THE HIGH COURT

[2023] IEHC 589

[Record No. 2021 395 JR]

BD, TD AND MD (MINOR SUING BY THEIR MOTHER AND NEXT FRIEND BD)

APPLICANTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Bolger delivered on the 24th day of October 2023

1. This is the applicants' application for *certiorari* which is not opposed by the respondents, but the issue is whether the court can and if so, should, grant partial *certiorari*, as the applicants seek, or quash the entire decision of the Tribunal as the respondents assert should occur.

2. For the reasons set out below I am granting *certiorari* of the entire decision on the basis that this is the most appropriate order in the circumstances but not because the court is unable to ever grant a partial or severed order for *certiorari*.

Background

3. The applicants are South African nationals. The first applicant is the mother of the second and third applicants whose father is Albanian. They applied for refugee status because they feared persecution in South Africa on grounds of race. Their application was refused by the IPO and they appealed to the Tribunal and identified up-to-date COI (country of origin information) that they asked the Tribunal to consider. In its decision of 23 March 2021 the Tribunal rejected parts of the applicant's case but did accept that the applicants faced a well-founded fear of persecution if they were to return to South Africa because of the second and third applicants' mixed race. The Tribunal relied on then current COI detailing high levels of xenophobic attacks in South Africa but went on to find that State protection was available to the applicants in South Africa. The parties agree that the Tribunal's decision about State protection is flawed and should be quashed, but the respondents say it should be quashed along with the entire decision of the Tribunal. The applicants say that only the finding in relation to State protection should be quashed and the matter should be remitted to a

rehearing on that issue only, on the basis of a valid existing finding that the applicants have a well-founded fear of persecution in South Africa. The first applicant says she would suffer distress if she had to give oral evidence of her experiences again and insofar as the respondents say her rehearing could be a paper-based appeal, she says that would deny her the fulsome appeal based on her oral evidence to which she is entitled.

4. The applicants rely on a number of previous cases in which partial orders of *certiorari* have been made by this court. The respondents suggest that none of them had the same opposition to partial *certiorari* as they maintain here.

5. For the purpose of this application I am satisfied that the court has jurisdiction to make a partial order of *certiorari*, including in an asylum matter, subject to the criteria that has been established in the case of *Bord na Móna v. An Bord Pleanála* [1985] I.R. 205 (which I discuss further below) which requires the court to determine whether the circumstances of a particular case merit such an order, a decision that has to be made on a case by case basis.

The court's jurisdiction to grant partial *certiorari*

6. The doctrine of severance has been applied to unconstitutional legislation (*Maher v. Attorney General* [1973] I.R. 140), statutory instruments (*The State* (*McLoughlin) v. Eastern Health Board* [1986] I.R. 416, *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297), an order returning an accused for trial (*Murphy v. Early* [2009] 4 I.R. 681, [2009] IEHC 261), a coroner's verdict (*State (McKeown) v. Scully* [1986] I.R. 524) and a County Council Development Plan (*Glencar Explorations Plc v. Mayo County Council* [1993] 2 I.R. 237). It has also been applied to asylum cases including *HAA (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 34, *AA (Pakistan) v. IPAT* [2018] IEHC 497, *NNM v. IPAT* [2020] IEHC 590 and *P.A.F (Nigeria) v. IPAT* [2019] IEHC 204.

7. In many of the authorities cited to me, the severed part was simply quashed and the provision in question continued in being without it. However in the case of *Bord na Móna v. An Bord Pleanála* [1985] I.R. 205 the entire planning permission was quashed as Keane J. (as he was then) found that the invalid condition of the planning permission was not trivial or insignificant and it was "*not possible to sever the offending condition from the permission and, accordingly, the decision to grant permission must be treated as a nullity in its entirety*."

8. The jurisdiction was well summarised by de Blacam in stating "*severance can take place only where the subject-matter, following severance, is intelligible, workable and consistent with the intention of the original decision-maker. But if there is doubt about the viability or legality of what*

remains, the court will refuse to sever" (de Blacam*, Judicial Review* (3rd ed., Bloomsbury, 2017) at [7.13]).

9. This court has jurisdiction to make an order for partial *certiorai*, including but not limited to where part of the decision is legitimately severable. However simply because part of the decision can be severed does not mean it automatically must be. Each case must be determined on its own facts and taking account of relevant provisions of national and European law.

The Tribunal's decision

10. The Tribunal was satisfied (at para. 5.30. of its decision), based on then up-to-date COI, that,

> "*the level of xenophobia in South Africa **is** such that there is a reasonable likelihood that the Appellant's Dependant Sons, if they were to be returned to South Africa, would face a well-founded fear of persecution on the basis of being of mixed ethnicity. In light of that finding, the Tribunal is satisfied that the Appellant would also be subject to the same likelihood due to her connection with her Dependant sons*" (my emphasis).

That finding about the level of xenophobia in South Africa and its subsequent view as to the likelihood of a well-founded fear of persecution, is expressed in the current tense *i.e.,* at the time of its decision.

11. The definition of 'refugee' as set out at s.2 of the International Protection Act 2015, reflecting the definition in both the Directives and the Geneva Convention, requires both a well-founded fear of persecution for the relevant reasons and the person's inability or unwillingness to avail of State protection:

> *"a person, other than a person to whom **section 10** applies, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it".*

12. The link in the definition of refugee between persecution and State protection supports the wisdom of having both aspects of the Tribunal's decision, *i.e.* the applicants' fear of persecution on grounds of their race and the State protection available to them, determined at the same time, with both decisions based on current, up-to-date COI rather than allowing one aspect of the Tribunal's

decision to have been based on historical COI, and another on up-to-date and potentially different COI. There is no need for evidence that different COI will or may be available to the Tribunal upon the remittal of this case than was available to them previously as it is the nature of the Tribunal's work that COI is constantly evolving. The Tribunal should be able to take account of the current situation in the country, as they did when they dealt with the applicants' appeal which included a consideration of further COI furnished by the applicants that had not been before the IPO, as well as further COI that had come to the Tribunal's attention after the hearing (referred to in the decision at para. 2.30).

An *ex nunc* hearing of an appeal

13. The respondents assert that the decision by IPAT on whether a person is entitled to international protection must be on an *ex nunc* basis that is up to date in law and in fact. They say this has always been required by s.28(4)(a) of the Act (considered further below), but they also say it has now been confirmed as part of European law by the recent decision of the Court of Justice of the European Union in *X v. IPAT (Case C-756/21)* (decision of 29 June 2023). The applicants distinguish that decision of the CJEU as applying only to the obligations of the Tribunal and does not create binding obligations for this court. However even if that is correct, I am of the view that the decision of the CJEU in confirming the Tribunal's obligations should be considered by this court in assessing what should be remitted to the Tribunal for them to determine. I find support for that in the decision of the CJEU in *KS and Others v. The International Protection Appeals Tribunal and Others (Joined Cases C-322/19 and C-385/19),* where it decided that when interpreting the provisions of both the 2015 Act and of the Original Procedures Directive, the provisions of Council Directive 2013/32/EU on common procedures for granting and withdrawing international protection ('the Recast Procedures Directive') are to be taken into account, albeit that Ireland had opted out of the latter Recast Procedures Directive. The CJEU held at paras. 59 and 60 of *KS* that: …

> *"In those circumstances, account must be taken of Directive 2013/32 even where that directive does not apply in the Member State of the referring court, pursuant to Protocol No 21, in order to interpret Directive 2013/33, applicable in that Member State, pursuant to that protocol, so as to ensure a uniform interpretation and application of the provisions of the latter directive in all the Member States.*

Accordingly, the answer to the first question referred in Case C-322/19 is that a national court must take account of Directive 2013/32, which, pursuant to Articles 1 and 2 and Article 4a(1) of Protocol No 21, does not apply in the Member State of that court, in order to interpret the provisions of Directive 2013/33, which is, by contrast, applicable in that Member State in accordance with Article 4 of that protocol."

14. In *X v. IPAT* the CJEU confirmed that the Tribunal is required to make its decision on an *ex nunc* basis and at para. 46 of its decision, held that a Member State is under a duty to assess "*the relevant elements of the application".* The court went on at para. 51 to rely on Articles 4(3)(a) to (c) and 4(5) of the Directive to confirm that "*the examination of the application for international protection must include an individual assessment of that application, taking into account, inter alia, all relevant facts as they relate to the country of origin of the applicant at the time of taking a decision on the application"***.** The court clearly imposed a duty on Member States to ensure that "*precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited (judgment of 22 November 2012, M., C-277/11, EU:C:2012:744, paragraph 67)"* (at para. 55).

15. The court continued at para. 60, *"[i]n such circumstances, it must be held that those findings also apply to the IPAT. Such a review of the merits of the grounds of the IPO's decision involves obtaining and examining precise and up-to-date information on the situation existing in the applicant's country of origin on which, inter alia, that decision is based, and the possibility of ordering measures of inquiry in order to be able to rule ex nunc. The IPAT may therefore be required to obtain and examine such precise and up-to-date information, including a medico-legal report deemed relevant or necessary."* The court concluded at para. 44 … *"that the duty of cooperation laid down in that provision requires the determining authority to obtain (i) up-to-date information concerning all the relevant facts as regards the general situation prevailing in the country of origin of an applicant for asylum and international protection...".*

16. Even if this court is not bound to consider the Recast Procedures Directive from which Ireland has opted out, national law also requires a consideration of up-to-date information in that s.28(4)(a) of the 2015 Act confirms the following as part of the Tribunal's obligations:

"(4) The assessment, by the international protection officer of an application, and by the Tribunal of an appeal under section 41, shall be carried out on an individual basis and shall include taking into account the following:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;"

17. Whether or not the Tribunal is obliged to obtain and apply up-to-date information in all cases, and including where this court has quashed only part of its decision, may have to be assessed on another occasion. However on the facts of this case, and having regard to the particular findings of the Tribunal in relation to the applicants' appeal and how then up-to-date COI was relied on in reaching both the impugned and non-impugned findings, I am satisfied that this is a case in which the Tribunal ought to make its entire decision on an *ex nunc* basis applying the precise and up-to-date information that is referred to in *X v. IPAT*.

The applicant's distress

18. The first applicant has sought to rely on the distress she says she would experience if she was required to give her evidence to the Tribunal again. I do not know if the applicant intends to give evidence to the Tribunal in relation to that aspect of the decision to which she says should be quashed *i.e.* the availability of State protection. That is a matter for her, as is her option to have a paper-based appeal or to give oral evidence to the rehearing of the appeal if she so chooses. She has not furnished medical evidence that giving her evidence again would cause her to suffer any recognisable psychiatric symptoms but she does rely on an academic article documenting the "*Impact of asylum interviews on the mental health of traumatized asylum seekers*" which found "*that the asylum interview might decrease posttraumatic avoidance and trigger posttraumatic intrusions, thus highlight the importance of ensuring that the already vulnerable group of traumatized refugees need to be treated with empathy during their asylum interview*". The applicant has never claimed to have been diagnosed with a psychiatric condition such as post-traumatic stress disorder. I do not wish to minimise her distressing experiences and I accept that she believes engaging in further interviews will be distressing for her. However, the challenge of giving oral evidence, where an applicant chooses to do so, is part of the asylum process, similar to many State processes including litigation. In the absence of medical evidence of a medical condition that might require a different process to conducting another interview with an applicant for asylum (a point on

which I make no finding) I do not consider the applicant's anticipated distress, in itself, could merit the partial order of *certiorari* which she seeks. Insofar as she is concerned about the further delay that a full hearing will involve, I do not consider it will be a significantly more delayed process than a partial remittal. I also take account of the delay that has already been caused by the hearing of this application. Any delay is not to be condoned but the prospect of further delay in this case does not, of itself, merit the partial order of *certiorari* that the applicants seek.

Conclusions

19. In considering the position of the applicants, this court must have regard to the jurisprudence of the CJEU including in relation to the Recast Procedures Directive and the CJEU's recent decision in *X v. IPAT*. That, along with the relevant provisions of the 2015 Act, require this remitted application to be considered on an *ex nunc* basis by reference to such up-to-date information, including COI, as may be available. I am therefore granting *certiorari* of the Tribunal's decision and remitting the entire matter back to the Tribunal for a fresh hearing of the applicants' appeal.

Indicative view on costs

20. Given the unusual nature of this application and the intervention of a decision of the CJEU while proceedings were in being, my indicative view on costs is that there should be no order for costs. I will put the matter in before me at 10:30am on 3 November 2023 to allow make such further submissions as the parties may wish to make in relation to costs and/or final orders.

Counsel for the Applicants: Conor Power SC and April Duff BL

Counsel for the Respondents: Sinead McGrath SC and Silvia Martinez BL