**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2011 No. 779 J.R.]**

**BETWEEN**

**P.C.N. (ZIMBABWE AND DEMOCRATIC REPUBLIC OF CONGO) (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND J.N.)**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**AND**

**[2011 No. 780 J.R.]**

**BETWEEN**

**J.N. (ZIMBABWE)**

**APPLICANT**

**AND**

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

**RESPONDENTS**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of April, 2018**

1. The mother in this case, who is Zimbabwean, and the father, who is from the DRC and is not a party to either of these judicial reviews, were married and living together at the time of their arrival in the State on 7th July, 2006. The child was born in the State shortly thereafter on 25th August, 2006. The parents applied for asylum on behalf of the child on 14th January, 2008. The Commissioner found that the father's claim was not credible and therefore the child's claim was not credible, and a similar finding was made in respect of the mother, so the asylum applications were rejected. The tribunal affirmed the rejection of the mother's asylum application on 3rd October, 2008 and of that of the child on 6th November, 2008. The tribunal held that the father was never harmed or threatened "*at any time by anyone nor is he likely to face harm upon returning*". The Minister refused declarations of refugee status to the mother on 9th January, 2009 and to the child on 13th January, 2009. The applicants then applied for subsidiary protection and sought temporary permission to remain, the mother applying on 28th January, 2009 and the child on 11th February, 2009.

2. On 26th July, 2011 the Minister refused both applications for subsidiary protection. On 5th August, 2011, deportation orders were made against both mother and child. On 26th August, 2011 the mother swore an affidavit indicating that family circumstances had changed, that she was living apart from the husband and that she had primary care of the child. This fundamentally changed the child's application in that there was no longer any realistic prospect of returning the child to the DRC, only to Zimbabwe. She had not previously informed the Minister of this. In response, the Minister wrote to the applicant indicating that this matter had not been notified and was more appropriate to a s. 3(11) application. Such an application was made on 15th December, 2011 and that resulted in both deportation orders being revoked. A deportation order against the father remains extant although that is not part of this case.

3. I have heard helpful submissions from Mr. Paul O'Shea B.L. for the applicant and Ms. Sinead McGrath B.L. for the respondents in each case.

**Amendment made at leave stage**

4. What is now before the court are two M.M.-related challenges (see *M.M. v. Minster for Justice and Equality* [2018] IESC 10) to the subsidiary protection decisions in each case. I had previously granted Mr. O'Shea liberty to amend his statement of grounds without prejudice to any objection to be made by the State at the hearing for the purpose of moving the matter on. The amended grounds are grounds 13 to 18 in the child's case and 15 to 20 in the mother's case. The respondents are now challenging the additional grounds added by amendment. Mr. O'Shea submits he can seek any appropriate amendment on the date of the application for leave. He says that the points involved in the amendments came from the judgments of Cooke J in *V.J. (Moldova) v. Minister for Justice and Equality* [2012] IEHC 337 (Unreported, High Court, 31st July, 2012) and Clark J in *M.L. (DRC) v. Minister for Justice and Equality* [2012] IEHC 485 (Unreported, High Court, 12th October, 2012). The amendments were applied for on 9th October, 2017, five years later. While that seems at first sight quite a delay, Mr. O'Shea says that that was his first opportunity to apply for judicial review because the leave application had been adjourned, so October 2017 was in fact the hearing of the application for leave.

5. The pertinent authority here is the judgment of Peart J. in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 (Unreported, Court of Appeal, 15th November, 2017) at para. 72 that: " *It is important to recall that the application for judicial review came before the trial judge by way of a so-called* "telescoped" *hearing where leave had not already been granted. In other words the leave application was combined with the hearing itself. The applicant submits therefore that normally prior to being granted leave an applicant may at any time add to the grounds in respect of which leave is being sought. There can be no doubt about that."* I would therefore follow that approach as I think I am bound to do, which is to the effect that the court should normally be very accommodating of adjustments sought by an applicant in the process of moving the leave application, and it seems therefore that Mr. O'Shea should be allowed to rely on the amendments. This situation certainly highlights the desirability that leave applications are dealt with promptly and not adjourned for lengthy periods.

**Disposition of legalistic, recycled points**

6. All purely legal grounds in the case have already been rejected in my decisions 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 Mr. O'Shea accepts that there is "*nothing new*" in the legal points. There is some force in Ms. McGrath's submission in the mother's case at para. 38 that some points made by the applicant have been "*litigated ad nauseam*". I would reject all of the purely legal points for the reasons already given by me in the two cases referred to. I turn then to the fact

specific points.

**Fact-specific grounds in relation to the child**
7. Mr. O'Shea says the relevant grounds are ground 7 as to irrationality, ground 8 that insufficient regard is had to the best interests of the child and ground 9, failure to appropriately consider all representations made.

8. As regards best interests, that principle relates to discretionary decisions and does not apply to a finding of fact such as whether there is a forward-looking risk so as to justify subsidiary protection. All of these grounds as pleaded are completely boilerplate and fail to allege any specific problems with the impugned decision. I cannot grant relief on that sort of cut-and-paste basis. If I am wrong about that, the only specific point seriously identified on behalf of the applicant was that representations were made on the basis of a fear of being returned to Kinshasa as a failed asylum seeker and that this was not expressly dealt with by the Minister. As a matter of probability the current factual context is that the child is not going to be returned to Kinshasa because he is in the custody of the mother who is Zimbabwean. If for any reason the permission to remain is revoked in future, the overwhelming likelihood is he will be returned to Zimbabwe. The case therefore is for all effective purposes moot; at its absolute best it is hypothetical in the extreme. The Minister must of course act in a fair and constitutional way. So given that he is asking that this application be dismissed as hypothetical, it would be unfair if at some future point there is a fundamental change in circumstances such that it was proposed to return the applicant to the DRC after all, that that could preclude a reapplication for protection if in such circumstances such a refusal of reapplication would breach the applicant's rights. Ms. McGrath submits with some justification that it is in effect a waste of the court's time to tediously pursue a judicial review where the factual basis has transformed and the basis of the original application simply no longer applies.

9. If I am wrong about accepting that objection to this point being pursued, I note that insofar as the application for subsidiary protection did rely on difficulties with treatment of returnees, it is also noted that the Home Office stated that such claims were exaggerated and that there was strong evidence that the country was safe. The submissions in relation to this issue, as with much of the rest of the issues raised, are entirely generalised and there is nothing to tie those points to the applicant. Indeed, relying on interrogation of returnees has absolutely no relevance to returning a child applicant. In that sense the application may appear to be similar to the generalised application criticised by the Supreme Court in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109, *per* O'Donnell J. The Minister's decision does not have to discuss an applicant's points in a narrative way: otherwise we would be into a tit for tat refutation of every sentence in an application. Such an obligation exists in no other area of administrative law. The Minister states that the applicant's submissions were taken into account. The conclusions, which are detailed, support a finding that the rule of law exists, that the applicant would have protection and would not be at risk of serious harm. That in substance answers the point submitted on the specific facts of this case. Having said that, in fairness to the applicant, it is probably sub-optimal that this point was not more explicitly considered, but on the specific facts of this particular case it is not a ground on which judicial review should issue.

**Fact-specific grounds in relation to the mother**
10. In the mother's case, Mr. O'Shea says the relevant grounds are ground 7, that the country material was read selectively against the applicant, the conclusions were unreasonable, there was a lack of fair procedures and the decision was disproportionate, and ground 13 that the information was not up to date, was read selectively against the applicant's interests and was not made available until after the decision. Insofar as these tediously repetitious grounds constitute generalised legal points, I have already rejected them in *F.M.* for the reasons set out there. Proportionality relates more to discretionary decisions; it does not really apply to a factual determination such as whether there is a forward-looking risk such as to warrant international protection. No case of breach of fair procedures, failure to consider appropriately up-to-date material or unreasonableness has been made out on the facts. The only specific fact-related point relied on is that general conditions in Zimbabwe warrants subsidiary protection, thus rendering the mother's previous incredible evidence irrelevant. The claim is made that the Minister failed to consider such general conditions. It seems to me the Minister's conclusion as to the failure to demonstrate that the applicant was without protection in Zimbabwe is not dependent on credibility findings and amounts in substance to an addressing of that issue.

**Order**
11. Both applications are dismissed.