[2019] IEHC 477

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 490 J.R.]

BETWEEN

M.S. (AFGHANISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[2018 No. 796 J.R.]

M.W. (AFGHANISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[2018 No. 962 J.R.]

G.S. (GEORGIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 2nd day of July, 2019

Facts in M.S.

1. Mr. M.S. is an asylum seeker from Afghanistan who claims to have come to the State via Greece, Italy and France. On 1st August, 2017 he applied for international protection. Fraudulently, he failed to tell the IPO that he had already been granted subsidiary protection by Italy. Following his application, a Eurodac hit showed matches with fingerprints previously taken in France in April and June, 2017 and in Italy on 6th August, 2012. Contact was made with the Italian authorities who on 10th October, 2017 informed the International Protection Office that the applicant had been granted subsidiary protection in Italy and had a residence permit up to 11th December, 2020. On 1st December, 2017 the IPO decided that the application for protection was inadmissible under s. 21(4)(a) of the International Protection Act 2015. The applicant appealed that recommendation to the International Protection Appeals Tribunal on 17th January, 2018. On 23rd May, 2018 the tribunal decided to uphold the decision to deem the protection application to be inadmissible.

Facts in M.W.

2. Mr. M.W. also hails from Afghanistan and has a particularly chequered immigration history. He claims to have left Afghanistan in 2009 and to have travelled through Iran, Turkey, Greece, Italy and France to the UK. He was given permission to remain for a year in the UK, which he unsuccessfully sought to renew. He then remained illegally until 22nd February, 2014 when he travelled to France and then Belgium. He applied for international protection in Belgium on 24th February, 2014 and then was returned to the UK on 1st May, 2014 presumably pursuant to the Dublin system. He was deported from the UK to Afghanistan on 22nd July, 2014 but left his home country again in December, 2014 when he travelled through Pakistan, Iran, Turkey, Greece, North Macedonia, Serbia, Croatia and Austria, ultimately spending periods in Germany, France and Italy. He then returned to France for a year, then came back unlawfully to the UK in early 2017 and finally to Ireland, where he made a claim for international protection on 4th July, 2017. Again, he does not seem to have disclosed his immigration history when doing so.

3. On 14th August, 2017 the Italian authorities informed the IPO that the applicant had been granted subsidiary protection in Italy and had a residence permit up to 23rd January, 2022. On 2nd February, 2018 the IPO decided to deem the application for international protection to be inadmissible. The applicant appealed that to the IPAT on 8th February, 2018, in a notice of appeal which did not contain any grounds. A subsequent ground of appeal was furnished on 22nd February, 2018. On 28th September, 2018 the tribunal rejected the appeal.

Facts in G.S.

4. Mr. G.S. is a national of Georgia who claimed to have left Georgia originally in 1993. He went to Germany and claimed asylum there but returned to his home country after ten days. He then left Georgia again in 1995 and went to Portugal on a work visa staying for four years before returning home. He left his own country again in 2003 and went to Austria where he claimed asylum, but was required to leave after four years' presence there. At some point he also applied for asylum in Switzerland but withdrew that claim. He returned to Georgia and then in January, 2009 travelled to Italy via Turkey and applied for international protection. He was refused refugee status but granted subsidiary protection. He then travelled to Ireland, arriving on 17th December, 2017 and was refused leave to land. He then indicated that he wished to apply for international protection and did so the following day. By contrast with the other applicants, he was forthcoming about his immigration history. A Eurodac hit confirmed matches with fingerprints taken in Italy in 12th March, 2009. A take-back request under the Dublin system was issued on 17th January, 2018 to Italy but that was refused on 31st January, 2018 on the grounds that the asylum procedure had been completed in Italy. On 29th June, 2018, the IPO decided to deem his application for international protection to be inadmissible. That was appealed to the tribunal, which decided on 18th October, 2018 to affirm that recommendation.

Procedural history in M.S.

5. The applicant's statement of grounds was filed on 20th June, 2018, the primary relief sought being an order of *certiorari* directed

to the decision of the tribunal of 23rd May, 2018. I granted leave on 25th June, 2018 and have received helpful submissions from Mr. Colm O'Dwyer S.C. (with Mr. James Buckley B.L.) for the applicant (and who also appeared in M.W.) and from Mr. Robert Barron S.C. (with Ms. Suzanne Kingston B.L.) for the respondent (who appeared in all three of the cases that are being heard together). Liberty to amend the statement of opposition was given on 1st July, 2019.

Procedural history in M.W.
6. The statement of grounds was filed on 4th October, 2018, the primary relief sought being *certiorari* of the tribunal decision of 28th September, 2018 (incorrectly referred to as 28th October, 2018 in the statement of grounds). I granted leave on 8th October, 2018. Liberty to amend the statement of opposition was given in this case also on 1st July, 2019.

Procedural history in G.S.
7. Leave in G.S. was granted on 19th October, 2018, the primary reliefs being an order of *certiorari* directed to the decision of the tribunal of 19th October, 2018 and a declaration that s. 21(2)(a) of the 2015 Act is contrary to EU law and is invalid. In this regard I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. David Leonard B.L.) for the applicant and, as noted above, from Mr. Barron (with Ms. Kingston) for the respondent. Again, liberty to amend the statement of opposition was given on 1st July, 2019.

National and European legislation at issue
8. Section 21(2)(a) of the 2015 Act says "(*2) An application for international protection is inadmissible where one or more than one of the following circumstances applies in relation to the person who is the subject of the application: (a) another Member State has granted refugee status or subsidiary protection status to the person…".*

9. Recital 22 to the asylum procedures directive 2005/85 states as follows: "*Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (1), except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country."*

10. Article 25 of directive 2005/85 states as follows: "*1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article. 2. Member States may consider an application for asylum as inadmissible pursuant to this Article if: (a) another Member State has granted refugee status; (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26; (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27; (d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC; (e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d); (f) the applicant has lodged an identical application after a final decision; (g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application."*

11. The recast procedures directive 2011/95, which does not apply to Ireland, has changed the corresponding reference to refugee status to being a reference to where "*another member state has granted international protection"* (art. 33(2)(a) of the recast directive).

12. The CJEU in Joined Cases C 297/17, C 318/17, C 319/17 and C 438/17 *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* at para. 71 stated that the recast procedures directive "*…permits Member States also to reject an application for asylum as being inadmissible where the applicant has been granted by another Member State not a right to asylum, but solely subsidiary protection.*" A similar point is made at para. 58 of the judgment.

13. The major interpretative problem in the present case is that while the interlocking elements of the common European asylum system are such that under the recast procedures directive and the Dublin III regulation 604/2013 working together, it is clear that any individual member state does not have to deal with a claim for international protection which has previously been granted in another jurisdiction, either because a subsequent application in a member state can be deemed to be inadmissible or because the person can be returned under the Dublin system. An anomaly arises in the very limited category of member states that have become bound by the Dublin III regulation but not by the recast procedures directive. Only Ireland and the UK are in this category, hence creating the essential interpretative question here which is ultimately whether it is open to a member state to regard the grant of subsidiary protection by another member state as being a basis for treating a subsequent application for international protection as being inadmissible.

14. There are three questions of European law that fall for a decision in the present case and in the exercise of my discretion in that regard I consider it both necessary and appropriate to refer these questions to the CJEU under art. 267 of the TFEU.

First question
15. The first question is: does the reference to "*the member state concerned*" in art. 25(2)(d) and (e) of directive 2005/85 mean (a) a first member state which has granted protection equivalent to asylum to an applicant or (b) a second member state to which a subsequent application for international protection is made or (c) either of those member states.

16. The applicants in M.S and M.W. says that "*the member state concerned*" means the second member state. The applicant in G.S. appeared to concede that it could be either member state. The respondents say that the phrase includes the first member state.

17. My own proposed answer is that the reference to "*the member state concerned*" in art. 25(2)(d) and (e) of the procedures directive makes most sense and is best interpreted as meaning either member state. That would also mean that recital 22 to the procedures directive would have a coherent meaning. In the absence of including the first member state in this provision a significant anomaly would arise because it would mean that the grant of rights equivalent to subsidiary protection in any country other than a member state would be sufficient to deem an application inadmissible. That makes very little sense.

18. The relevance of this question is that if "*the member state concerned*" includes the first member state *i.e.* if it means the first member state or it means either of the member states, then there could have been a lawful basis on which the present applications were held to be inadmissible and therefore s. 21 of the 2015 Act may not be incompatible with EU law. Admittedly the lawful basis that would thereby arise was not the one specifically relied on by the tribunal. But that could be viewed as a purely technical issue because fundamentally the tribunal relied on s. 21 of the 2015 Act which could be regarded as valid if "*the member state concerned*" either means or includes the first member state.

The second question
19. The second question is: where a third country national has been granted international protection in the form of subsidiary protection in a first member state and moves to the territory of a second member state does the making of a further application for international protection in the second member state constitute an abuse of rights such that the second member state is permitted to adopt a measure providing that such a subsequent application is inadmissible.

20. The applicants in all three cases say that such a subsequent application is not an abuse of rights. Two of the applicants also appeared to hint at a pleading objection but that has since been addressed by an amendment to the pleadings. The applicant in G.S. also contended that this question does not arise out of the tribunal decision, although that appears to be an objection of limited force because the question goes to the validity of the legislation which was relied on by the tribunal decision. The respondents contend that a member state is permitted to adopt a measure of the type referred to in the question.

21. My own view is that the making of a second or indeed subsequent application where a person has already been granted subsidiary protection does amount to an abuse of rights and therefore in accordance with the general principles of Union law a member state is entitled to adopt measures to deem such applications inadmissible, such as the measure at issue in the present case. Furthermore I would respectfully suggest that in terms of the overall future sustainability of the European project, it would be improvident to interpret Union law so as to confer additional rights in the sensitive area of immigration unless that is the clear meaning of the provision in question, especially as regards third-country nationals, and doubly so where there is a significant question of abuse.

22. The relevance of the question is that if the application may be rejected as an abuse of rights then the applicants' challenge fails

The third question
23. The third question is: is art. 25 of directive 2005/85 to be interpreted so as to preclude a member state which is not bound by directive 2011/95 but is bound by regulation 604/2013 from adopting a measure such as that at issue in the present case, which deems inadmissible an application for asylum by a country national who has previously been granted subsidiary protection by another member state.

24. The applicants submit that the adoption of the legislation referred to in the question is precluded, whereas the respondent submits it is not precluded.

25. My own view is that to read the procedures directive in a literal manner in this context would create an anomaly to no particular purpose and would be inconsistent with the intention and purpose of the directive when taken together with the Dublin system legislation. The anomaly arises here because the logic and intention of the procedures directive and the Dublin II regulation taken together is that a member state does not have to determine an asylum application by someone who already has subsidiary protection or its equivalent in another member state or indeed elsewhere. That also remains the logic and intention of the recast procedures directive and the Dublin III regulation taken together, as indeed noted by Vedsted Hansen in Hailbronner and Thym, *EU Immigration and Asylum Law*, 2nd ed. (C.H. Beck/Hart/Nomos, 2016) p. 1354 where it is said that the recast procedures directive can be "*seen as a supplement to the Dublin III Regulation*". But the lacuna is where a state operates on the basis of a combination of the original procedures directive and the Dublin III regulation which is a situation that only applies to Ireland and the UK. In such a situation, the question is whether the literal meaning of the procedures directive should be departed from and the directive interpreted in a manner consistent with the overall intention.

26. The relevance of the question is that if such legislation is permitted then the applicants' challenge fails.

Order
27. Having regard to the foregoing the appropriate order is that the following questions be referred to the CJEU pursuant to art. 267 of the TFEU.

> (i). Does the reference to "the Member State concerned" in art. 25(2)(d) and (e) of directive 2005/85 mean (a) a first member state which has granted protection equivalent to asylum to an applicant for international protection or (b) a second member state to which a subsequent application for international protection is made or (c) either of those member states.
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> (ii). Where a third country national has been granted international protection in the form of subsidiary protection in a first member state, and moves to the territory of a second member state, does the making of a further application for international protection in the second member state constitute an abuse of rights such that the second member state is permitted to adopt a measure providing that such a subsequent application is inadmissible.
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> (iii). Is art. 25 of directive 2005/85 to be interpreted so as to preclude a member state which is not bound by directive 2011/95 but is bound by regulation 604/2013, from adopting legislation such as that at issue in the present case which deems inadmissible an application for asylum by a third country national who has previously been granted subsidiary protection by another member state.