THE HIGH COURT
JUDICIAL REVIEW

[2013 No. 44 J.R.]

BETWEEN

D.D. (LIBERIA AND NIGERIA)

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 July, 2018

1. The applicant was born in 1984. He claims to have left Liberia on 31st September, 2008, travelling by plane to Belfast and arriving on 1st October, 2008. He was fingerprinted as an illegal entrant on 3rd October, 2008. Later in 2008 he arrived in the State. In his interview he says that his girlfriend's father arranged the travel. The Refugee Applications Commissioner made a negative recommendation. In February, 2009 the Refugee Appeals Tribunal rejected the appeal. The applicant was found not to be credible.

2. On 18th March, 2009 a proposal to deport was issued, the so-called three options letter. This is an important document in the context of the present proceedings. On 4th April, 2009, the applicant sought subsidiary protection and leave to remain. He left for the UK shortly after making the subsidiary protection application, saying he arrived on 31st May, 2009. The Minister was informed that he was apprehended there on 6th August, 2009. He was imprisoned in HMP Manchester awaiting trial regarding possession of a false Dutch passport and a counterfeited UK national insurance card. He was duly convicted and served a custodial sentence in connection with the fraud charges. He did not admit in his interview with the UK authorities that he had been resident in Ireland. On 20th February, 2010 he was returned under the Dublin II regulation. He claims that from 2010 to 2011 he was in a relationship with an Irish citizen and had a child with that citizen, who resides with the mother. He claims he subsequently formed a relationship with a Latvian national. On 6th December, 2012, subsidiary protection was refused. On 18th December, 2012 a deportation order was issued. On 4th January, 2013 the applicant's solicitors wrote stating that the applicant was in a relationship with an Irish citizen and had an Irish citizen child. The letter does not assert that there is an ongoing relationship. That is not entirely the same story as set out in his affidavit in these proceedings.

3. On 24th January, 2013 the present proceedings issued. That is also an important date for present purposes, almost four years after the three options letter. On 15th February, 2013 at a time when he was unlawfully present in the State and subject to a deportation order, he married the Latvian citizen. On 17th September, 2013 the deportation order was revoked because of that marriage. On 18th September, 2013 he was granted a five year permission to reside in the State by reason of the marriage. On 28th December, 2013 he says he has a child with the Latvian citizen. He claims they separated in 2014. On 9th October, 2017 leave was granted, including on amended grounds.

4. I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicant and from Mr. David Conlan Smyth S.C., and Ms. Elizabeth Cogan B.L., who also addressed the court, for the respondents.

Relief sought

5. The primary relief sought is *certiorari* of the subsidiary protection refusal. By order of 1st May, 2018, I allowed additional reliefs seeking a declaration that the Minister erred in failing to allow the applicant to remain temporarily during the assessment of the subsidiary protection claim and erred in not providing the option to the applicant to leave the State without a deportation order if his subsidiary protection application was unsuccessful.

6. The respondents challenged my order giving liberty to amend, which was made on a *de bene esse* basis, but I am not persuaded that the amendment should have been refused given the information before the court at the time. There is a limit to how deeply a court can get into an application at the amendment stage. That is, of course, separate from whether the point raised in the amendment should be upheld in the end of the day.

7. The legalistic grounds in the application have already been rejected in *N.M. v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 and *F.M. (Democratic Republic of Congo) v. Minister for Justice and Equality & ors* [2018] IEHC 274 [2018] 4 JIC 1706 (under appeal) other than a point said to arise from the judgment in *Luximon v. Minister for Justice and Equality* and *Balchand v. Minister for Justice and Equality* [2018] IESC 24 [2018] 2 I.L.R.M. 153. Apart from the grounds relating to that point, and the formally-moved legalistic points, the only other grounds being pressed by Mr. O'Shea are grounds 4A, 6 and 7.

***Luximon* point is a collateral challenge to the letter of 18th March, 2009.**

8. It is clear that the effect of the *Luximon* grounds are to challenge the three options letter, and indeed Mr. O'Shea accepts that. The problem there is that the time limit in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies as the three options letter is a proposal to deport and is subject to s. 5. The time limit would not be a problem if the point being made was one going to the substance of the subsidiary protection decision, which the applicant could have dealt with by way of making submissions and awaiting the final decision and then challenging the latter if negative. But the question of whether the applicant should have a right to remain in the State pending the subsidiary protection decision is inherently an ephemeral situation and time runs from when the grounds first arise, namely the date of the three options letter at the latest.

***Luximon* point - merits**

9. However, rather than decide the matter on time I would assume in favour of the applicant that I am entirely wrong about the foregoing and that he is not out of time. There are multiple reasons why the claim must fail.

> (a) As a matter of practicality, the Minister did allow the applicant to remain in the State during the currency of the application for subsidiary protection.
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> (b) The applicant's submission is not warranted by *Luximon*. Paragraph 43 of *Luximon* states that a person who is refused a renewal of permission by the Minister might never enter the s. 3 process because in order to do so they would have to place themselves in the situation of remaining illegally in the State. The punchline is that the Minister is not entitled to include a requirement to leave the State in a refusal of renewal under s. 4(7). That is not relevant here. The *ratio* of *Luximon* is firstly, that the Minister does not have jurisdiction to require someone to leave the State when refusing a renewal under s. 4 (7); and secondly that the Minister should consider art. 8 of the ECHR when considering renewal of

permission under that provision. Neither of these points apply here.

(c) The applicant's rights were considered. What was found to be at fault in *Luximon* was a suggestion that one would have to leave the State before one's art. 8 rights could be considered. Nothing like that arises here. All of the applicant's rights were considered in the subsidiary protection and deportation context. As the respondents' submissions point out at para. 24, eligibility to be considered for subsidiary protection was not predicated on the applicant's illegal presence but on the refusal of the asylum application.

(d) The applicant's complaints regarding a lack of a right to reside are moot as he was given permission to reside. Furthermore, all issues relating to the conduct of the deportation process and the question of the applicant's right to remain pending finalisation of the process no longer arise and are entirely moot because the applicant was given such a right to reside in the State.

(e) The applicant lacks standing as he was not inhibited from making a subsidiary protection application. He was not harmed or in any way hindered from making a subsidiary protection application. In the absence of such standing, a reference to the CJEU does not arise. That cannot be "*necessary*" if the applicant has no standing.

(f) Even if I am wrong about all of the foregoing and the question of considering some shortcoming in the system should arise, it would not be just and convenient to grant declaratory relief. The applicant is the last man standing in the category of persons who successfully delayed the finalisation of their subsidiary protection applications on the grounds of the *M.M.* case. He is in a category of one. The system under which he was dealt with ceased to exist on 31st December, 2016. Declarations in such a situation are neither just, convenient nor appropriate and contribute nothing of benefit to the applicant or anyone else. Mr. O'Shea claims it would be of benefit to him if the Minister was minded to refuse to renew his present permission if he was able to say that his presence in the State during the limited period awaiting the subsidiary protection application was lawful rather than unlawful. Whether that presence was technically lawful or unlawful does not seem to matter very much as the Minister's written submissions effectively make clear because we are all agreed as to the basis of that presence, namely an unsettled basis pending a protection decision. It does not add anything tangible to the applicant's status, nor does it enhance or advance any hypothetical citizenship application, for example, if that presence is to be regarded as technically lawful rather than technically unlawful. Thus the benefit of a declaration to the applicant is entirely speculative and hypothetical. Furthermore, the applicant cannot point to anyone else in this situation. Mr. O'Shea as it happens has been making the enmeshment complaint without conspicuous success in dozens of cases for a period of over six years since *V.J. (Moldova) v. Minister for Justice and Equality* [2012] IEHC 337 (Unreported, Cooke J., 31st July, 2012), a judgment in proceedings commenced on 19th June, 2012. Leaving aside matters at appellate level, there is simply no-one else left at High Court level - not a single person - that could benefit from a declaration. The applicant here is a kindred spirit of the last Japanese soldier discovered decades on, fighting World War II in a remote jungle. It is hard to imagine a situation where a declaration is less appropriate than the present case.

Lack of effective remedy

10. The failure to provide an express permission to remain in the State and the refusal of the asylum claim arose in March, 2009. Any effective remedy argument based on arts. 3 or 13 of the ECHR, as applied by the European Convention on Human Rights Act 2003, must fail for the reasons set out above. Furthermore, the 2003 Act is not pleaded in ground 7A so this ground cannot succeed as formulated. The pleas under Article 40.3 of the Constitution are entirely general and opaque. Article 47 of the Charter of Fundamental Rights does not alter the position and the reasoning set out above.

11. Most fundamentally of all, the applicant was not deprived of an effective remedy. His application was fully considered and he has judicial review available now of that decision. No lack of effective remedy has been shown.

12. I now turn to the fact-specific complaints made.

Country material not put

13. Ground 4A alleges that country material that post-dated the decision was not put to the applicant. I have already dealt with that complaint in a number of decisions, including *I.M. v. Minister for Justice and Equality* [2018] IEHC 296 (Unreported, High Court, 24th April, 2018) (under appeal) following *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 (Unreported, Supreme Court 27th July, 2017). The applicant does not aver that he would have had anything specific to say had he been given notice of the particular country material. Thus the evidential foundation for this point is entirely lacking. He submits that he would have urged a different interpretation of the material but there was nothing stopping him putting forward whatever information he wanted and urging whatever interpretation of generally-known country material he wanted. Interpretation of such material is a matter for the Minister, subject to review for lawfulness.

Country material allegedly misread

14. Ground 6 complains that the country information was read selectively against the applicant and not in a rational manner. There is no obligation to read material in favour of an applicant. No irrationality has been shown. It must be taken that the Minister will have formed general views as to particular country situations. That is entirely legitimate: see *G.O.B. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 229 (Unreported, Birmingham J., 3rd June, 2008).

Lack of reasons

15. Ground 7 complains that there is a lack of reasons in the decision. That point has not been made out. The decision appears to be reasoned. The Minister is entitled to have regard to the rejection of the applicant's credibility by the tribunal. Mr. O'Shea complains that the relevant questions were not considered, but those questions are set out in the subsidiary protection decision and addressed in a rational manner.

Discretion

16. The fundamental abuse of the subsidiary protection process by leaving the State during the currency of the application as well as the applicant's involvement in immigration fraud in the United Kingdom by possession of false U.K. and Dutch documentation precludes relief in any event. Had I not dismissed it on the merits, and even if it had been in time, I would have refused relief on discretionary grounds.

Request for reference

17. Mr. O'Shea submits, mechanically, that if any doubt should arise in relation to EU law I should refer the matter to Luxemburg. It is

a facile interpretation of EU law that all an applicant has to do is raise a European point. The point must be necessary for the determination of the proceedings, and those proceedings must comply with national rules in accordance with the principle of national procedural autonomy. Neither applies here.

Order

18. I therefore will:

> (i). refuse the application to refer questions to the CJEU under Article 267 of the TFEU, questions which were never precisely formulated in any event, and
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> (ii). dismiss the proceedings.

19. This is now the last of the *M.M.* cases at High Court level. On 14th February, 2018, when the Supreme Court gave judgment in *M.M. v. Minister for Justice and Equality* [2018] IESC 10 [2018] 1 I.L.R.M. 361, approximately 43 judicial reviews were backing up that decision at High Court level. Some were struck out but around half required a full hearing. Within a fortnight, the first of those back-up cases had been heard and determined: see *N.M. v. Minister for Justice and Equality* [2018] IEHC 186 [2018] 2 JIC 2710 (Unreported, High Court, 27th February, 2018). I am now dismissing the last of those cases. O'Donnell J. noted at para. 31 of the Supreme Court judgment in *M.M.* that "*the decision of this court may bring to a close this act in the long running drama but it is unlikely to be the last scene.*" The present judgment closes the act that followed. As far as the High Court is concerned, therefore, it is *finita la commedia.*