THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 1013 J.R.]

BETWEEN

N.M. (Georgia)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of February, 2018

1. This case is the first to be heard at High Court level in the wake of the substantive resolution of the nine-year *M.M.* saga, which culminated recently in the Supreme Court judgment in *M.M. v. Minister for Justice and Equality* [2018] IESC 10 (Unreported, Supreme Court, 14th February, 2018). O'Donnell J. said at para. 31 of that judgment that: "*The decision of this Court may bring to a close this act in this long running drama, but it is unlikely to be the last scene.*" He went on to say that: "*It is difficult to be enthusiastic about the decision making process to date, even though characterised by conscientious and well meaning decisions at each stage, or to be optimistic about the future progress of this and related cases*."

2. As regards the future progress of related cases, this is the first of the fallout cases, of which there appear at present to be 43 in the High Court. Given that the present case has been heard within two weeks of the Supreme Court judgment, that possibly can be regarded as a start to progressing the outstanding matters as envisaged by O'Donnell J.

Facts

3. The applicant applied for asylum in the State on 29th August, 2005. On 1st March, 2006 that application was rejected by the Refugee Applications Commissioner. On 23rd June, 2008 an appeal to the Refugee Appeals Tribunal was also rejected. On 5th September, 2008 a proposal to deport was issued to the applicant, setting out her options including the possibility of applying for subsidiary protection. On 26th September, 2008 the applicant applied for subsidiary protection. That application was refused on 29th July, 2011.

4. On 7th October, 2011 the applicant's first judicial review [2011 No. 498 J.R.] was instituted, challenging the subsidiary protection refusal. *Certiorari* of that decision was granted on consent on 22nd March, 2011. On 21st September, 2011 a deportation order was made in respect of the applicant. On 7th June, 2012 a further application for subsidiary protection was made. That was refused on 20th November, 2012. On 17th December, 2012, leave to challenge that subsidiary protection decision was granted by McDermott J., giving rise to these proceedings. The statement of opposition was delivered on 19th April, 2013 and the matter remained on hold for nearly five years thereafter, awaiting the resolution of the *M.M.* proceedings.

5. I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicant and Mr. David Conlan Smyth S.C. (with Ms. Fiona O'Sullivan B.L.) for the respondents.

Grounds of challenge

6. The statement of grounds sets out seven grounds, numbered 1 to 3, followed by two ground 4s and then grounds 5 and 6. Leave in the case was only granted in respect of grounds 1, 2 and 3.

Ground 1 - Breach of the right to be heard

7. Insofar as this ground claims the right to an oral hearing, that is not being pursued by the applicant in the light of the Supreme Court decision in *M.M. v. Minister for Justice and Equality*. In written and oral submissions, further complaints are made ranging way beyond the ground as pleaded as follows:

> (i) That different country information was used, of which the applicant was not aware. That point fails for the reasons set out in my judgment in *Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176 [2017] 3 JIC 1306 (Unreported, High Court, 13th March, 2017) and by the Supreme Court in its judgment in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109.
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> (ii) The applicant had no way of knowing when a decision was going to be made so asked for a month's notice so that she could update her submissions. There is no substance to that point. The applicant was entitled to make whatever submissions she wished to make at the outset of the process and insofar as fair procedures required her to be given a facility to update her submissions, it would have to be demonstrated evidentially that that was necessary, had been attempted and had been refused. The applicant's claim under this heading simply fails to engage with the facts at any level.
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> (iii) A complaint is made about reliance on material in the decision which was not specifically drawn to the applicant's attention. That complaint might possibly have required further discussion had it been pleaded, which it was not.
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> (iv) The complaint is made that information provided by the applicant was not considered. However, the decision-maker states that all documents were considered and thus the judgment of Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 applies. It is not a requirement that the decision-maker engage in narrative discussion, so the fact that the prison conditions for example are not discussed expressly is not a ground for challenge.

8. Going back to the pleading issue, unfortunately it is simply not open to the applicant on these pleadings to make elaborate arguments of the kind being made. The grounds on which leave were granted are entirely generic. There is a failure to engage with the facts of the case. Those grounds have an air of mass-production about them, and the first notice the State seems to have been given of the attempt to make these points under the heading of ground 1 was when the applicant's legal submissions were received.

That is not an approach that is open to applicants by virtue of O. 84 r. 20(3) of the Rules of the Superior Courts. That is doubly so in the present case where leave was actually refused on the first of the two ground 4s in relation to many of these matters. That refusal was not appealed and consequently the issues encompassed by that ground cannot be introduced by the back door if they do not already properly belong within the wording of ground 1, which they do not. Insofar as the matters submitted relate to the matters actually pleaded, the matters so pleaded do not give rise to grounds for *certiorari*.

Ground 2 - Complaint that the subsidiary protection procedure was entwined with the deportation order procedure
9. The complaint is made that under the old procedure, prior to the International Protection Act 2015, the subsidiary protection application was entwined or "*enmeshed*" with the deportation order procedure in the sense that it could only be made after a proposal to deport. There is no illegality in such a procedure; that is a legislative choice. It does not put any meaningful inhibition whatsoever on the making of a subsidiary protection application. Leave was granted on this point by Cooke J. in *V.J. (Moldova) v. Minister for Justice and Equality* [2012] IEHC 337 (Unreported, High Court, 31st July, 2012). The substantive decision in that case was given by McDermott J. in *M.L. v. Minister for Justice and Equality* [2017] IEHC 570 (Unreported, High Court, 20th July, 2017), which dealt with three separate cases together. This point is addressed at paras. 40 to 60 and I follow that approach. As McDermott J. says: "*In this case each applicant had a full opportunity to make submissions in respect of their applications for subsidiary protection. There is no evidence to support the proposition that the exercise of their rights was made 'impossible' or 'excessively difficult' in a manner that would contravene European Union Law*" (para. 55).

10. Mr. O'Shea submits that the application of the principle of equivalence of effectiveness, as outlined in Case C-429/15 *Danqua v. Minister for Justice & Ors*. (29th October, 2016) requires *certiorari* to be granted, but that does not follow. *Danqua* deals with a separate issue, namely the fourteen-day time limit. While the overall principle of equivalence and effectiveness is well-established, the applicant in any given case has to show that the particular rule at issue is in breach of the equivalence or effectiveness principles. Here the applicant has not done so. In any event the whole argument is nonsense on the facts because the applicant made a subsidiary protection application and had it considered. She was not denied an effective examination of EU law rights.

Ground 3 - Lack of independence of the decision-maker
11. Sub-ground 1 of ground 3 is an elaboration of ground 2 and fails for the same reasons. It is not unfair or a breach of natural and constitutional justice or *ultra vires* for there to have been a system where the invitation to make a subsidiary protection application came in tandem with the proposal to deport. The court must look at the substantive reality of the situation which was that the applicant's rights were respected.

12. Sub-ground 2 is not being pursued (see p. 7 of submissions).

13. Insofar as grounds sub-grounds 3 to 6 are concerned, these relate to the issue of independence of the decision-maker, as dealt with at paras. 95 to 103 of *M.L.*, and I would respectfully follow McDermott J.'s decision in that regard. The complaint of lack of impartiality has already been rejected by the CJEU in Case C-604/12 *H.N. v. Minister for Justice Equality and Law Reform,* ECLI:EU:C:2014:302 (8th May, 2014) paras. 53 to 55.

Order
14. Accordingly the application is dismissed.