

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 566 J.R.]

BETWEEN

R.B. (BANGLADESH)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of April, 2018

1. The applicant sought asylum in the State in November, 2010 and, following the refusal of his application by the Refugee Applications Commissioner, he appealed to the Refugee Appeals Tribunal, where he was again unsuccessful in April, 2011.

2. On 19th May, 2011 he applied for leave to remain and for subsidiary protection. The latter application was refused on 11th May, 2012 and a deportation order made on 17th May, 2012.

3. The statement of grounds in the present proceedings was filed on 20th June, 2012. On 12th September, 2012, O'Keeffe J. granted leave for relief 1 on a single ground, formulated by the court, in the form of a legalistic point which has since been rejected in other proceedings regarding enmeshment of the subsidiary protection and deportation processes. An interim injunction was also granted. The applicant's counsel says that it was understood that the balance of the leave application was adjourned to be sought later. The applicant failed to issue a notice of motion on foot of the grant of partial leave.

4. In January, 2013, the applicant married a Polish national. On 16th August, 2013, the deportation order was revoked because of that marriage, and a five-year permission granted to the applicant to reside in the State until 15th August, 2018. In April, 2015, the applicant's Bangladeshi passport was renewed. In August, 2017 the applicant's wife was granted an Irish passport. On 11th September, 2017 the applicant applied for Irish citizenship. As regards the fortunate occurrence of a marriage to an EU national, I can record that while, as part of Operation Vantage, a substantial number of applications for residence cards have been investigated by the EU Treaty Rights section of the first named respondent's Department, it so far appears that an entirely comprehensive approach has not been taken and one might certainly think that consideration could be given to a more comprehensive review in that regard.

5. On 23rd October, 2017 I granted leave on certain of the remaining reliefs and grounds that had not been dealt with by O'Keeffe J. In doing so I was satisfied with the applicant's counsel's explanation that it was intended by O'Keeffe J. to adjourn the remaining elements of the leave application even though the order does not in fact say that. I granted leave to seek reliefs 4 and 5 (leave for relief 1 having already been granted). I also gave leave on grounds 16 to 21 and additional grounds 23 to 27, allowing an amendment in that regard. I also directed that the extended grounds will also apply in relation to relief 1. The limited reliefs and grounds granted represent the fact that what I gave on the 23rd October, 2017 was what was applied for on behalf of the applicant on the day. His lawyers did not press certain matters on that occasion. The order does not say anything explicit about extension of time for issue of the notice of motion for substantive relief, but that was the effect of it. The leave order was not in fact perfected until after the commencement of the present hearing on 20th April, 2018. When at the hearing it became clear that the order had not been perfected, I gave appropriate directions in that regard and I adjourned the balance of the hearing.

6. On 16th March, 2018 the applicant applied for a permanent residence on grounds of marriage to an EU national. That application on the face of it seems questionable given that his wife is not an other EU national any more but that matter will no doubt be considered by the Minister in due course.

7. I have received submissions from Mr. Paul O'Shea B.L. for the applicant and Mr. Daniel Donnelly B.L. for the respondent.

Litany of procedural failures by the applicant

8. Unfortunately, the present case involved an unduly complex procedural situation which is entirely down to a litany of procedural failures on behalf of the applicant.

- (i). He applied for partial leave and failed to notice that the order of O'Keeffe J. did not adjourn the balance of the leave application.
- (ii). He failed to issue a substantive notice of motion on foot of the partial leave and took five years to rectify this.
- (iii). He failed to follow up the need for a perfected leave order on foot of my own grant of leave in October, 2017.
- (iv). He allowed a date to be fixed without that far-from-straightforward leave order having been perfected.
- (v). He failed to respond to the Central Office's request for a copy of the original statement of grounds until after the hearing commenced.
- (vi). Submissions were made on behalf of the applicant on grounds on which leave was neither sought nor granted.

9. This situation, while unfortunate, now seems to have been rectified to the maximum extent possible and I will proceed to deal with what seems properly before the court at this stage.

Effect of partial grant of leave

10. The respondents made a point based on *Henderson v. Henderson* (1843) 3 Hare 100 to the effect that having obtained a partial grant of leave from O'Keeffe J. the applicant could not come along at a later stage and seek further leave from me. However, it seems to me in the particular circumstances of this case that point is misplaced. This is not a case of separate proceedings as in *Henderson*

v. Henderson; it is a case where leave was partly applied for and the balance was then adjourned, with the rest, or at least some of the rest, applied for later. While that is certainly not the greatest procedure and definitely not to be encouraged, it is not an abuse of process in the same sort of category as successive duplicative proceedings. Likewise the principle that if leave is refused on one ground, one cannot then seek an amendment to resuscitate the point (*L.R. v. Minister for Justice Equality and Law Reform* [2002] 1 I.R. 260) does not apply here because that is not what happened. O’Keeffe J. did not refuse the balance of the leave but rather adjourned it. Mr. Donnelly submits that one cannot look behind the perfected order made by O’Keeffe J. (see para. 25 of respondent’s written submissions), but it seems to me that if counsel tells me what was intended in an *ex parte* application I can legitimately feel entitled to rely on that even if the order as perfected on one interpretation suggests otherwise. It perhaps is obvious that it would have been better if the applicant had gone back to have the order amended under the slip rule but I do not think that failure to comply with such a counsel of perfection is fatal.

Absence of explicit application for extension of time to issue the substantive notice of motion

11. The respondents also complain that there was no express application for an extension of time to issue the substantive notice of motion and dispute whether I was correct to effectively extend that time given the five-year delay in issuing the motion on foot of the order of O’Keeffe J. It seems to me that in the particular circumstances of this case the respondent was not prejudiced, first of all because a substantive notice of motion in a judicial review is something of a formality anyway seeing as the reliefs are already set out in the statement of grounds, which, taken together with the leave order, tells the respondent everything he or she needs to know. The notice of motion, while a part of the procedure under the rules as they currently stand, does not in fact give the respondent any information he or she does not otherwise have. Secondly, in this particular case the respondent is not prejudiced because the case would have been parked anyway due to the ongoing *M.M. saga* (see *M.M. v. Minister for Justice and Equality* [2018] IESC 10 [2018] 1 I.L.R.M. 361),

12. The respondents make the perhaps legalistic objection that the applicant did not formally apply for a five-year extension but that was the effect of the order made. Nor did the applicant make the application by way of a formal notice of motion but it is not necessary that every application be accompanied by such a formal notice of motion especially if the other party is not thereby prejudiced. Indeed, an insistence on formal notices of motion and grounding affidavits for every conceivable procedural application would only increase costs of litigation to no great purpose.

13. Furthermore, the point is made that the applicant gave no explanation for the delay in issuing a notice of motion. I understood from Mr. O’Shea’s submission that the explanation was inadvertence. I would have allowed the applicant to put that explanation on affidavit if it had been in any real doubt or would have made any difference.

Relief sought

14. The primary relief as matters now stand is *certiorari* of the subsidiary protection refusal.

15. Mr. O’Shea formally moves the legalistic points that have already been rejected in *N.M. v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018) and *F.M. v. Minister for Justice and Equality* (Unreported, High Court, 17th April, 2018). He says that the remaining fact-specific ground is ground 1 which complains about consideration of the representations and facts of the application. In submissions, he initially sought to rely on reliefs 5 and 6 but it is clear from the leave order that leave for those reliefs was not sought or granted and Mr. O’Shea now accepts the grounds allowed are as I have set out above.

Failure to examine all relevant facts under art. 4 of the Qualification Directive

16. The decision states that all submissions were considered. It also says at p. 4 of 11 that notwithstanding that the applicant is not credible, consideration will be given to all matters under reg. 5 (1)(a) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). That, it seems to me, is sufficient. That disposes of the fact-specific ground that is pleaded, but in case I am wrong in not dealing with any other grounds I will now refer to those.

Complaint that matters were raised disputing the tribunal findings that are not dealt with

17. An applicant’s points do not have to be narratively dealt with. The Minister is entitled to adopt the findings of a tribunal if they seem to him to be reasoned and logical. It is not established that the Minister did not apply independent judgment to whether to adopt them or not: see *N.D. (Nigeria) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 44 (Unreported, Cooke J., 2nd February, 2012) at para. 14, which was disapproved of by Hogan J. in *M.M. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 9 [2013] 1 I.R. 370 at para. 37 prior to the correction of the latter’s erroneous analysis by the CJEU. *N.D.* was subsequently cited with apparent approval in *A.A.A. v. Minister for Justice and Equality* [2017] IESC 80 (Unreported, Supreme Court, 21st December, 2017) per Charleton J. at para. 30; see also *S.J. v. Minister for Justice and Equality* [2017] IEHC 591 (Unreported, Keane J., 10th October, 2017) at para. 89.

Reliance on asylum claim rather than subsidiary protection claim

18. Mr. O’Shea says that the applicant’s claims are not adequately dealt with in the decision, which he says relies more on the asylum claim than the subsidiary protection claim and fails to deal with the likely situation of the applicant on removal. It seems to me the risks to the applicant are dealt with in the decision in a manner that is adequate. Whether the applicant would be at risk as a Buddhist or as a Buddhist monk is to some extent interlinked with his previous asylum claim. The manner in which this is dealt with by the Minister is not unreasonable. This is not a case where the applicant has introduced new evidence of a significant nature which renders the conclusions irrational or unlawful.

19. Regard must also be had to the very generalised nature of the claim of the applicant. He claims a risk of the death penalty but that is not explained in the subsidiary protection application. His claim of a risk of indiscriminate violence is opaque. Nonetheless, both of those headings are included and considered in the Minister’s decision: see p. 3 of 11 onwards. Insofar as the point is made that the risk to him as a failed asylum seeker was not considered, that case was not made to the Minister.

Order

20. The application is dismissed.