THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 899 J.R.]

BETWEEN

J.A. (BANGLADESH)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,

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

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of November, 2018

1. The applicant was born in Bangladesh in 1974. He claims to have been wrongly convicted *in abstentia* in his home country in June, 2008 and sentenced to life imprisonment. He arrived in Ireland on 19th December, 2008 and claimed asylum. The credibility of his account was rejected by the Refugee Applications Commissioner in a decision on 29th May, 2009 and on appeal by the Refugee Appeals Tribunal on 30th June, 2010. He then sought subsidiary protection on 6th September, 2010, relying *inter alia* on harsh prison conditions in Bangladesh. He claimed leave to remain on the same date on grounds including suffering from chronic hepatitis B. Subsidiary protection was refused by the Minister in reliance on the findings of the tribunal on 8th September, 2011 and a deportation order was made on 23rd September, 2011.

2. Originally, the case involved a challenge to the asylum and subsidiary protection refusals and the deportation order. Leave was granted by McDermott J. in a written judgment in *J.A. v. Refugee Appeals Tribunal (No. 1)* [2013] IEHC 244 (Unreported, High Court, 19th April, 2013) in relation to the subsidiary protection and deportation aspects of the case, together with an amendment extending the subsidiary protection challenge to cover grounds arising from the *M.M. v. Minister for Justice and Equality* [2011] IEHC 547 (Unreported, High Court, 18th May, 2011) litigation. Leave in relation to the asylum claim was refused, in effect on time grounds, albeit that some aspects of the asylum challenge were not pressed. The effect of the *M.M.* amendment was to delay the case for a further five years due to the lengthy period of time that that litigation was to take before being rejected. Mr. Daniel Donnelly B.L. for the respondents wryly comments in relation to the system of separate asylum and subsidiary protection decision-making that applied at the material time in this case that "*one thing the case illustrates is the potential shortcoming of the two stage system*". I tend to agree, but at least that aspect has been addressed to some extent by the International Protection Act 2015. Perhaps also this case illustrates some of the problems that arise when a significant investigation of the case at the leave stage becomes counterproductive due to the additional delay and expense involved. The most Mr. Donnelly would concede on that front was that, with all appropriate caveats, the case "could be offered as an example for that argument".

3. The respondent appealed to the Supreme Court against the order allowing the amendment (Supreme Court Record No. 241/13). In November, 2013, the applicant sought a residence card on the basis of a marriage to an EU national. That was refused because the EU national had left her place of employment. In 2014, the State's appeal was transferred to the Court of Appeal under Article 64 of the Constitution and assigned Court of Appeal Record No. 2014/863.

4. On 20th January, 2015, on a review from the residence card refusal, the applicant was granted permission to remain in the State on the basis of the marriage to the EU national, and the deportation order was revoked. On the face of it, it seems strange that the applicant was seen as a good catch despite being in the State unlawfully, being subject to a deportation order and also having chronic hepatitis B, a highly sexually transmittable disease. Operation Vantage does not appear to have taken an interest in the applicant to date, but whether that is because the marriage is clearly genuine or because that Operation is not comprehensive in its scope, Mr. Donnelly cannot say. But there may be a case for such an investigation as regards the applicant, on the very limited information that I have.

5. In 2018, following the decision of the Supreme Court in *M.M. v. Minister for Justice and Equality* [2018] IESC 10 [2018] 1 I.L.R.M. 361, the applicant decided not to pursue the *M.M.* points, so the respondents' appeal was struck out by the Court of Appeal and the present proceedings were given a hearing date shortly thereafter.

6. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and, as I have mentioned, from Mr. Donnelly for the respondents.

Relief sought

7. The only relief now sought is that at para. C1 of the amended statement of grounds, namely *certiorari* of the subsidiary protection refusal. The only relevant ground was ground E1 of the amended statement, which was a general allegation of a breach of fair procedures and natural justice. That is certainly an unduly generic claim and, following a discussion with counsel, Mr. Conlon applied to amend the grounds to particularise the complaint being made. There was no objection from the respondents as to the first sentence of the new ground E1, but while Mr. Donnelly was formally not consenting to the second sentence I, notwithstanding that, allowed the amendment in all the circumstances having regard to the interests of justice.

Did the Minister properly consider the claim for subsidiary protection?

8. The core remaining element of the applicant's claim is that he will be subject to serious harm due to prison conditions if required to serve a sentence in Bangladesh. The premise of that argument is the assumption that it is, at least to some extent, accepted that the applicant is facing imprisonment. The question then is did the Minister accept that the applicant is facing imprisonment. The broad thrust of the tribunal decision and the Minister's subsidiary protection decision is rejective of the applicant's credibility. Insofar as the applicant's credibility is rejected, it must be assumed that his account of likely imprisonment is also rejected. There is no obligation on the decision-maker to go on to say that if they were wrong, they then need to consider whether imprisonment would breach the applicant's rights if the decision-maker does not in fact consider that imprisonment is a prospective risk.

9. As against that, there is some contradictory language in both the tribunal decision and the Minister's subsidiary protection decision. The tribunal member refers to the applicant fleeing prosecution rather than persecution, a phrase that is also used in the Minister's decision. That implies some degree of acceptance of the possibility of imprisonment which, on the specific facts of this particular case, would have given rise to a situation where the decision-maker should have gone on to give at least some express consideration to the question of inhumane prison conditions. That was a point specifically relied on in a significant way in the subsidiary protection application. I said in *N.M. (Georgia) v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018) (para. 7(iv)) and *T.O. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 256 [2018] 4 JIC 1806 (Unreported, High Court, 18th April, 2018) (para. 11) that there was no obligation on the decision-maker in those cases to narratively discuss prison conditions, for example. But those were cases where prison conditions were part of a generalised complaint as to conditions in the country concerned, thus not giving rise to a need for narrative discussion. There was no specific allegation that either of those applicants was facing imprisonment under a specific sentence.

10. The contradictions in the decision under challenge are also in effect acknowledged in the leave judgment. Taking para. 22 of the No. 1 judgment in isolation, that seemed to read the tribunal decision as accepted by the Minister as meaning that the applicant's credibility was not accepted, but that the tribunal went on to consider the situation even if the applicant faced prosecution and conviction. The reference to prosecution in the tribunal decision is strange because that was not part of the applicant's case. Indeed, no one is suggesting that the applicant is facing prosecution. It is possibly something of a legal cliché or what Mr. Donnelly calls a catchphrase, but certainly not one that is particularly helpful in the present context. But by contrast, at para. 45, McDermott J. says that "*The court is, therefore, satisfied that the applicant has established that the Minister has failed to consider the core basis of his application … Clearly, the Tribunal decision made a finding accepting his reason for leaving Bangladesh but rejecting the alleged political motivations of the complainant of the robbery charge".* The reference to points being established or clear and so forth cannot be taken literally as McDermott J. was only dealing with arguability rather than the substance of the case.

11. Ultimately, the present case emphasises the need for findings of a clear and unambiguous nature. If the Minister had stated that the applicant's account was rejected generally and if the reference to the applicant facing prosecution had not been included, then that would have been a clear finding. However, given that the decision is worded in the somewhat contradictory way that it is, I have to conclude that the basis of this particular decision, in the fact-specific circumstances of the present case, is insufficiently clear. Failure to address the allegation of harsh prison conditions could only have been acceptable if the applicant's entire story was clearly rejected, which, given the contradictions referred to, is not sufficiently evident.

Order

12. The delay in this case since the decision under challenge, which is due to the confusion introduced by the wrong-turning in the law embodied in the decision in *M.M. v. Minister for Justice and Equality (No. 3)* [2013] IEHC 9 [2013] 1 I.R. 370 (Hogan J.), and the long-drawn-out fallout from that, means that I do not realistically have the option to give relief by way of a direction that the decision-maker amplify the reasoning by way of further statements of reasons or affidavit; a situation which Mr. Donnelly accepts. The only remedy that is available therefore is to quash the subsidiary protection refusal. Having regard to the transitional provisions of the 2015 Act, it is agreed that in the event of my coming to such a conclusion, the appropriate order is that there be an order of *certiorari* removing for the purpose of being quashed the subsidiary protection refusal and remitting the application to the International Protection Office for consideration of the subsidiary protection aspect; and that is the order that I will make.

Postscript - costs

13. Having heard submissions from the parties, I will deal with costs by identifying what are essentially the three phases in the present proceedings. Firstly, what can be described as the leave phase between the institution of the proceedings on 26th September, 2011 to the determination of leave in the judgment of 19th April, 2013. The second phase can be described as the *M.M*. phase, between 20th April, 2013 and 2nd May, 2018, when the State's appeal in relation to the decision of McDermott J. allowing an amendment on *M.M*. grounds was disposed of in the Court of Appeal. The third phase is the substantive phase, between 3rd May, 2018 and 6th November, 2018.

14. As regards the leave phase, given that a number of points that were originally part of the leave and were part of the contested application for leave were ultimately not pursued or were not successful, and having regard to the limited nature of the case as it was ultimately run, the appropriate order in the interest of justice is that the applicant should have 50% of the costs incurred between 26th September, 2011 and 19th April, 2013 inclusive, other than the costs relating to the amendment regarding the *M.M*. issue which will be awarded to the respondents, who ultimately prevailed on that because the point was in the end abandoned by the applicant. That does not affect any costs already awarded in December, 2011 regarding the costs of the injunction.

15. As regards the second phase of the proceedings, the *M.M*. phase, this period was primarily devoted to the delay as a result of the applicant's amendment regarding the *M.M.* case. The respondents are entitled to costs of this phase, again because they ultimately prevailed on this issue. The *M.M*. point was ultimately not pursued, and raising it had the effect of delaying the case for five years. The appropriate order as regards the second phase of the case is that the respondents should be awarded their costs for the period between 20th April, 2013 and 2nd May, 2018 inclusive.

16. As regards the third phase of the proceedings from 3rd May, 2018 to 6th November, 2018, these costs have to follow the event in favour of the applicant.

17. Any costs in favour of the respondent under this order can be set off against those in favour of the applicant, and therefore should be agreed or taxed prior to the applicant being entitled to recover such net balance as may arise.