High Court of Ireland Decisions

Judgment Title: E.D. -v- The Minister for Justice & Equality

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THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 857 JR]

BETWEEN

E. D.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 16th day of October 2014

1. This is an application for judicial review seeking *certiorari* to quash a decision of the Minister for Justice and Equality dated 5th November 2013 to refuse to consider the applicant's application for subsidiary protection. Leave to seek judicial review in this regard was granted by McDermott J. on 18th November 2013.

Background:
2. The applicant is a Ghanaian national who was born on 16th January 1960 and who arrived in the State and made an application for asylum on 13th April 2010. The applicant's claim for asylum stemmed from a claimed fear of persecution from the elders in her village who want her to serve them at their shrine. The applicant received a negative recommendation at first instance from the Refugee Applications Commissioner who found that her claims were not credible and, without prejudice to that finding, that internal relocation was an available option for her. The applicant subsequently appealed this decision to the Refugee Appeals Tribunal who upheld the recommendation of the Commissioner and again found the applicant's claims to be lacking in credibility. The Tribunal Member in refusing the appeal went on to make the further finding that the applicant's profile matched that of an 'economic migrant' as referred to in paragraph 62 of the UNHCR Handbook.

3. The applicant duly received a 'three options' letter from the Minister dated 9th February 2011 giving her the options to either: i) voluntarily leave the State before a deportation order issued; ii) consent to the making of a deportation order; or iii) make an application for subsidiary protection and/or an application for humanitarian leave to remain. The applicant through her solicitors, the Refugee Legal Service, elected to make an application for humanitarian leave to remain temporarily in the State pursuant to s. 3 of the Immigration Act 1999 by way of representations to the Minister on 1st March 2011.

4. Correspondence issued from the Refugee Legal Service to the Irish Naturalisation and Immigration Service ("INIS") in the Department of Justice on 18th April 2013 seeking information on when a decision would be taken on her application. A letter acknowledging receipt of this correspondence was sent on 26th April 2013 and the decision of the Minister to issue a deportation order was sent by letter of 23rd September 2013. Thereafter, the applicant sought to make an application for subsidiary protection through her new legal advisors, Trayers & Company.

5. By letter of 8th October 2013, Trayers solicitors wrote to the Minister seeking the revocation of the deportation order and the consideration of an application for subsidiary protection. The applicant's solicitor included correspondence from the Refugee Legal Service, including internal memoranda and attendance notes in which the views of the Refugee Legal Service not to assist the applicant in preparing an application for subsidiary protection are set out. The applicant's current solicitors set out their concerns that the applicant as an illiterate grandmother with limited English did not fully understand or appreciate the decision not to submit an application for subsidiary protection or the implications for her as a result of not doing so.

6. The applicant's solicitors sent a follow-up letter to the Department of Justice on the 31st October 2013 seeking confirmation, or otherwise, as to whether the Minister was willing to allow the applicant to make an application for subsidiary protection and an

undertaking that she would not be deported pending the consideration of such application. By letter of 5th November 2013, the INIS replied setting out the reasons for the Minister's refusal to entertain an application for subsidiary protection by the applicant. It is that decision which is impugned in these proceedings.

Impugned Decision:

7. At this juncture it is worthwhile setting out the reasons for the refusal to consider an application for subsidiary protection contained in the letter of 5th November 2013. In the first instance, the INIS note that the applicant was served with a 'three options' letter which set out the various avenues open to her on receipt of a negative recommendation on her application for refugee status. In this regard the letter states:

> "This communication set out in some detail the options open to your client arising from the refusal of her asylum application with these options to be exercised within a period of 15 working days. Those options included, *inter alia*, the right to lodge an application for subsidiary protection and the right to submit written representation against the making of a Deportation Order. Even allowing a generous interpretation of the 15 working day period, your client's 'window of opportunity' for the lodgement of an application for subsidiary protection would have closed in or around 7th/8th March 2011. As a result, we cannot accept such an application from your client some two and a half years later."

8. With regard to the applicant's claim that the Refugee Legal Service advised against the lodgement of an application for subsidiary protection, the letter states: "...the position is that an asylum or protection applicant is solely or singularly responsible for the lodgement of any application, and within the prescribed period of time." Finally, with regard to contentions made by the applicant that the decision of the Refugee Appeals Tribunal was flawed and that a full reconsideration was merited, the letter states:"...you will appreciate that an application for subsidiary protection is not, in this context or in any case, a request for a re-consideration of a Decision of the Refugee Appeals Tribunal and, as such, this does not provide a justification for having an application for subsidiary protection from your client considered at this point in time."

Submissions:

9. In the first instance it is contended that the applicant has a European law right to apply for subsidiary protection and that the Minister has a corresponding obligation to grant such protection to an eligible applicant in accordance with Chapters II and V of Council Directive 2004/83/EC. It is asserted that there was no lawful basis which entitled the Minister to refuse to consider such an application. It is also submitted that the 'principle of equivalence' in European law precludes a less favourable treatment of the processing of subsidiary protection claims as against asylum claims. In this regard, it is contended that there is no comparable limitation of time within which an applicant must apply for asylum in domestic law. Finally, it is asserted that the decision to refuse to consider an application for subsidiary protection was disproportionate to any legitimate aims sought to be attained, that no rationale was provided for the refusal of the applicant's application and that the Minister failed to address the matters raised in support of the applicant's application.

10. In his submissions, the applicant claims that while Reg. 4(1)(a) of the E.C. (Eligibility for Protection) Regulations 2006 stipulates that an applicant "may" apply for subsidiary protection within a 15 day period from receipt of the 'three options' notification, the regulations do not contain a prohibition on applications being made outside that period. The applicant claims that the respondent has accepted many 'late' applications for consideration in this regard.

11. Counsel notes that there is no statutory or stipulated time period within which an application for asylum must be made. Further, it is submitted that asylum is a form of

protection which is a right in domestic law (or alternatively a right arising from a mix of domestic and European law), while subsidiary protection is a purely European law right. As such, the applicant submits that asylum and subsidiary protection are 'comparators' for the purposes of applying the 'principle of equivalence' in European law. In this regard, it is submitted that there can be no less favourable treatment of the European law right of subsidiary protection as opposed to the domestic law right of asylum.

12. It is submitted that because there is no time limit within which an application for asylum must be made and there is a 15 working day time limit for an application for subsidiary protection, there is a breach of the principle of equivalence thus rendering the refusal to consider the applicant's application unlawful.

13. The applicant made reference to the decision of *F.A. (Iraq) v. Secretary of State for the Home Department* [2011] UKSC 22 in support of the claim that the 'principle of equivalence' is relevant to this particular case and precludes a less favourable treatment of the processing of subsidiary protection claims as against asylum claims. Counsel submits that in order to make out this claim in *F.A. (Iraq)* the applicant had to show that his asylum claim was a legitimate comparator with his claim for subsidiary protection. If he was able to demonstrate that, it was submitted that his subsidiary protection claim was subject to less favourable rules than his asylum claim as the asylum claim provided for an appeal mechanism whereas the subsidiary protection claim did not. Counsel noted that the issue of whether asylum constituted a legitimate comparator, amongst others which troubled the UK Supreme Court, compelled them to make a preliminary reference to the Court of Justice of the European Union ("CJEU"). In the event, counsel conceded that the matter was settled subsequent to the judgment of the UK Supreme Court being handed down and before the matter went to the Court of Justice. At hearing, the applicant also claimed that the respondent's submission in respect of the status of subsidiary protection as being 'complimentary' to refugee protection failed to take into account the decision of Hogan J. in *M.M. v. Minister for Justice* [2013] IEHC 9.

14. In submissions, counsel also contends that the principle of proportionality as set out in Article 5 of the Treaty on the European Union is not respected by the exclusion of a right to apply for subsidiary protection outside of the fifteen day period. Finally, it is submitted that contrary to the decision of *Meadows v. Minister for Justice* [2010] IESC 3, there was a failure to address the matters raised by the applicant in her application and a failure to provide a proper rationale for the impugned decision.

15. The respondent submits that counsel for the applicant is wrong in his submission that S.I. 518/2006 does not preclude the applicant from making an application for subsidiary protection outside of the 15 day period specified. Mr. Barron S.C. notes that there is no implied right to make an application otherwise than in accordance with the provisions of the regulations and insofar as any possibility of an application being considered might exist, it is by virtue of the Minister's discretion and not by right.

16. With regard to the applicant's claim that the principle of equivalence is applicable in this instance, the respondent rejects this contention and submits that the applicant's right to claim asylum and subsidiary protection is anchored in the law of the European Union rather than national law. The judgments of Murray J. and Fennelly J. in *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29 are cited in support of this proposition. As a consequence it is submitted that the applicant has not identified a valid comparator for the purposes of the principle of equivalence.

17. It is submitted that the consequence of the applicant's submission that an application for subsidiary protection can be made at any time, even after the making of a deportation order, would result in there being no time limit in existence. It is contended that such a scenario would not be consistent with the principle of good administration and would lead to legal uncertainty. In this regard, counsel cites the decision of the Court of Justice in

Case C-308/06 *The Queen (On the application of Intertanko) v. Secretary of State for Transport* [2008] ECR I-4057. Further, counsel notes that EU law does not preclude the application of a national rule whereby a subsidiary protection application must be submitted within a specified time. It is noted that the purpose of a time limit is a legitimate one which promotes the interests of both the State and applicants for protection, namely that protection applications are determined as soon as possible. The respondent's third criticism of the applicant's argument in this regard is that it ignores the fact that an application for subsidiary protection is not a stand alone application but rather is intended to apply where persons do not qualify for refugee status.

18. Insofar as the applicant relies on the decision in *F.A. (Iraq) v. Secretary of State for the Home Department* [2011] UKSC 22, it is submitted that the uncertainties in that case arose because the United Kingdom had opted for a single unified procedure which meant that an effective remedy by way of appeal against the joint decision on the two forms of protection was obligatory by virtue of Article 3.3 of the Procedures Directive. Counsel makes reference to the judgment of Cooke J. in *B.J.S.A. v. Minister for Justice & Equality* [2011] IEHC 381 in this context.

19. In any event, it was noted by counsel for the respondent at hearing that in light of the decision of the Court of Justice in Case C-604/12 *H.N. v. Minister for Justice, Equality and Law Reform* (8th May 2014) an applicant is entitled to make an application for subsidiary protection at the same time as making an application for asylum, with the requirement that the asylum application must be decided first in order. As such, it was submitted that even if the substance of the issue raised in *F.A. [Iraq]* has the meaning ascribed to it by the applicant, the asylum system and subsidiary protection would not be appropriate comparators (in the context of the principle of equivalence) being part of the one system.

20. With regard to the latter complaints raised by the applicant, namely that she 'never previously understood clearly that such an application was open to me' the respondent submits that not only did the applicant receive a "three options" letter but she was also represented by the Refugee Legal Service at the time she opted to make representations for humanitarian leave to remain as opposed to an application for subsidiary protection. Further, counsel notes that it is not put in evidence by the applicant in her affidavit that she was not told about the possibility of making an application for subsidiary protection and remarks that she did instruct the RLS to make an application for leave to remain on her behalf.

21. Finally, the respondent submits that while the applicant did have a right under European Union law to make an application for subsidiary protection, once she failed to avail of that entitlement, the opportunity was lost to her. As such, it is submitted that the application in issue in this case is of an *ad misericordia* nature and the only obligation on the Minister could have been to consider it without necessarily providing a discursive 'judgment' on the matter. Without prejudice to that submission, the respondent is of the view that the decision taken by the Minister was reasonable and proportionate in light of the facts. In this regard, counsel notes the lateness of the application, the delay in making the application, the fact that a deportation order had issued and the fact that the applicant was not an inactive or passive participant in the overall protection process. Further it is submitted that the applicant's reliance on proportionality is misconceived as it is contended that she has no right to have her application considered and accordingly no question of any disproportionate interference with any right arises. Insofar as proportionality may be raised it is submitted that the decision taken is clearly in pursuit of a legitimate goal, that being the maintenance of the integrity of the international protection and immigration system.

Findings:
22. The EC (Eligibility for Protection) Regulations 2006 establish a 15 working day time limit within which application may be made for subsidiary protection. The use of the word

'may' in Reg. 4(1)(a) is instructive and indicates that it is an option open to an applicant for international protection to make a subsidiary protection application in addition to making representations under s. 3(3)(b) of the Immigration Act 1999, if they consider that they are eligible for such protection. They may not wish to make such an application or they may not believe that they are eligible for such protection. In any event, it is stated that such application is to be made within 15 working days of the sending of the notification.

23. It is a matter for an applicant to decide whether to apply for subsidiary protection. If the decision to make such application is taken, the applicant must proceed in accordance with law and do so within the time indicated and in the manner laid down by regulations. An applicant may or may not have the benefit of legal advice but here, at all stages in her application for asylum, her representations for humanitarian leave to remain and her representations to the Minister, this applicant had the benefit of such advice. Legal advice is an important factor in assisting an applicant to negotiate the asylum process, however the case remains that an applicant personally provides the relevant instructions to their legal team and ultimately decides the course to take. I have no doubt that the applicant was advised as to whether an application for subsidiary protection was appropriate.

24. I agree with the respondent's submission that insofar as the Minister may entertain a late application for subsidiary protection, particularly, as in this case, one made two and a half years late, it is a matter within the Minister's discretion to permit such a late application to proceed. While a delay of a few working days might be excusable, significant delay in the matter of months or indeed years will result in the loss of opportunity to an applicant unless there is a very good reason to explain the delay.

25. At hearing, the primary claim advanced on behalf of the applicant was that the principle of equivalence is breached because there is no express time limit applicable for the making of an application for asylum while there is a fifteen working day time limit applicable in respect of applications for subsidiary protection. In this regard, counsel urged the court to consider the case *of F.A. (Iraq) v. Secretary of State for the Home Department* [2011] UKSC 22 and to consider that asylum and subsidiary protection were appropriate 'comparators' for the purposes of the principle of equivalence.

26. The principle of equivalence precludes less favourable treatment of claims based on European Union law by comparison with treatment of similar claims based exclusively in domestic law. As stated in Joined Cases C-430/93 and C- 431193 *van Schijndel & Anor v. Stichting Pensioenfonds voor Fysiotherapeuten* (14th December 1995) "...rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law." In *T.D. v. Minister for Justice* [2014] IESC 29 (Supreme Court, 10 April 2014) Murray J. said of the principle as follows: "It is manifestly clear that when the Court of Justice applies the principle of equivalence it is referring to equivalence between actions to enforce or safeguard rights derived from European Union law and similar or comparable actions to enforce rights derived from national law." My view is that the principle of equivalence has no application here because the applicant does not compare and Irish and EU measures and identify a difference in treatment whereby a purely domestic measure is less onerous than a similar measure deriving from European law. The applicant makes the mistake of comparing measures both of which are based on EU law - asylum and subsidiary protection. Notwithstanding the enactment of the Refugee Act 1996, the content of Irish asylum law is now governed by EU law and Irish law, though made prior to EU Asylum rules, implements Irish obligations in this field. However, even if I am wrong about the applicability of the principle of equivalence, my view is that subsidiary protection applications are not treated unfairly by comparison with asylum applications in relation to time limits.

27. It is clear from the Immigration Act 1999 that a person cannot have his/her

application for subsidiary protection considered until an application for asylum has been refused. Thus, the time limit for making an application for subsidiary protection is not fifteen working days as submitted by the applicant, rather it is fifteen working days following the sending of a notification by the Minister with a refusal of an applicant's application for asylum. As noted by counsel for the applicant, there is no (strict) time limit within which an application for asylum can be made. Therefore a subsidiary protection applicant cannot be said to be in a less favourable position as there is a period of fifteen working days in which to make an application for subsidiary protection *in addition* to the period in which application for asylum may be made. The decision of the Court of Justice in Case C-604/12 *H.N. v. Minister for Justice, Equality and Law Reform* (8th May 2014) adds further clarity to the area. In the first instance the court notes that subsidiary protection is "complementary and additional to the protection of refugees enshrined in the Geneva Convention." The Court also expressly confirms that, in principle, an application for subsidiary protection should not be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status. However, the CJEU also found that the requirement for genuine access to subsidiary protection status means that it should be possible for an applicant to submit an application for refugee status and an application for subsidiary protection at the same time.

28. In light of the judgment in *H.N.* it is clear that it is open to an applicant for international protection to make an application for subsidiary protection either at the same time as their application for asylum or they may wait for the conclusion of the asylum process before making their application for subsidiary protection within fifteen working days thereafter, should they so wish. Their application for subsidiary protection will not be considered until the asylum process has been completed and the asylum application is rejected. Therefore it cannot be said that they have been subject to a less favourable regime than an applicant for asylum. In short, the periods in which application for asylum and subsidiary protection must be made are the same save that, at the election of the applicant, application for subsidiary protection may be postponed for fifteen working days following notification of a negative asylum decision. The gravamen of the applicant's complaint is that there is a difference between the time limit for application for asylum and the time limit for application for subsidiary protection which results in a shorter period for subsidiary protections applications. There is no such difference. The applicant treats applications for asylum and subsidiary prot1ection as if they were entirely separate processes each with separate rules as to when the applications may be made. This is a misconception. Asylum and subsidiary protection are complimentary and linked forms of protection for persons who say they fear harm. The time limits are also linked. I reject the contention that the rules provide a shorter time to apply for subsidiary protection. An applicant cannot choose between one or the other. Application for asylum must be made followed by application for subsidiary protection if needed. As I said earlier, if anything, this is not a shorter period; it is longer.

29. I also reject the other complaints raised by the applicant, namely with regard to proportionality and the claim that the Minister failed to address the matters raised or provide an adequate rationale. In light of the above findings with regard to the nature of the application made in this case and accepting the submissions of the respondent in this regard, it is clear that the Minister's response in this case was not unreasonable or disproportionate and nor does it fall short of the standard envisaged by the Supreme Court in *Meadows v. Minister for Justice* [2010] IESC 3.

30. In those circumstances, I refuse the applicant the reliefs sought.