THE COURT OF APPEAL

Baker J.
Whelan J.
McGovern J.

Neutral Citation Number: [2020] IECA 20

Appeal No: 2018/216

BETWEEN/

H.I. AND H.I. (ALBANIA)

APPELLANTS

-AND-

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

RESPONDENTS

Appeal No: 2018/217

AND

BETWEEN/

A.I., B.I. AND H.I. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, A.I.)

APPELLANTS

-AND-

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

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 5th day of February 2020

1. These appeals arise from the orders made in the High Court on the 19th April, 2018 following a judgment *H.I. and H.I.(Albania) v The Minister for Justice and Equality, The Attorney General and Ireland and A.I. and B.I. and H.I. (a minor suing by his father and next friend H.I.) v The Minister for Justice and Equality, The Attorney General and Ireland* ([2018] I.E.H.C. 275) of Humphreys J. delivered on the said date refusing the appellants' applications for certiorari seeking to quash the decisions of the Minister to refuse subsidiary protection. The Minister made consequent deportation orders in respect of the five appellants.

Background and Procedural History

2. The appellants are five members of an Albanian family who identify as members of the Gabel ethnic community. Appeal No. 2018/216 relates to a husband and wife, H.I. and H.I. (hereafter the "first appellant" and "second appellant" respectively). Appeal No. 2018/217 relates to their son A.I., his wife B.I. and their minor son H.I. (hereafter the "third appellant", "fourth appellant" and "fifth appellant" respectively). The first and second appellants arrived in the State in August, 2005. The third, fourth and fifth appellants arrived in July, 2008.

3. Asylum applications were submitted by the appellants pursuant to s. 17 of the Refugee Act, 1996 (as amended) with the underlying protection claim in each case relating to persecution as a result of their Gabel ethnicity claimed to be suffered by the appellants at the hands of the Albanian authorities or at the hands of third parties operating with relative impunity in that state. The applications of the first and second appellants for asylum were made on the 31st August, 2005, almost fourteen and a half years ago.

4. The third, fourth and fifth appellants travelled to Ireland on foot of false Czech passports which they had acquired in Bologna, Italy in the days prior to their travelling to this jurisdiction in July 2008. The third appellant's application was made on the 18th July, 2008 with a further application made by him on the 5th August, 2008, over eleven years ago. An application for asylum on behalf of the fourth appellant and her child the fifth appellant was made on the 21st July, 2008, approximately eleven and a half years ago. Accordingly, the decision made in relation to her asylum application also extended to the fifth appellant.

Decisions on asylum applications

5. Each application was determined at first instance by the Refugee Applications Commissioner ("ORAC") which recommended that the applications be refused.

6. Each decision was the subject of an appeal to the Refugee Appeals Tribunal ("RAT"). In each case the RAT concluded that the account presented did not serve to advance the well-foundedness of a fear based on alleged experiences undergone in Albania. The Tribunal went on to conclude also that the accounts given were implausible. Even if credible, they did not of itself go to the essence or the core of the individual applicant's application. The RAT concluded in respect of each application that the account given failed to demonstrate that the appellants had presented a subjectively or objectively well-founded fear of persecution.

7. In each case the RAT concluded that the recommendation made by the ORAC in the first place ought to be upheld and the appeals dismissed.

Notification of options/Three options letters

8. Following conclusion of the RAT process details of the procedure and the sequence to be followed were furnished to each appellant by letter.

The options included: -

i. Option 1 – leave the State before the Minister decides on a deportation order
ii. Option 2 – consent to a deportation order, or
iii. Option 3 – apply for subsidiary protection and/make representations to remain temporarily in the State.

The appellants elected for Option 3.

Applications for subsidiary protection

9. The appellants thereafter each applied for subsidiary protection pursuant to European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006) (the "2006 Regulations"). Each relied on essentially identical grounds to those which had been advanced and rejected in relation to their applications for asylum status in the first instance.

10. Consideration of the subsidiary protection claims was made within the Department of Justice originally by an Executive Officer and thereafter considered and approved by a Higher Executive Officer, and then determined by an Assistant Principal for ministerial approval. The assessment in each case considered extensive country of origin information ("COI") and concluded on the basis of same that whilst problems existed in the Albanian police force with regards to unprofessional behaviour and corruption there was a functioning police force in Albania. An ombudsman was in place who processed and determined complaints against the police. Statistical data in relation to the ombudsman was referred to. The determinations concluded that there were structures in place for making complaints against members of the police force and that the ombudsman was willing to investigate such cases.

Subsidiary protection decisions

11. It was asserted in each application that, if returned, the appellant faced a real risk of "serious harm" within the meaning of Article 2 of Directive 2004/83/EC (the Qualification Directive).

12. In deciding each subsidiary protection application, the Minister considered the key issue to be: -

> "...whether substantial grounds have been shown for believing that [the applicant], if returned to Albania, would face a risk of 'death penalty or execution' or 'torture or inhuman or degrading treatment or punishment' and critically, whether protection is available to and accessible by the applicant."

13. In determining the availability and adequacy of state protection, the assessments by the Minister included a consideration of COI obtained from the US Department of State Report for Albania, published on 11th March, 2010 which was cited in detail.

14. The Minister concluded that the COI: -

> "...shows that there is a functioning police force in Albania which the Applicant could seek protection from should [the applicant] encounter problems because of...ethnicity. While it is acknowledged that problems exist in the Albanian police force with regards to unprofessional behaviour and corruption, the ombudsman processed and completed 151 out of 168 complaints against the police ruling in favour of the complaining citizen in 63 cases. It is clear that there are structures in place for making complaints against members of the police force and it is also clear that the ombudsman is willing to investigate such cases. ...The extract further

shows that efforts are being made to reform areas of the police force by the Ministry of Interior".

i. Decisions relating to the first and second appellants

15. The Minister proceeded to consider the position of ethnic minorities in Albania. In the decisions relating to the first and second appellants, the Minister quoted an extract from the UK Home Office "Operational Guidance Note on Albania", published in December 2008.

16. The Minister concluded in both decisions: -

> "Having considered the above extracts I conclude that the applicant would not be at risk of suffering serious harm if … returned to Albania because of …ethnicity as there is a functioning police force that [the applicant] could seek protection from and …the Albanian Government is making efforts to improve the rights of recognised ethnic minority groups".

17. The decision in respect of the first appellant noted that the asylum and subsidiary protection applications were both based on the same issues: -

    i. That the first appellant was persecuted because he is of Gabel ethnicity.
    ii. He claimed his brother had married a non-Roma woman in August 2004. Her family disapproved of the marriage and killed his brother on the 5th August, 2004.
    iii. He claimed that in Shkodër a member of the Gabel ethnic group could not go to the police as they would be mistreated and that families extract revenge through blood feuds.

    Having quoted an extract from the UK Home Office "Operational Guidance Note on Albania", published in December 2008, the Minister observed: -

> "…as noticed previously in this submission there is a functioning police force in Albania which the applicant could seek protection from should the Socialist Party members who allegedly threatened him and murdered his nephew continue to pose a threat to him."

The decision continued –

> "Overall, and having regard to all facts on file, I am not satisfied that the applicant has demonstrated that he is without protection in Albania and I do not find that there are substantial grounds for believing that the applicant would be at risk of serious harm by 'torture or inhuman or degrading treatment', in Albania if he is returned there."

18. Separately the Minister's decision had regard to the RAT's assessment of credibility of the first appellant. Relevant aspects regarding credibility in relation to the first appellant distilled from the decision of the RAT which was considered and taken into account by the Minister in reaching the subsidiary protection decision.

The report noted the RAT determination on credibility –

> "...the notion that the Applicant's pursuers sent a letter to him after the election threatening to kill him and his son is not in the circumstances tenable or credible."

The subsidiary protection decision concluded that because of the doubts surrounding his credibility, the applicant did not warrant the benefit of the doubt. It was considered, in conclusion, that substantial grounds had not been shown for believing that the first appellant would face a real risk of suffering serious harm if returned to Albania.

19. In the case of the second appellant, having reviewed relevant extracts from the COI materials as aforesaid, the first respondent considered the assessment by the RAT raising doubts regarding the second appellant's credibility and took into account its unchallenged findings and conclusions: -

> "In the view of the Tribunal it cannot be credibly maintained that the Applicant and her husband were the subject of persecution by way of racially motivated attacks or politically motivated attacks in 2005."

The RAT had found material statements were not credible. The decision to refuse subsidiary protection to the second appellant concluded that "Because of the doubts surrounding her credibility, the applicant does not warrant the benefit of the doubt."

ii. Decisions relating to the third, fourth and fifth appellants

20. In the decisions relating to the third, fourth and fifth appellants, the Minister further cited extracts from the 2010 US Department of State Report which, while noting that Romani people "suffered significant societal abuse and discrimination", referred to positive steps proposed by the Albanian Government in relation to the protection of minorities. The Minister concluded that: -

> "...While it is accepted that some discrimination of visible minorities may occur in Albania...the Albanian authorities are making determined efforts to support the inclusion of Roma by way of their 'National Action Plan for the Roma and Egyptian Involvement Decade'. It is also not accepted that the applicant would be unable to seek state protection because [the applicant] is Roma."

21. In the case of the third appellant, the determination recommended he be refused subsidiary protection. The determination details inconsistencies which undermine credibility, and which were extrapolated from the decision of the RAT made in the appeal from the initial ORAC decision on the asylum application. Seven distinct aspects were identified and considered in detail.

22. This included extracts from pages 15, 16, 18 and 19 of the decision of the RAT all of which findings and conclusions were unchallenged. This led to the conclusion that "Because of the doubts surrounding his credibility, the applicant does not warrant the benefit of the doubt."

23. In respect of the decision relating to the fourth and fifth appellants, the claimed fear of serious harm in Albania by reason of (a) the death penalty or a risk of execution and (b) torture or inhuman or degrading treatment or punishment of the fourth appellant in Albania was considered in detail. It noted that Albania had abolished the death penalty in 2007. It is further noted that the fourth appellant had not claimed to have committed any crimes in Albania and the Minister therefore concluded that the fourth appellant and her son the fifth appellant would not be at risk of the death penalty or execution if returned to Albania.

24. The COI considered included the US Department of State Human Rights Report on Albania of the 8th April, 2011. The Minister concluded that substantial grounds had not been shown for believing that they would face a real risk of suffering serious harm if returned to Albania. They were determined to be not eligible for subsidiary protection. Weight was also attached to the adverse credibility findings as set out in the RAT decision; "Because of the doubts surrounding her credibility, the applicant does not warrant the benefit of the doubt."

Deportation orders

25. The applications for subsidiary protection were rejected by the respondent Minister. The decisions refusing the applications for subsidiary protection were communicated in writing to each. Annexed to each decision was a detailed document identifying the reasons, the factors taken into account and the assessment of same which led to the determination that they were not eligible for subsidiary protection.

26. Likewise, in respect of the ensuing deportation orders, the appellants were notified of the decision by letter. Annexed to same were the deportation orders together with a document, being an examination of the file which encompassed the factors taken into account in making the deportation order.

27. The appellants were deported in 2013 pursuant to deportation orders signed in 2011. They have all resided in Albania ever since.

28. In each case the deportation orders are sought to be quashed on the basis that the refusal of subsidiary protection was not valid and the decisions were irrational.

Grounds on which Judicial Review was sought

29. Leave to seek judicial review was granted in September 2011 based on what later came to be known as *M.M.* grounds. The applications for judicial review thereafter stood adjourned awaiting the outcome of the said case which ultimately concluded with the decision of O'Donnell J. in *M.M. v Minister for Justice and Equality* [2018] 1 I.L.R.M. 361. Thereafter, the applications seeking judicial review proceeded.

Decision of the High Court

30. In a succinct judgment, the High Court firstly noted that these were *M.M.*-based challenges. Humphreys J. noted that while the statement of grounds challenged the asylum refusals, this ground was later disclaimed and the substantive relief proceeded with consisted of certiorari of the decisions refusing subsidiary protection and the ensuing

deportations. He observed that he had previously rejected "legalistic points of a general nature" raised by other applicants, referring in particular to two previous judgments (*N.M. v The Minister for Justice and Equality* [2018] I.E.H.C. 186 and *F.M. v The Minister for Justice and Equality* [2018] I.E.H.C. 274) in which such points had been unsuccessfully advanced.

31. The trial judge rejected the appellants' submission which had argued that the Minister's conclusions in relation to the availability of state protection in Albania did not follow from the specific country material referred to.

32. The judgment went on to also cite with approval the observations of Birmingham J. (as he then was) in *G.O.B. v. Minister for Justice & Equality* [2008] I.E.H.C. 229 (*G.O.B.*) which had stated at para. 26: -

> "one must appreciate that the Minister and his officials are not coming to this issue as total novices. A great number of other cases will have raised issues about seeking assistance from the Nigerian police. Those officials who deal with these issues must be considered to have acquired a broad familiarity with the general perception of the Nigerian police force."

Humphreys J. observed that this reasoning applied *mutatis mutandis* to other countries.

33. The trial judge found that the Minister's decisions were not based on the availability in Albania of state protection alone but also had proceeded to note the unchallenged RAT findings of lack of credibility of the appellants' accounts of events. He observed that "The latter is an independent ground why the present judicial review fails."

34. In response to the contention that the third appellant's explanation as to why the RAT credibility findings should not be followed since same were not discursively or narratively referred to in the Minister's decision, the High Court judge noted that this argument had not been pleaded. He observed that: -

> "…even if it was pleaded he is up against the decision in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 per Hardiman J. which means that the material submitted has to be taken to have been considered if the decision-maker so states, even if it is not narratively discussed, unless an applicant shows otherwise which has not been done here."

He dismissed the applications.

Appeal

35. The appellants primarily rely on two grounds:

    i. Whether the High Court was correct in finding that the Minister's conclusion on state protection was rational/lawful.
    ii. Whether the High Court was correct in finding that the decisions could be sustained on a finding of lack of credibility.

The respondents oppose the appeals in their entirety.

Arguments of the appellants

i. Findings on state protection

36. In outlining the legal principles of effective judicial review, the appellants place emphasis on the judgment of this court in *NM (DRC) v. Minister for Justice, Equality and Law Reform* [2018] 2 I.R. 591 wherein Hogan J. at p. 620 stated: -

> "I accept that the 'no relevant material' standard prescribed by the Supreme Court in *O'Keeffe* would not satisfy the *Diouf* requirements, since in practice it would not be possible to subject the reasons given by the decision maker to a 'thorough review' by the judicial review judge if that were indeed the applicable test. Nevertheless, for the reasons essentially set out by Cooke J. in *ISOF* and by me as a judge of the High Court in *Efe*, I consider that *O'Keeffe* test can no longer be applied to judicial review applications in asylum matters such as the present one in which the protection of either constitutional rights or EU law rights are engaged. The Supreme Court has, in any event, made this clear: this, at least, is the clear implication of major post-*O'Keeffe* decisions such as *Clinton* and *Meadows.* Even if that were not so, this Court's duty of loyal co-operation with the requirements of EU law would, in any event, require us to ensure that our domestic law of judicial review is remoulded in this manner in order to accommodate the requirements of Article 39.1."

The decision in *NM (DRC)* was subsequently cited with approval by Charleton J. in the Supreme Court in *A.A.A. v. Minister for Justice* [2017] I.E.S.C. 80.

37. In relation to availability of state protection in Albania, the appellants submit that the basis for the Minister's finding that the appellants were not at risk of suffering serious harm and the Minister's conclusions in the subsidiary protection decisions on this were flawed. They argue that state protection means "effective protection".

38. They contend that Article 7(2) of the Qualification Directive and Reg. 2(1) of the 2006 Regulations require an examination of whether "an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm" exists in the state in question. They rely on *Idiakheua v Minister for Justice* [2005] I.E.H.C. 150 wherein Clarke J. (as he then was) refers to the true test as being whether "the country concerned provides reasonable protection in practical terms."

39. The appellants contend that the conclusions reached by the Minister on the basis of the COI relied upon are *prima facie* irrational. Referring to the decision of Murray C.J. in *Meadows v Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701, they argue that the conclusions do not flow from the data and that the COI corroborated the appellants' case that an "effective" police force has yet to be developed in Albania.

40. The appellants submit that the High Court judge erred in placing reliance on the dicta in *G.O.B.* and argue: -

(i) The RAT's knowledge of Nigeria (the country at issue in *G.O.B.*) is superior and cannot be compared with its knowledge of Albania due to higher numbers of asylum applications emanating from the former state.

(ii) They are entitled to a transparent process, which, in line the right to good administration under EU law, requires the COI to be made available to applicants and to be expressly referred to in the reasoning of the decision-maker.

(iii) They submit that the decision in *G.O.B.* can be distinguished on the basis that the Minister here did not purport to rely on his own expertise or knowledge but rather, he based it on the COI. They refer, by way of contrast, to the decision of *Efe (A Minor) and Others v Minister for Justice and Others* [2011] 2 I.R. 798 at p. 812, to support a contention that where a decision maker relies entirely on COI as opposed to personal knowledge of a country to assist with a credibility assessment, "any doctrine of curial deference would seem misplaced".

ii. Sustainability of lack of credibility as basis of decision

41. The appellants submit that the Minister did not make a specific finding in relation to credibility when concluding in each decision that, "Because of the doubts surrounding … credibility, the applicant does not warrant the benefit of the doubt." They argue that relevant COI shows that one might be in danger by virtue of being Roma but that this issue was dealt with by the decision-maker by stating that state protection was available to the appellants.

42. The appellants submit that if the subsidiary protection decision relating to an applicant is quashed, any ensuing deportation decision must also fall, and further, that the same irrationality which, they argue, infects the subsidiary protection reasoning also infects the deportation decision reasoning.

iii. Article 267 reference

43. The appellants suggest that a reference pursuant to Article 267 to the CJEU may be appropriate in relation to two questions:

> "1. Does the right to good administration under Article 41 of the Charter of Fundamental Rights of the EU (or the equivalent general principle of EU law) require that protection decisions concerned with state protection be made based on disclosed documentary Country of Origin Information or may the authorities of a member state rely on their own expertise in relation to aspects of state protection matters such as the possibility of seeking effective assistance from a police force?
>
> 2. Is it consistent with the right to an effective remedy under Article 47 of the CFEU for the High Court to uphold the protection decision of a decision maker based on deference to that decision maker's own knowledge in relation to the effectiveness of a police force when the decision maker himself expressly justified his conclusion not on the basis of his own knowledge but on the basis of Country of Origin Information?"

Arguments of the respondents

i. Findings of the RAT

44. The respondents contend that the appeal grounds advanced by the appellants to the findings made at the asylum (RAT) stage of the process, both as to the availability of state protection and credibility of the appellants, were disclaimed and abandoned by the appellants as bases for judicial review. Therefore, those findings stand as a matter of law.

ii. Consideration of COI by Minister

45. The respondents contend that it is clear from the terms of the decisions under challenge that the evidence was carefully weighed by the Minister. The decisions acknowledge that there were shortcomings in relation to the police in Albania but that same are counterbalanced by evidence regarding the existence and operation of the office of the ombudsman which processes complaints against the police. The respondents, referring to the decision of McDermott J. in *R.P. v. Minister for Justice, Equality and Law Reform* [2014] I.E.H.C. 125, argue that the consideration of COI is a matter for the decision-maker.

iii. Article 267 reference

46. In relation to the appellants' submission on a possible Article 267 reference to the CJEU, the respondents contend that such a reference is unnecessary. The respondents contend that the comments of the High Court judge in relation to the issue of credibility, which the appellants seek to rely on as a basis for an Art. 267 reference, were merely a reflection of the reality of the Minister's position on the issue, evidenced by the Minister's clear conclusion in the subsidiary protection decisions that "Because of the doubts surrounding…credibility, the applicant does not warrant the benefit of the doubt". The respondents also contend that the second proposed reference question is rendered moot by the fact that the appellants have conceded that deference was not part and parcel of the decision-making process thereby rendering a reference pursuant to Art. 267 an academic exercise.

iv. Delay and mootness

47. The respondents argue that given the significant delays the issues under appeal – including the validity of the deportation orders – are now moot.

v. Subsidiary protection decisions

48. The respondents assert that appropriate reliance was placed on the decision of the RAT that the appellants' claims made in the course of the application for refugee status were found not to be credible. Further, that the appellants did not challenge the validity of the refusal of the asylum application nor any of these findings with regard to lack of credibility.

49. It is contended on behalf of the respondents that there was no further information submitted on behalf of any of the appellants as might have fairly required the subsidiary protection decision-maker to disregard the credibility findings of the RAT. No decision would or could have been made in relation to a deportation order unless a decision had first been made to refuse the application for subsidiary protection.

Discussion

The Law

50. Given the very substantial changes in the law since the within applications seeking orders of *certiorari* by way of judicial review quashing the refusal of subsidiary protection and the deportation orders in question were sought in September 2011 in respect of the appellants, it is necessary to recall the relevant statutory regime that operated at the relevant time.

51. Unsuccessful asylum seekers could be deported pursuant to the Immigration Act, 1999 s.3(2)(f). The Qualification Directive came into operation in 2006. It established minimum standards for the qualification and status of third country nationals or stateless persons as refugees and which persons who otherwise need international protection and the content of the protection granted. It required Irish law to give effect to its provisions on subsidiary protection and for persons who did not qualify for asylum. Following its coming into operation unsuccessful asylum seekers could not be deported without the State first determining whether they qualified for subsidiary protection.

52. Domestically, the 2006 Regulations gave effect to the Qualification Directive. Regulation 4(1)(a) required notification of a proposal to deport pursuant to s.3(3) of the 1999 Act in respect of a person whose application for asylum had been refused. The notification had to include a statement that, if the proposed deportee considered that he or she was a person eligible for subsidiary protection then he or she could, in addition to making representations pursuant to s.3(3)(b) of the 1999 Act in respect of why he or she should not be deported, make an application to the Minister within a fixed time limit for subsidiary protection.

53. If the Minister determined that the applicant was not a person eligible for subsidiary protection the Minister was then required to proceed to consider whether a deportation order should be made in respect of the applicant having regard to the matters identified in s.3(6) of the Immigration Act, 1999 and in accordance with Regulation 4(5) of the 2006 Regulations.

54. Pursuant to the operative regime the Minister's decision regarding whether to grant or refuse subsidiary protection and whether to make a deportation order could be made proximately provided the Minister decided whether to grant subsidiary protection before deciding whether to deport a person to whom subsidiary protection had been refused. This approach has been considered in detail and endorsed in decisions such as the judgment of Mac Eochaidh J. in *N.J. v. The Minister for Justice* [2013] I.E.H.C. 603.

55. Procedures were further refined by virtue of the European Union (Subsidiary Protection) Regulations 2013 (S.I. 426/2013) (the "2013 Regulations"). Finally, after the decision on subsidiary protection was processed the issue of deportation was then dealt with within a specified time frame.

56. In the decision of *H.N. v. Minister for Justice Equality and Law Reform* C-604/12 EU:C:2014 302, a preliminary reference concerned with the scheme under the 2013

Regulations, the CJEU held that EU law did not preclude a national procedural rule, such as that applicable in this jurisdiction, under which an application for subsidiary protection could be considered only after an application for refugee status had been refused provided it was possible to submit the application for refugee status and the application for subsidiary protection at the same time (para. 57 of the judgment). Since under the regulations and statutory regime that operated at that time it was not possible to so do, arising from the decision in *H.N.* the 2013 Regulations were amended entitling an individual to apply for subsidiary protection either when making an application for a declaration of refugee status or after making such an application, so long as the application is made within time.

57. Subsequently in the decision of *Danqua v. Minister for Justice and Equality* C-429/15 EU: C: 2016 789 the CJEU held that the principle of effectiveness applied so as to preclude a national procedural rule as then operated in this jurisdiction and required an application for subsidiary protection from a person whose asylum application was refused to be made within 15 working days. In the opinion of the Advocate General it was for the national court to determine whether the period in which the application for subsidiary protection was made was reasonable having regard to all of the relevant circumstances of the case.

58. The Court of Appeal in *Danqua v. Minister for Justice and Equality (No. 2)* [2017] I.E.C.A. 20 allowed the applicant's appeal to quash the Minister's refusal and permit the applicant to submit an application for subsidiary protection.

Subsequent legal developments

59. After the institution of the above entitled proceedings in 2011 the law changed in this jurisdiction. In particular, the 2013 Regulations and the provisions of the International Protection Act, 2015 (the "2015 Act") became operative. The latter Act came into operation on the 31st December, 2016. As a result, a single procedure now operates for the examination of all applications for international protection which involves a composite process whereby firstly an application is considered from the perspective of asylum and thereafter in respect of subsidiary protection. This represents a streamlining and a greater efficiency in regard to such applications. The evidence relied upon in support of an asylum application is demonstrably highly material and of central importance in reaching a determination in regard to subsidiary protection.

60. As was observed by O'Donnell J. in *M.M.*: -

> "... as of the time of consideration of the application for subsidiary protection in 2009 despite the very significant degree of overlap between the tests for refugee status and subsidiary protection, Ireland operated what has been described as a bifurcated system of assessment for international protection. Applications for refugee status were dealt with under the refugee appeals process first before the ORAC, and then on appeal to the RAT, while as this case shows applications for subsidiary protection pursuant to the Regulations of 2006 were made to the Minister. The development of these separate procedural strands may have reflected nothing more than an incremental development of the law, different legal sources,

and different timing. Relatively recently, the two processes have been amalgamated in the application for international protection under the International Protection Act 2015."

Mootness

61. Given that one of the consequences of a deportation order is that the individual deported may not re-enter the State unless the order is quashed or subsequently revoked an application for judicial review by a deported applicant is generally not moot. In this regard the decision in *Esmé v. Minister for Justice and Equality* [2015] I.E.S.C. 26 is of relevance. (para. 35)

Ministerial reliance on prior decisions of the RAT tribunal

62. In the decision *H.M. v. Minister for Justice Equality and Law Reform* [2011] I.E.H.C. 16 Hogan J. held that the Minister was entitled to rely on the reasoning on credibility made by the RAT subject to the caveat that irrespective of whether the Tribunal decision is challenged, if its reasoning is open to objection then the Minister's decision will in turn be open to objection also.

63. Mac Eochaidh J. in *Barua v. Minister for Justice* [2012] I.E.H.C. 456 opined: -

> "This principle places an obligation on the Minister if adopting the findings of the Refugee Appeals Tribunal to ensure that all findings are reasonable."

64. In light of the decision in *Meadows*, the Minister's decision on refoulement must contain a sufficiently reasoned opinion on the existence and extent of risk, if any, to an applicant upon return to the country of origin in the context of claimed fears. The bare reiteration of prior findings by a different decision-maker is generally insufficient if the decision of the Minister is devoid of any indication of the Minister's own reasoning for concurring with the earlier decision or prior opinion.

65. However, merely because the applicant's credibility was rejected during the asylum process in the *Meadows* case does not mean that such findings are not relevant and material to be taken into account by the Minister. The decision in *Meadows* first and foremost requires reasons to given by the Minister.

66. The jurisprudence suggests that there is limited scope for an unsuccessful applicant for international protection to challenge a refoulement decision. In particular, Clarke J. in *Kouaype v. Minister for Justice Equality and Law Reform* [2011] 2 I.R. 1 expressed a view that it would be unlikely that an unsuccessful applicant for international protection who, having benefitted from a quasi-judicial international protection process in substance amounting to a finding that the prohibition of refoulement does not arise, would be in a position to challenge a deportation decision on reasonableness grounds, although it will be incumbent on the Minister to consider any matters coming to his or her attention which tend to show a change in circumstance from the position which obtained when the decision to refuse refugee status was made in the first place. Clarke J. indicated that the situation would have to have altered "... to a sufficiently significant extent as to arguably lead to a different conclusion" (para. 26).

67. In *Kouaype* the appellants had proffered new evidence purporting to show a risk to returned failed asylum seekers. However, Clarke J. found that this was insufficient where the evidence also showed that such persons were not routinely stopped and that there was no legislation for their prosecution. Clarke J. was satisfied that this new information would not alter the substance of the applicant's position so far as s. 5 of the Refugee Act, 1996 was concerned (para. 32).

68. As far as the deportation order is concerned, the role of the court in reviewing the decision to make a deportation order required the Minister to be satisfied that the provisions of s.5 of the Act of 1996 did not apply to the case under consideration. Clarke J. observed that this is: -

> "...in all cases but in particular in cases where the applicant concerned has already been the subject of a decision to refuse a declaration of refugee status, necessarily significantly more limited than the role of the court in considering the determination of the statutory bodies in respect of the refugee process itself." (para. 23)

69. Clarke J. continued at paras. 24-25: -

> "In the absence of unusual, special or changed circumstances or in the absence of there being evidence that the first respondent did not consider the matters specified by s.5 in coming to his opinion, it seems to me that it is not open to the court to go behind the first respondent's reasoning...
> Given that amongst the materials that will be before the first respondent in the case of a failed asylum seeker will be materials which have led to an unchallenged determination by the appropriate statutory body that the person concerned does not qualify for refugee status, and does not, therefore, at least as of the time of that decision, come within the scope of s. 5 of the 1996 Act, it would require special circumstances before it could be said that the first respondent had an obligation to engage in any significant reconsideration of that aspect of the matter of deportation."

70. In my view it is significant that no additional material evidence was placed before the Minister prior to the making of the deportation orders to demonstrate that there had been a significant and material change in circumstances so that it could be credibly contended that notwithstanding the view taken, at the time of its decision by the RAT, the circumstances had changed to such an extent as would warrant reaching a different conclusion with regard to either subsidiary protection or deportation.

71. Whereas significant changes have been brought about in the international protection regime pursuant to the 2015 Act, the dicta of Clarke J. in *Kouaype* offers guidance and assistance in considering the approach adopted by the Minister in 2011 and I adopt its reasoning.

Evidence before the High Court

72. In each decision concerning the appellants it was concluded that substantial grounds had not been shown for believing that they would face a real risk of serious harm if returned to Albania. It was recommended that they be refused subsidiary protection.

73. Whilst to an extent each of the appellants sought to dispute the COI and selectively emphasise elements of same, they did not offer evidence to the High Court sufficient to contradict the overall thrust of the COI and in particular those conclusions relied upon by the Minister in forming his opinion on the availability of state protection to the appellants.

74. The trial judge's succinct process of reasoning encompassed: -

a. All appellants were unsuccessful in their asylum applications at the ORAC and on appeal at the RAT. (para. 1)
b. The statement of grounds challenging the asylum refusals was disclaimed by the appellants. (para. 3)
c. It implicitly follows that the trial judge was satisfied that Minister was entitled to rely on the RAT findings and have regard to same in accordance with law and as outlined above.
d. The Minister's decision was also based separately on lack of credibility. (para. 5)
e. The court rejected the aspects of the statement of grounds which encompassed generalised legalistic points and identified two authorities for that approach.
f. The trial judge relied on the decision of *G.O.B.* – including an excerpt quoted.
g. The court relied on clear authority in concluding that the burden had not been discharged by the third appellant as to why the RAT findings as to lack of credibility should not be followed (para. 6)

Findings

Mootness

75. Whilst the respondents contend that there is a significant issue as to mootness in light of the passage of time since the appellants were deported to Albania, I am satisfied that given the nature and significance of the matters at issue, in particular whether the findings and conclusions of the Minister on subsidiary protection were rational and lawful notwithstanding that the appellants have been residing in Albania for upwards of six years, that the issues for determination are not moot in the circumstances of this case.

76. Individuals such as the appellants enjoy a constitutional right of access to the courts to challenge the validity of the deportation order.

Credibility findings

77. As was noted by the trial judge, while the statement of grounds challenged the asylum refusal – it having been rejected initially by the ORAC and again on appeal by the RAT– that part or aspect of the grounds was effectively abandoned and the substantive relief sought was *certiorari* in respect of the subsidiary protection and deportation decisions only. The asylum decision was not challenged by judicial review in respect of any of the appellants.

78. The ORAC and RAT were bodies which were independent from the first named respondent. Where their findings were unchallenged and where the claim for subsidiary protection repeated with the claim for refugee status, the findings of those bodies, particularly the RAT, were potentially relevant as a constituent element to be considered by the subsidiary protection decision-maker.

79. The practical consequences of abandoning the challenge to the asylum refusal is that those findings in respect of each appellant stand as a matter of law and the reasons identified in the ORAC decisions and on appeal by the RAT remain unimpeached in respect of each appellant.

80. The decision on subsidiary protection in each case made specific reference/allusion to the prior decision of the RAT insofar as it noted that the relevant appellants' credibility was noted and whether the benefit of the doubt should be given in the light of Regulation 5(3). It is clear that the RAT decision in regard to credibility was never challenged by any of the appellants, nor was any aspect of the said decision. The Supreme Court decision in *M.M.* (referred to above) of O'Donnell J. has not identified any difficulty in a decision regarding subsidiary protection making reference to, and apparently relying upon, an RAT decision and in particular making reference to "credibility" as determined at the RAT appeal refusing refugee status.

81. It will be recalled that the appellants contended that by reason of their Gabel ethnic origin and background they were at risk of serious harm in Albania. The assessment of credibility in that context was not so much as to whether the appellants were telling the truth (it was not in contest or disputed that they were members of the Gabel ethnic group) but whether the asserted serious risk advanced on behalf of each of them, namely that they were, by reason of their ethnic origin, at risk of serious harm and that the Albanian police force were either unwilling or incapable of protecting them from such serious harm, was found by the Minister not to follow from those facts.

82. As is clear from each of the decisions under challenge, lack of credibility was not the sole or primary basis for same. Therefore, it is not necessary to decide whether a lack of credibility on a stand-alone ground in any individual case would have warranted the Minister's decision. The fact was that the absence of credibility was an additional factor. It was also a relevant factor and regarded as such by the Minister. It supported the decision made in each case. In substance the High Court judgment meets the requirements to show reasons as provided in *Meadows* and *Mallak v Minister for Justice* [2012] 3 I.R 297.

83. The substance of the decision in each case refusing subsidiary protection was based primarily on COI and the trial judge was correct in his conclusions that the RAT findings of lack of credibility were an additional distinct material ground in each case which supported the Minister's decision in refusing the applications for subsidiary protection.

COI and reference to *G.O.B.*

84. In the instant case the decisions sought to be impugned were based on the evidence, including COI information, and the files and submissions and the ORAC and RAT

determinations before the Minister rather than the decision-maker's own knowledge and expertise. The trial judge's reference to the dictum of Birmingham J. in *G.O.B.* which had emphasised the level of expertise and knowledge of the Minister and his officials in connection with issues regarding the availability of assistance from the national police force was relevant although to an extent the passage cited from that judgment might be considered *obiter*. Whilst the judgment in question was specifically directed towards Nigeria, as Humphreys J. rightly stated "The same obviously applies *mutatis mutandis* to other countries."

85. Whilst the appellants object that the decision in *G.O.B.* had not been opened to the judge by either party, nevertheless it is clear that the trial judge himself had raised the case with the parties in the course of the hearing and hence ample opportunity was afforded to both parties to advance arguments as to why that decision was distinguishable or otherwise inapposite. He was accordingly entitled to refer to it in his judgment.

86. It will be recalled that in the latter case, in reviewing the Minister's decision and the treatment of COI, Birmingham J. also stated at para. 28: -

> "I feel I must also have regard to the principle, accepted both domestically and internationally, that absent clear and convincing proof to the contrary, a state is to be presumed capable of protecting its citizens. This was established in the seminal case of *Canada (AG) v Ward* [1993] 2 RCS, which has been approved in a number of Irish cases, including the judgments of Hedigan in *P. L. O. v The Refugee Appeals Tribunal & Anor* [2007] IEHC 299 and Feeney J. *O.A.A. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 169. There must be few police forces in the world against which some criticism could not be laid and in respect of which a trawl through the internet would fail to produce documents critical of their effectiveness and sceptical of their capacity to respond."

I am satisfied that it was a relevant decision and correctly considered so by the trial judge in the circumstances of this case.

87. Whilst the appellants argue that there was a lack of expertise within the Department in regard to circumstances obtaining within Albania, no evidence was advanced to support this contention beyond a bare assertion, and that bare assertion did not warrant the decision in *G.O.B.* being rendered inapplicable to the facts in this case.

88. Notwithstanding the submissions and arguments advanced on behalf of the appellants, the issue of curial deference was not properly before the High Court in the context of the judicial review as the hearing proceeded and accordingly it does not fall to be considered in this appeal. Further, at all events, the appellants would appear to acknowledge that in conducting the exercise of determining the applications for subsidiary protection in each case the Minister did not purport at any time to rely on his own expertise or knowledge, or indeed that of the Department, rather the entire thrust of the determination in each case was based primarily on an assessment and analysis of COI formation.

89. Quite apart from the decision in *G.O.B.* it was clear from COI information quoted extensively by the Minister in the subsidiary protection decisions which the trial judge refused to quash that there was ample evidence before the Minister to which he had regard and which was referred to in the decisions, which entitled him to reasonably conclude that state protection was available to the appellants and that they would be adequately protected by the police upon their return to Albania. It is evident that the reasoning of the Minister involved reliance on COI from credible sources in each case and a careful calibration of the various competing and countervailing factors before arriving at the conclusion which he did in refusing subsidiary protection. No decision was based on departmental or ministerial knowledge alone as to the availability of state protection.

Article 267 reference

90. The appellant suggested a reference to the CJEU pursuant to Article 267 of the TFEU may be appropriate with regard to two questions outlined at para. 43 *ante*.

91. Such a reference does not sensibly follow in circumstances where the decisions sought to be impugned in each case are based on COI information clearly referenced which was relied on by the decision-maker. The appellants disagree with the Minister in his analysis of and conclusions based on the specific COI material. It is to be inferred from the judgment of Humphreys J. that the trial judge rejects the contention central to the appellant's complaint and identified in the heading to para. 5 that "...conclusions on State protection do not follow from the country material on which the Minister relies". The judge implicitly acknowledges that the Minister correctly relied on the material.

92. The issue arising from *G.O.B.* is a distinct point but that judgment too calls for a clear analysis. Consideration of the entire judgment demonstrates its direct relevance – as outlined above.

93. It does not appear to me appropriate accordingly that this court should refer any question for a preliminary ruling since to do so would be predicated on an unduly artificial and distorted construction of the succinct judgment of the High Court in the first place. Furthermore, a reference on such terms as are proposed would be inconsistent with the appellants' own contention at para. 44 of their submissions: -

> "On our reading of the decision it is because state protection is available that the decision maker finds the Applicants would not be at risk of serious harm."

This renders the first reference question moot.

94. Nowhere in his judgment did the trial judge accept the appellants' submission that the Minister's conclusions in any case in relation to the availability of state protection did not follow from the specific COI material referred to in each of the determinations the subject matter of the challenge. There was no evidence that the Minister's decision was based on reliance on his own expertise/ knowledge in relation to aspects of state protection matters including the possibility of seeking effective assistance from a police force. The references by the trial judge to departmental and ministerial expertise and knowledge and the

related jurisprudence were, in part, *obiter*. Therefore, the questions proposed to be raised are not relevant to the resolution of any substantive issue arising in this appeal.

95. I accept the respondents' contentions based upon the decisions in M.*I. v Michelle O'Gorman and Others* [2013] I.E.H.C. 368 and *M.E.O (Nigeria) v IPAT* [2018] I.E.H.C. 782 that the reference by the High Court judge to *G.O.B.*, amounted to no more than the court taking "judicial notice of the reality that the Minister, through his decision-makers, has accrued significant experience in dealing with asylum applications over a substantial period of time."

96. It is to be borne in mind that the CJEU in Case C-277/11 *M.M v. Minister for Justice, Equality and Law Reform* held that Article 4(1) of the Qualification Directive did not require the decision-maker to supply the applicant with a draft of any possible arguments on which it intends to base its rejection for comment prior to its formal adoption. The earlier relevant decisions of the ECJ of the 22nd November, 2012 and the further reference decision of the 9th February, 2017 had also held that a written procedure was not incompatible with the right to be heard in European law. It had stated: -

> "... The fact that an applicant for subsidiary protection has been able to set out his views only in written form cannot, generally, be regarded as not allowing effective observance of his right to be heard before a decision on his application is adopted."

97. Insofar as arguments concerning Articles 41 and 47 of the CJEU were not previously raised by the appellants they are not entitled to raise them now for the first time.

Conclusions on irrationality/unreasonableness

98. In circumstances where each decision incorporates extensive evidence outlining the rationale for the decisions made in refusing subsidiary protection I am satisfied that the trial judge correctly concluded that the appellants failed to discharge the burden of proof to establish that the decisions on subsidiary protection in respect of each of the appellants could be regarded as either irrational or unreasonable. Neither was there any legal basis identified at the High Court hearing upon which to challenge the decisions for failure to comply with the terms of the Directive or the regulations transposing it. The appellants failed to offer any material capable of supporting their contention that the Minister's decision ought to be impugned on irrationality grounds.

99. The key issue is whether the judge erred in effectively concluding that the Minister correctly interpreted the COI with regard to Albania and the capacity of its police authority to provide an appropriate response and protection in the event that it is required to do so.

100. It is a fact that an adverse decision on the same facts had been previously made in respect of the asylum application of each appellant by the ORAC and RAT and in the applications for subsidiary protection in each case the appellants did not raise any substantial grounds challenging or casting doubt on the conclusions as to credibility embodied in the decisions made by the ORAC/RAT.

101. It is clear from the COI and material taken into account that it was reasonable for the Minister to conclude that it was not credible that such matters would give rise to a risk of serious harm on the facts advanced in the instant cases as the High Court decision in effect concludes.

102. Whilst each of the appellants may have believed that they were at risk, the Minister was fortified with adequate independent COI in arriving at a finding that such a risk did not arise. If such a risk was not established subsidiary protection was not warranted.

103. The Minister was required to form an opinion on the nature and extent of the risk to the applicant on return and if of the view that refoulement would not arise must give reasons why.

104. *Meadows* is not authority for proposition that prior decisions in the asylum process are immaterial or irrelevant. In particular, the crucial aspect of the judgment includes the dictum of Murray C.J. which provided: -

> "That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context." (para. 93)

105. Provided the Minister is satisfied that the findings of the RAT were reasonable the Minister is entitled to adopt the said findings and have regard to same. There is no obligation on the Minister to reconsider the same facts and events to decide whether they are plausible or credible in the absence of new or additional information or evidence or some other basis capable of demonstrating that the original findings were vitiated by fundamental error.

106. It is noteworthy, and the trial judge rightly focused on the fact, that none of the appellants sought to contest the inferences drawn and conclusions reached by the RAT in connection with any of the material matters therein contained including the issue of credibility. No new or additional evidence was sought to be adduced contesting the RAT findings, neither was there an attempt to correct or amend any alleged error or erroneous conclusion whether in regard to the overall thrust of COI or otherwise.

107. In light of the authorities, in the absence of unusual, special or changed circumstances or in the absence of there being evidence that the first respondent did not consider the matters specified by s.5 in coming to his opinion, it seems to me that it was not open to the High Court to go behind the first respondent's reasoning and hence his conclusions were correct.

108. The appellants have failed to establish any evidence of irrationality in the process adopted by the trial judge. It was clear to the trial judge that there was ample COI evidence before the Minister entitling him to reach the conclusions which he did.

109. I am satisfied that the trial judge's decision was correct in circumstances where there was clear evidence before the Minister in the form of COI which entitled him to make the decision, draw the inferences and reach the conclusions which he did. The evidence

before him was cogent and reliable and the means whereby he reached his conclusions were rationally connected to the objective of the legislation and were not arbitrary, unfair or based on irrational considerations.

110. No stateable ground was identified for contending that the determination of the High Court judge refusing judicial review was irrational or otherwise unreasonable. No basis has been established which would warrant interfering with the decision of the High Court.

111. I would dismiss the appeals.