

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 961 J.R.]

BETWEEN

C.M. (ZIMBABWE)

APPLICANT

AND

THE CHIEF INTERNATIONAL PROTECTION OFFICER AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of May, 2018

1. The applicant arrived in the State from Zimbabwe in April, 2016 and applied for asylum. He completed a questionnaire and attended for a s. 11 interview. The asylum application was refused in October, 2016. The applicant then appealed to the Refugee Appeals Tribunal. In December, 2016, the International Protection Act 2015 was commenced. As a result of the transitional provisions, he was deemed to have made an application for international protection and was interviewed in September, 2017 by the International Protection Office (IPO).

2. On 25th September, 2017, the applicant's solicitor called on the IPO to provide access to a record of the interview with a view to making post-interview submissions. On 26th September, 2017, the applicant was interviewed. On 18th October, 2017, the applicant's solicitor wrote further and stated that she was aware from a letter of 6th October, 2017 to another client that "*it is the policy of the IPO...not to release the notes from an applicant's substantive interview prior to the application being finalised*". The IPO ultimately gave a substantive reply on 13th November, 2017 which did not refer to such a "policy" but stated simply that "*there is no statutory obligation on this office to make such interview notes available in advance of a recommendation being issued. We do not propose to do so at this stage. Our decision is based on previous jurisprudence of the Superior Courts in this regard*".

3. Clarification was then sought as to what jurisprudence the IPO had in mind and in further correspondence dated 1st December, 2017 the IPO stated that the relevant case was *J.R.H. v. Minister for Justice, Equality and Law Reform* [2006] IEHC 355 [2009] 4 I.R. 474. On 11th December, 2017, the present proceedings were instituted and an injunction granted preventing finalisation of the IPO recommendation.

4. I have heard helpful submissions from Mr. Michael Conlon S.C. (with Ms. Eve Bourached B.L.) for the applicant and from Mr. Daniel Donnelly B.L for the respondent.

Essential issue

5. The key issue is whether the applicant is entitled to be furnished with notes of the interview, prepared by the IPAT, after that interview takes place but before a report is prepared thereon, in order to enable post-interview submissions to be made on his behalf. Reliefs of *mandamus*, *certiorari*, declarations and injunctions are sought in the statement of grounds but they all relate to this one issue.

Conceptual distinction between interference with rights and a positive duty on the State

6. An important context here is that there is no positive right to make post-interview submissions. Section 35(11) says that the IPO is not precluded from receiving post-interview submissions, but that is very much not a positive invitation to make such submissions and is certainly not a trigger for a whole further process in every case or even in most cases.

7. In terms of what has changed since the Supreme Court rejected an analogous right in *J.R.H.*, one major aspect of the jurisprudential landscape that has evolved is the emphasis on proportionality set out in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 [2010] 2 I.R. 701 [2011] 2 I.L.R.M. 157, particularly *per* Denham J., as she then was, at pp. 751 – 752: "*When a decision maker makes a decision which affects rights the court could consider whether the effect on the rights of the applicant would be so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness.*" This principle could be of some relevance if the IPO tried to stop an applicant from recording an interview. It seems to me to be of significantly less relevance if an administrative body postpones handing over notes until after the decision where there is no positive right to make post-interview submissions, in circumstances where the routine handing-over of such notes would create a significant administrative burden. It seems to me that *J.R.H.* is not necessarily determinative if a proportionality challenge based on *Meadows* were to be launched in relation to a hypothetical prohibition on tape-recording at this stage in the evolution of the jurisprudence relating to international protection. I am not prejudging such a challenge but in such a context, *Meadows* is a new development which would have to be given due weight and consideration and in those circumstances the decision of the Supreme Court in *J.R.H.* would not necessarily be determinative. Such considerations do not arise here. The court can, it seems to me, give at least some, although not necessarily decisive, weight to the possible consequences of finding for the applicant.

8. Mr. Donnelly submits that the furnishing of notes will create a further layer of submissions by applicants. I am informed that the average time interval between interview and s. 39 report on Mr. Donnelly's instructions is in the order of four to five weeks. Allowing a procedure whereby notes have to be furnished would in all likelihood interpose a further round of submissions in the majority of cases. Those submissions will have to be considered and the net result will most likely be a significant slowing down of the whole process. Furthermore, the first set of representations will almost inevitably become more exiguous because applicants will say they will have to wait to see what the applicant said at interview before they can supplement the submissions. In addition, inconsistencies will inevitably appear between the first and second set of representations, which will presumably provoke a further round of complaints by applicants if such inconsistencies are relied on. As Mr. Donnelly describes the applicant's submission: "*it potentially leads to a quagmire; it is far more elaborate and far more complex than what is required*".

9. A positive duty on the IPO to hand over its records at this stage of the procedure would introduce a significant distortion in the process. That is a fact to which I can have regard. It is a fundamental objective of jurisprudence that "*things must be made to work*" (see *B.W. v. R.A.T. (No. 2)* [2015] IEHC 759 para. 57). While the court of course holds the scales equally as between applicants and respondents, it does not hold the scales equally as between social order and disorder. One of the fundamental

objectives of law is to support the functioning of the State and of public institutions, and the court can at least have some regard to this issue in determining whether the IPO's reasons for its approach are sufficient and reasonable.

Allegation that fair procedures in the context of the enactment of s. 35(11) of the 2015 Act make it necessary to furnish interview notes.

10. As noted above, s. 35(11) of the 2015 Act allows the IPO to take into account post-interview representations as long as they are made before a report under s. 39(1) of the Act. However, the right to fair procedures does not include a right to notice of what the applicant is already aware of: see *M.A. v. Refugee Appeals Tribunal* [2015] IEHC 528, (Unreported, Mac Eochaidh J., 31st July, 2015), *C.N.K. v. Minister for Justice and Equality* [2016] IEHC 424 (Unreported, MacEochaidh J., 25th July, 2016), *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 (Unreported, Court of Appeal, 15th November, 2017), per Peart J., *A.M.A. v. Minister for Justice and Equality* [2016] IEHC 466 [2016] 7 JIC 2923 (Unreported, High Court, 29th July, 2016).

11. The State's written submission argues that "*sub-s. (11) does not confer a right to make representations following an interview ... sub-s. (11) is simply a gloss on sub-s. (10) clarifying that the IPO may consider representations after an interview but is not obligated to do so*". It seems to me that submission is well-founded. Fair procedures are a minimum not a maximum. Given that the applicant can bring along a solicitor to take a note as allowed by para. 4.2.1 of the IPO procedures document and given that this particular applicant did not request a right to record the proceedings, I cannot consider whether failure to afford that latter option is in breach of his rights. The refusal to furnish the notes is not in itself a breach of the constitutional right to fair procedures, as follows from the decision of the Supreme Court in *J.R.H. v. Refugee Applications Commissioner*. However, *J.R.H.* does not deal with the EU law points so I will go on to consider those separately.

Allegation that the duty to cooperate with the applicant under art. 4 (1) of the qualification directive makes furnishing the interview notes necessary

12. The process here is covered by the qualification directive 2004/83/EC effective from 10th October, 2006 after the proceedings in *J.R.H.* were instituted. Thus the directive was not relied on in those proceedings. Article 4.1 of the directive says that "*in cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application*".

13. The meaning of the duty of co-operation has already been clarified by the CJEU in Case C-277/11 *M.M. v. Minister for Justice and Equality* (22nd November, 2012) where the court says at para. 60 that there is no obligation to supply elements of the decision and to seek observations thereon. That applies here. There is no obligation on the IPO pursuant to the duty to co-operate under art. 4(1) to supply the elements of the decision and to provide opportunity for observations thereon, especially where those elements come from the applicant himself.

14. Quite independently of that basic point, such a right is specifically provided for in art. 17.5 of the recast procedures directive to which Ireland is not a party and it is not necessary or appropriate to read that right into the qualification directive. Such an approach seems to me consistent with what Hogan J. said in *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018) at para. 64. I note in passing that that comment seems to be *obiter* in the sense that the ratio of the Court of Appeal decision in *X.X.*, as indeed was the *ratio* of my decision in that case (*X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016)), was that the action was a collateral challenge to a decision subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and therefore was covered by s. 5 of that Act. Hence an appeal to the Court of Appeal did not lie absent a certificate, which was refused, so the earlier part of the judgment of the Court of Appeal in *X.X.* seems on such a view to be *obiter*. But nonetheless, obviously, I take it very much into account. However, I would respectfully not be inclined to broaden para. 64 of the Court of Appeal judgment in *X.X.* beyond its particular terms, namely interpretation of s. 17(7) of the Refugee Act 1996. As a general proposition, international jurisprudence can be relied on as persuasive authority, so on an analogous basis if a provision of positive law that does not apply to Ireland can throw light on a provision that does apply one can presumably look at that on a purely persuasive basis. Doubly so where the latter provision has an objective meaning throughout the Union and it is only happenstance that we are considering it in a country not bound by the recast provision. The non-applicability of the latter to Ireland is really neither here nor there in terms of its value in interpreting an earlier directive – the issue is whether the recast directive is clarifying and declaratory or as here amounts to a positive amendment. If for example the provision is declaratory only it is hard to see a jurisprudential basis why a court should shut its eyes to that. To do so could be an unduly insular approach to jurisprudence. On the other hand, if such a provision is not declaratory but rather creates a positive amendment, that possibly reinforces the case for saying it should not be read into a provision that *does apply to the State* and that is the situation here.

15. However, leaving that point aside entirely, a further problem for the applicant is that art. 14(2) of the procedures directive 2005 clearly allows post-interview furnishing of the notes: "*Member States shall ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time*". This did not apply to this applicant because it only applies to asylum and therefore is only relevant to the subsidiary protection situation post-31st December, 2016, when the two have been taken together. But presumably it has to be regarded as consistent with the duty to co-operate as set out in the qualification directive and indeed consistent with art. 41 of the Charter of Fundamental Rights. It seems to me that the point under discussion here is *acte clair* on the basis it has already been clarified in *M.M.* As Mr. Donnelly says, *M.M.* could not have been decided the way it was if the applicant's submission is correct.

16. Thus, the applicant's argument is inconsistent with art. 14(2) of the procedures directive, which would be phrased differently if that argument was valid. The same point was made by Cooke J. in *B.J.S.A. (Sierra Leone) v. Minister for Justice and Equality* [2011] IEHC 381 (Unreported, High Court, 12th October, 2011) at para. 22 "*Article 14.2 of the Procedures Directive recognises, however, that the report of the personal interview with the applicant on which the decision of the determining authority on an asylum application is based, may be communicated to the asylum seeker after the decision has been adopted. It would be inconsistent with these arrangements that the duty of cooperation in Article 4.1 [of the Qualification Directive] should be construed as imposing on a determining authority a mandatory obligation to submit either the report or a draft decision to an applicant for prior comment.*" While that was in an *M.M.*- type context, the same logic applies here. If the applicant's argument is correct then the procedures directive is inconsistent with the qualification directive. That seems to me to be an implausible submission that also seems contrary to *M.M.*

Allegation that art. 41 of the Charter on Fundamental Rights requires the applicant to have access to the interview notes

17. Article 41(2)(i) of the Charter embodies the right to be heard and art. 41(2)(ii) includes the right to have access to one's file. Hailbronner and Thym in *EU Immigration and Asylum Law*, 2nd ed. (C.H. Beck/Hart/Nomos, 2016), at p. 1053 state that the guarantees under art. 41, 42 and 47 "*apply to asylum law and can be particularly relevant since they reach further than the ECHR*". However, this appears to be wrong. Article 47 does apply but art. 41 and 42 relate to administration by the European Union itself rather than directly by member states; see Joined Cases C 141/12 and C 372/12 *Y.S. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. M.S.*, ECLI:EU:C:2014:2081, reaffirmed in Case C-166/13 *Mukarubega v. Préfet de*

police, ECLI:EU:C:2014:2336 *WebMindLicenses kft v. Nemzeti Adó* at para. 86. These specific findings supersede the earlier general comment of the CJEU in *M.M.* at paras. 83 to 84. Therefore, it seems to me that the art. 41 point is not stateable, is *acte clair* and is already the subject of express CJEU jurisprudence.

18. Insofar as art. 41 is reflective of general principles of EU law (see Hailbronner and Thym at p. 19), those general principles, are not so micro-specific as to allow me to hold that the IPO's approach here is invalid. No authority prior to art. 41 has been produced to show that the principles of good administration require the entire file of a member state to be handed over without delay in the course of a particular process from which there is a subsequent right of appeal. In the document entitled "Explanations relating to the Charter of Fundamental Rights", 2007/C308/02 the relevant previous case law underlying art. 41 is referred to. Mr. Conlon identifies as particularly relevant the decision of the ECJ in *Hauptzollamt München-Mitte v Technische Universität München* Case C-269/90 (21st November, 1991) where at para. 25 the court refers to the right to have documents taken into account during the actual procedure, in that case before the Commission. However, that that is not a controversial proposition and is very familiar in terms of the right to fair procedures, but it is only a general statement. There is no breach of fair procedures to decline to give information to an applicant that that applicant already has or potentially has access to, such as notes of an interview at which he was present or at which his solicitor could have been present.

19. Even if I am wrong about all the foregoing and the right to good administration involves access to the file held by national authorities when implementing EU law, that does not necessarily mean immediate and unrestricted access. Indeed, that qualification is quite obvious. The general principle along those lines does not seem to me to provide any basis for a finding that the IPO is required to hand over the notes at this precise stage of the process. As noted by Margrét Vala Kristjánsdóttir in "Good Administration as a Fundamental Right" *Icelandic Review of Politics and Administration* Vol. 9 Issue 1 p. 237 at p. 245: "The doctrine of direct effect and supremacy requires states to implement and apply law in accordance with EU law. The doctrine of procedural autonomy allows Member States to decide by whom and how the implementation takes place. ... The scope of the right to good administration as defined in Article 41 seems to coincide with this, limiting the applicability of this right to the bodies and institutions of the Union and thereby leaving the procedures to the Member States."

20. Thus, that a national procedure whereby the notes are handed over after the report to facilitate any appeal from an IPO decision is not something that I can hold to be invalid. Also as noted above, the applicant's argument is inconsistent with art. 14(2) of the procedures directive. Indeed, if the applicant is correct, art. 14(2) is invalid. It seems to me that no basis has been made to suggest that. It is much more compelling to read art. 14(2), as Mr. Donnelly submits, as legislation which provides for access to the file and regulates the manner in which it is to be done. The applicant's reading of art. 41, even if it is applicable to the situation, which it isn't, is absolutist and has no support in authority so again this point is *acte clair*.

Order

21. The EU law points are clearly insubstantial and *acte clair* in that they have already been determined by the CJEU, so a reference does not arise, and the national law points have already been determined by the Supreme Court in *J.R.H.*, so the order will be that the proceedings be dismissed.