remedy.

Ground 11 – Judicial review is an ineffective remedy
20. This is a repeat of ground 4. Mr. O'Shea has tagged on a challenge to common law rules but that does not make the point significantly different.

Ground 12 - Country of origin information was insufficient, not up to date, read selectively and not made available until after the decision.
21. Five separate unparticularised grounds are packed into one single sentence here.

> (i). That the country material was insufficient. That is primarily a matter for the decision-maker.
>
> (ii). That it was not up to date. That has not been demonstrated.
>
> (iii). That it was read selectively. That has not been demonstrated.
>
> (iv). That it was read against the applicant's interest. There is no obligation to read such material in favour of an applicant.
>
> (v). That the material was not made available until after the decision. There is no obligation to give an advance preview of "*mainstream country of origin information"* as found in *Y.Y.*

Again here the complaint is totally unparticularised and relief is not open to an applicant on a pleading that fundamentally fails to comply with basic requirements of particularity, as now embodied in O. 84 r. 20. Furthermore, in any event, much of the country material was similar to that presented by the applicant himself in the context of his s. 3 application so the point does not in fact really arise.

Ground 13 – No proper consideration given to the applicant's medical report.
22. Consideration of material submitted is quintessentially a matter for the decision maker.

Ground 14 – The decision-maker took into account irrelevant materials or failed to consider relevant materials
23. Again, this complaint is totally unparticularised. In any event it has not been made out. While it may be the case that some of the material considered related to areas other than Kinshasa that does not mean the decision is invalid, particularly where the applicant himself submitted similar material in the context of the s. 3 process.

Ground 15 – By confining a right to apply for subsidiary protection to a circumstances in which the entitlement to remain is expired the 2006 regulations imposed a disadvantage on a subsidiary protection application contrary to EU law
24. I have already rejected that point in *N.M. v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018) following *V.J. and M.L. v. Minister for Justice and Equality* [2017] IEHC 570 (Unreported, McDermott J., 20th June, 2017).

Ground 16 – Failure to allow an opportunity to address issues of credibility
25. Mr. O'Shea accepts that that is a variant of the "*give us a draft decision*" argument rejected by the Supreme Court in *M.M. v. Minister for Justice and Equality* [2018] IESC 10 (Unreported, Supreme Court, 14th February, 2018), *per* O'Donnell J.

Ground 17 - Failure to allow an opportunity to comment on adverse credibility findings
26. The same point applies here.

Ground 18 – Failure to provide a completely fresh assessment of the applicant's credibility on all matters relating to a subsidiary protection application.
27. The same point applies here.

Ground 19 – The fact that the Refugee Appeals Tribunal had already ruled adversely to the applicant's credibility did not suffice or should not be considered relevant.
28. This is not a case where the tribunal decision is held to suffice and the Supreme Court has already rejected the argument that such a decision should be considered irrelevant in its judgment in *M.M.*

Ground 20 – Enmeshment and independence
29. Insofar as enmeshment of the deportation and subsidiary protection processes is concerned, this is a rehash of previous grounds. In any event both of these points were rejected in *M.L.* by McDermott J. and by me in *N.M.* The judgment of the CJEU in Case C-604/12 *H.N. v. Minister for Justice and Equality* (8th May, 2014) ECLI:EU:C:2014:302 was also to the contrary.

***S.S.L.* case**
30. If I am wrong about whether the applicant can rely on the point as to the alleged unreasonableness of the finding of a lack of general civil disorder in Kinshasa, or perhaps more precisely that the applicant can challenge the finding that the rule of law prevailed in Kinshasa, an argument which is nowhere mentioned in the statement of grounds, I turn to whether I should follow the *S.S.L.* case.

31. First of all, that is currently under appeal so therefore strictly speaking cannot really be properly relied on by the applicant.

32. But if I am wrong about that, Mr. O'Shea is relying on the *S.S.L.* judgment almost as a finding of fact as to conditions in Kinshasa. The State's notice of appeal to the Supreme Court which has been made available to me, contends that the incidents of violence referred to in the judgment of McDermott J. "*referred to excessive government violence directed at its political or military opponents and did not disclose a situation of internal armed conflict at the date of the appellant's decision*". The argument being made is that the judgment incorrectly read specific incidents of political conflict as indicative of generalised civil strife, which they are not. That perhaps indicates the importance of not reading any particular High Court judgment as some sort of blanket finding of fact applicable to other cases of a country-specific, fact-specific, time- specific and evidence-specific nature. It is also alleged by the State in their notice of appeal that there are a number of other issues with the judgment insofar as it was not based on identifiable country of

origin information material at all. Ground 8C of the grounds of appeal was that such material was incorrectly read geographically (see also ground 8B which alleges that an incident outside Kinshasa was incorrectly held to have occurred in Kinshasa) or that such materials read out of the context of the specific political conflict and inappropriately generalised; see also grounds 8A and 8D. I recite these matters not of course to comment on them as such, that is entirely a matter for the appellate forum, but I do so simply because that conflict highlights the point that it is not for me to read the *S.S.L.* decision in a more general way as being in some sense determinative or even hugely relevant in the present case. Each case has to determine its own particular facts and it is a matter for the Minister to assess the material in the present case in the first instance subject to any demonstration of illegality, which has not been made out. In particular I consider it is not open to me to read *S.S.L.* as making some finding of fact of assistance to the applicant here or indeed of any finding beyond the contours of the evidence in that particular case.

Time
33. The deportation order challenge is out of time. There is currently no explanation on affidavit, although Mr. O'Shea offered to put one in. As I am refusing the application on the merits anyway I do not need to decide that point.

Conclusion and order
34. The applicant's credibility was rejected at every stage. Representations made to the subsidiary protection decision-maker were very limited and of questionable relevance. Mr. O'Shea indeed accepts that the representations were not even all that relevant to the subsidiary protection matter. The pleadings are vague in the extreme and boilerplate in their language; they have a distinct air of mass-production, and lack case-specific allegations. In my view it is simply not open to an applicant to make the sort of argument he is now seeking to make on these pleadings. If I am wrong about that, all the applicant really has going for him is that McDermott J. in *S.S.L.* held that on the facts of that case, it was unreasonable to take the view that the rule of law held in Kinshasa. It does not follow from that that anyone from the DRC is entitled to international protection as of right. No country's immigration system could operate on that basis and indeed I am not aware that any country does operate on that basis. The argument essentially is that the applicant can serve up any old material to the protection decision-maker, contribute little or nothing to the decision-making process, then sit on the side-lines and pick apart the decision when made on the basis that was never put. Merely because there is a duty of co-operation does not require the court to quash a decision in such circumstances even if some infirmity has been demonstrated which is not the case here.

35. The application is dismissed.