THE HIGH COURT

JUDICIAL REVIEW

[2011 874 J.R.]

BETWEEN

J.U. (BANGLADESH)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of April, 2018

1. In March, 2011 the applicant applied for asylum on the basis of having been an NGO worker and having attempted to mediate a resolution between a rape victim, a perpetrator and some residents. He claimed to have been attacked as a result. His claim was rejected. The asylum claim did not specifically claim persecution on grounds of political opinion but rather on grounds of membership of a human rights body.

2. In October, 2009 he applied for subsidiary protection, stating on p. 2 of the application that the claim was based on political opinion, although the political opinion was unspecified. There was no express acknowledgement that the applicant was changing his story as to the basis of his claim. If there was confusion as to the basis of the claim it seems to me to be the applicant's fault. Mr. O'Shea says that it is to be indirectly inferred from reliance on country material that the applicant was making a claim about political opinion. However, towards the end of the subsidiary protection application it states that the applicant is relying on the "*entire asylum file*" as "*documentary evidence*". The application also states that the facts are as set out in the asylum procedure. Far from stating what the political opinion is specifically, it refers back to the position that "*a more detailed account of the factual background will already be apparent from the file*". The asylum file does not state what the alleged political opinion is.

3. In August, 2011, subsidiary protection was refused and a deportation order issued. The statement of grounds was filed on 20th September, 2011. I granted leave on 3rd October, 2017, including on amended grounds. In March, 2018 a s. 3(11) application for revocation of the deportation order was made without prejudice to the challenge to the validity of that order.

4. I have heard helpful submissions from Mr. Paul O'Shea B.L. for the applicant and Ms. Kilda Mooney B.L. for the respondents.

Whether a s. 3(11) application acknowledges the validity of the underlying deportation order

5. In *O.O. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 165 (Unreported, High Court, 16th March, 2011) Cooke J. said at para. 4 that "*In many cases the introduction of an application to revoke a deportation order under s. 3(11) of the Act of 1999, necessarily implies an acceptance on the part of the applicant that there exists a valid deportation which requires to be revoked. In such cases the Court would normally insist that the applicant choose between the contradictory reliefs and abandon the claim to quash the deportation decision in order to pursue the application to quash the refusal of revocation."* With the utmost respect, I do not agree. First of all, it is a mischaracterisation of such reliefs to call them "*contradictory*". Rather they are alternative reliefs, a phenomenon which is universal throughout pleadings in any area. By way of postscript, Bullen & Leake's *Precedents of Pleadings* (12th ed.) (London, 1975) states at p. 41 that it is one of the general rules of pleading that "*Either party may in a proper case include in his pleading alternative and inconsistent allegations of material facts, as long as he does so separately and distinctly … he may rely upon several different rights alternatively, although they may be inconsistent*" (citing *Phillips v. Phillips* (1878) 4 Q.B.D. 127 at 134 per Brett L.J.).

6. An approach whereby making a s. 3(11) application would be deemed to imply an acceptance of the validity of a deportation order would be contrary to a number of goals of the legal system.

7. Firstly, it would interfere with the goal of promoting voluntary resolution of disputes. It would hugely handicap applicants if they could not normally make a s. 3(11) application without prejudicing their challenge to a deportation order. It would be a disincentive to attempts to resolve matters *inter partes* and would have consequent knock-on effects of drawing on limited and scarce court resources.

8. Secondly, such an approach would not cohere with general principles of law. Barring anything specific to the contrary, a party in any proceedings is generally able to make an application without prejudice to another position. There is no reason why deportation should be a more hostile environment to applicants in that regard. One qualification I should note by way of postscript here is the distinction between the *making* of the application not prejudicing the applicant, and the fact that the *adverse determination* of that application may so prejudice him or her. Thus where an applicant makes Application A followed by making Application B without prejudice to Application A, if Application B then results in an adverse and unchallenged decision, the failure of the applicant to challenge that decision may indeed prejudice the applicant, even if the application was originally made "without prejudice": see *X.X. v. Minister for Justice and Equality* [2018] IECA 124.

9. Thirdly, as I have adverted to, litigants generally are entitled to make alternative arguments and seek alternative reliefs and are not confined to any one theory. Indeed the State does this itself, and frequently advances multiple theories, an example of which I recently dealt with in *S.G. (Albania) v. Minister for Justice and Equality* [2018] 3 JIC 2311 [2018] IEHC 184 (Unreported, High Court, 23rd March, 2018) where the State offered no less than three alternative interpretations, each mutually inconsistent. In fairness to Ms. Mooney, she did not ultimately press this objection here.

Relief sought

10. The essential reliefs sought are *certiorari* of the subsidiary protection refusal and the deportation order. Mr. O'Shea formally moved the legalistic points rejected 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* [2018] IEHC 274 (Unreported, High Court, 17th April, 2018).

11. On the fact-specific points, Mr. O'Shea complained that the Minister's decision involved a process of cut and paste, a submission

that required considerable chutzpah in the circumstances. Mr. O'Shea stands in command of a veritable armada of identical proceedings, in which the present action is merely one vessel, flying under the battle-torn ensign of the paste-pot and crossed shears. In each of these proceedings the same generalised legalistic points are rolled out without reference to the facts of the individual case. Such pleadings are what I referred to in *C.O. (Nigeria) v. Minister for Justice and Equality* [2017] IEHC 725 [2017] 11 JIC 2406 at para. 4 as "*the Type Baroque, an approach in defiance of the stipulations of the Supreme Court in Babington v. Minister for Justice Equality and Law Reform [2012] IESC 65; a product of the scissors and paste pot, generating intricate legal candyfloss for page after tediously generalised page with every attempt made to obscure any good point that might be in the case.*"

12. Ms. Mooney submits very trenchantly and with considerable justification that judicial review is a fact-specific exercise not an academic exercise, and that the failure to specify in pleadings what an applicant is talking about or to specify that at all until written or oral submissions are introduced at a very late stage in the day means that a respondent is unable to take appropriate instructions and assess the appropriate attitude to the application, with consequent knock-on effects again for drawing on scarce judicial resources: see the judgment of MacEochaidh J. in *R.O. v. Minister for Justice and Equality* [2012] IEHC 573 [2015] 4 I.R. 200 at 208. I consider that it is not appropriate to grant relief on the basis of such vague and boilerplate pleadings as here. If I am wrong about that, only two fact-specific grounds were relied on: ground 6, failure to have regard to representations made and ground 13, that the country information was read selectively, not made available to the applicant and did not exist at the time of the subsidiary protection application.

13. There is no substance to the suggestion that the material was not made available to the applicant or did not exist at time of the applicant's application because the decision-maker is entitled to have regard to up-to-date mainstream country information: see the Supreme Court judgment in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109, *per* O'Donnell J. and my own judgment in that case (*Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176 [2017] 3 JIC 1306 (Unreported, High Court, 13th March, 2017) (and by way of postscript see also *M.A.A v. Minister for Justice, Equality and Law Reform* [2011] IEHC 560 (High Court, Birmingham J, 24th March, 2011)).

Failure to address the subsidiary protection application rather than the asylum application.
14. Mr. O'Shea's main point is that the Minister addressed the asylum application rather than the subsidiary protection claim and failed to comply with minimum standards, particularly by failing to seek clarification from the applicant as to whether the new subsidiary protection application was based on the same grounds as the asylum claim or on a different basis. But given that the subsidiary protection claim very explicitly states that it relies on the asylum claim, it was not necessary for the Minister to have sought clarification. If there was confusion it is down to the applicant and cannot be a ground for *certiorari*.

15. Furthermore and independently of the foregoing, if an applicant wishes to make an argument "if I had been consulted I would have said X and everything would have been different" there is an evidential onus on such an applicant to aver that he or she would have had something specific to say had there been such consultation. Here the applicant is entirely silent in his affidavit as to the relationship between the subsidiary protection and asylum claims, so there is no evidential basis to suggest that some different claim has been made.

Lack of up-to-date country information
16. Insofar as any suggestion that the country material submitted by the applicant was not up-to-date and the Minister failed to take the appropriate steps to rectify this, the subsidiary protection application made in October, 2009 relied on country material from 2006 and 2007, whereas the Minister's decision of August, 2011 relied in country material from 2009 and 2010. It has not been established that the Minister has not looked at more up-to-date material or that there was more recent material that would have made a difference. Again, there is simply no evidential basis for the proposition that other material exists, regard to which was not had, that would have been significantly different, and that the Minister should have considered. That is a matter requiring positive evidence and is not an issue where inference or submission remotely suffice.

Order
17. The application is dismissed. Accordingly the respondents are released from their undertaking not to deport the applicant.