[2012] IEHC 99

THE HIGH COURT

[2010 No. 1492 J.R.]

IN THE MATTER OF COUNCIL DIRECTIVE 2004/83/EC AND S.I. 518 OF 2006 AND THE IMMIGRATION ACT 1999 AND THE REFUGEE ACT 1996 BETWEEN

JTM

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Kevin Cross delivered on the 1st day of March, 2012

1. The case consists of a challenge to a decision of the respondent as notified by letter of 29th October, 2010, to the applicant of the refusal of her application for subsidiary protection. Leave to challenge the decision was granted by order and judgment of Hogan J. on the grounds as follows:-

(a) The respondent in the analysis conducted, erred in law in concluding that because State protection was available in respect of the actions of non-State agents who inflicted serious injury on the applicant, the said injury could not amount to "serious harm" within the meaning of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006).

(b) The respondent misconstrued and/or misapplied the provisions of Regulation 5(2) of S.I. 518 of 2006 in failing in the assessment conducted to consider whether, arising out of the previous harm suffered by the applicant, compelling reasons existed to warrant a determination that she was eligible for subsidiary protection.

Background

2. The applicant, who is a Nigerian national, arrived in the State on 28th November, 2006, and applied for asylum. She had entered into an arranged marriage at the age of 16 years and was unable to have children. She suffered from Sickle-Cell Anaemia. The applicant recounted serious ill-treatment, rape and indeed torture at the hands of her husband and his associates, which left scars on he body which treatment continued to have traumatic experience upon her.

3. The credibility of the applicant is not and could not be in doubt.

4. Initially, the applicant applied for asylum which was rejected by the Refugee Appeals Commissioner and thereafter, on appeal, by the Refugee Appeals Tribunal on the grounds that internal relocation was appropriate.

5. The applicant applied for subsidiary protection which was refused by letter dated 29th October, 2010.

6. It is against this refusal that the applicant sought judicial review, initially applying for leave on a number of grounds, but ultimately she was granted leave on the above grounds only.

7. The crux of the matter turns upon the conclusion reached by the Minister under the heading 'Has the Applicant already been subjected to Serious Harm (as defined in Regulation 2(1) (Regulation 5(2)' and the applicant contends that the respondent answered that question with an error at law which said error has allegedly infected the entirety of the decision so as to entitle the applicant for an order of *certiorari*.

8. The relevant paragraph of the decision that is attacked states as follows:

> "However, in accordance with Regulation 2(1), non-State actors can only be considered to be actors of serious harm if it can be demonstrated that the State,

or parties or organisations controlling a State or a substantial part of the territory of that State, are unable or unwilling to provide protection against serious harm."

It has not been demonstrated that:-

"the State are unable or unwilling to provide the protection against the treatment allegedly suffered by the applicant and therefore, the alleged inflictors of this treatment cannot be considered to be "actors of serious harm" within the meaning of Regulation 2(1). As serious harm can only be carried out by "actors of serious harm" within the meaning of Regulation 2(1), I do not find any evidence that the applicant has suffered treatment in her country of origin that would come within the definition of "serious harm" as defined in Regulation 2(1)." [Emphasis added].

The Instrument and the Directive

9. S.I. 518 of 2006, the European Communities (Eligibility for Protection) Regulations 2006 has as its purpose to implement Council Directive 2004/83/EC of 29th April, 2004 on the minimum standards for the qualification of status of third country nationals or Stateless persons as refugees or as persons who otherwise need internal protection.

10. Regulation 2(1) of S.I. 518 (the Definition Regulation) "actors of persecution of serous harm" are stated to be:-

"(a) A State;

(b) Parties or organisations controlling a State or a substantial part of the territory of that State, or

(c) non-State actors, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are

unable or unwilling to provide protection against persecution or serious harm. . ."

11. "Person eligible for subsidiary protection" is stated to mean a person:

"(a) who is not a national of a Member State;

(b) who does not qualify as a refugee;

(c) in respect of whom substantial grounds are being shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these Regulations;

(d) [not applicable]

(e) is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

12. "Serious harm" is stated to consist of:

"(a) Death penalty or execution;

(b) torture of inhuman or degrading treatment or punishment of an applicant in the country of origin, or

(c) serious and individual threats to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

13. Regulation 2(2) provides:

"A word or expression that is used in these Regulations and is also used in the Council Directive shall have in these Regulations the same meaning as it has in the Council Directive unless the contrary intention appears."

14. It should be stated that identical definitions of the above matters are contained in the Directive. The essential difference, however, which may be of relevance, is

that these definitions are in the Statutory Instrument contained in the definition section, whereas in the Directive, they are defined in the body of the text under chapter headings entitled Chapter 2 'Assessment of Applications for Internal Protection' ("Actors of Persecution or Serious Harm") or Chapter 5 'Qualification for Subsidiary Protection' ("Serious Harm"). The Directive further states at Article 18, "Member States shall grant subsidiary protection status to a third country national or a Stateless person eligible for subsidiary protection in accordance with Chapters II and V". There is no corresponding Regulation in the Irish Statutory Instrument which is unfortunate but it is clear that the Minister must assess applications in accordance with Regulations 5 – 15 of the Irish Statutory Instrument.

15. The term "actors of persecution or serious harm" appears in the interpretation section only, not to reappear again in the substantial portion of the Statutory Instrument or indeed to be mentioned therein. The term "serious harm" does reappear regularly in the body of the Regulations. It is nowhere stated in the Regulation that "serious harm" must be perpetrated by "actors of persecution or serious harm". The Minister in his decision, however, stated:-

> "As serious harm can only be carried out by 'actors of serious harm' within the meaning of Regulation 2(1), I do not find any evidence that the applicant has suffered treatment in her country of origin that would come within the definition of 'serious harm' as defined in Regulation 2(1)."

16. Counsel for the respondent, Ms. Nuala Butler, S.C., has cogently urged that we must look at the decision as a whole and that the decision to refuse subsidiary protection is based upon a careful analysis as is required by Regulation 5 of the Statutory Instrument of matters to be taken into account by a protection decision maker including all relevant facts in the country of origin, their laws and regulations,

the statements and documents provided by the applicant, the personal circumstances of the applicant. The respondent commenced this analysis with the following question:-

> "Whether substantial grounds have been shown for believing that the applicant, if returned to Nigeria, would face a real risk of suffer and torture, inhuman or degrading treatment, or would face a real risk of suffering serious and individual threat to a life or person by reason of indiscriminate violence in situations of international or internal conflict and critically where the protection is available to accessible by the applicant."

17. Regulation 5(1) ("Assessment of Facts and Circumstances") sets out the matters to be taken into account by the decision maker for the purpose of making a decision and the respondent analysed the application under these headings and answered the first question posed i.e. whether the applicant faced real risk of suffering torture, inhuman or degrading treatment as follows:-

> "Having considered country of origin information, while it is accepted that domestic violence, rape and other abuses of women remain huge problems in Nigeria, nevertheless, it is not accepted that the applicant would be without the remedies of seeking the help of a non-governmental organisation advocating on behalf of abused women. State protection or internal relocation within Nigeria, were she to seek such protective remedies against her husband or anyone else she states she fears in her home village...In the light of the foregoing it is not accepted that the applicant faces a real risk of torture or inhuman or degrading treatment in her country of origin."

18. The applicant has no criticism of this analysis.

19. The respondent then proceeded to address the questions whether they were substantial grounds for believing that the applicant would face a real risk of a serious harm and threat to her life by reason of indiscriminate violence in situations of international or internal armed conflict in her country of origin and concluded:-

> "I am not satisfied the applicant has demonstrated that she is without protection in Nigeria and I do not find there are any substantial grounds for believing that the applicant would be at risk of serious harm by 'torture or inhuman or degrading treatment' or 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' in Nigeria if she returned there."

20. The respondent then considered the personal characteristics of the applicant and concluded "there is nothing to suggest that the acts which the applicant could be exposed to would amount to serious harm".

21. The respondent finally considered the issues to whether the applicant has been subjected to "serious harm" (as defined in Regulation 2(1)) (Regulation 5(2)) and it was this conclusion which stipulated that serious harm could only be carried out by "actors of serious harm" that the applicant holds to be false.

22. In addition the applicant contends that previous conclusions of the respondent that the applicant would not be at risk of serious harm in Nigeria under Regulation 5(1)(a) or under 5(1)(c) were all at least arguably polluted by the wrong definition of serious harm referred to above.

23. Regulation 5(2) which was the Regulation which the decision maker was considering when he propounded the definition of "serious harm" which is attacked by the applicant provides as follows:-

"The fact that a protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection." (Emphasis added)

24. The end clause of Regulation 5(2) (to which I have added emphasis) is an addition in the Regulations not contained in the EU Directive.

25. The effects of this additional clause were analysed by Cooke J. in *MST v. Minister for Justice, Equality and Law Reform* (4th December, 2009), Cooke J. stated:-

"...there cannot be any doubt, in the Court's view, that the additional wording can only be construed as intending to permit some limited extension to the conditions of eligibility prescribed in article 4.4 designed to allow some latitude in according subsidiary protection based exclusively upon the fact of previous serious harm when it is accompanied by compelling reasons... It is possible therefore to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because

the return itself could be so traumatic as to expose the applicant to inhuman or degrading treatment...

Eligibility remains dependent upon it being established that there is a real risk upon return of suffering serious harm as defined. Regulation 5 is concerned with how a protection decision maker assesses the reality of the risk. Regulation 5(2) tells the decision maker that the fact of previous serious harms suffered, when proven, is a serious indication that the risk is real in such a case and if that harm gives rise to compelling reasons for considering that international protection is necessary, that fact alone may be enough even if it is possible that the same fact may not be repeated..."

26. The Statutory Instrument was adopted on the basis of s. 3 of the Act of 1972 in order to transpose a community directive and accordingly the court must presume in the absence of explicit words to the contrary effect that the legislative purpose is to give and full accurate effect to the provisions of the community measure and no more. In the case of this Directive, however, there is the additional clause that clearly has been added to the Irish Statutory Instrument that is not a mirror of the Directive and has been discussed by Cooke J. in *MST* (above). It is the view of the court that the provisions of the Directive are very clear. Chapter 2 provides for rules governing the assessment of facts and circumstances and, "actors of serious harm" is given the same definition as in the definition section in the Irish Statutory Instrument. Chapter 5 of the Directive sets out the qualification for subsidiary protection and defines serious harm as is defined in the Irish Statutory Instrument (under the definition section) and Chapter 6 states, *inter alia*, that "Member States shall grant subsidiary protection status to a third country national or a stateless person eligible subsidiary protection in accordance with Chapters 2 and 5".

27. Accordingly, under the Directive the decision maker must assess the facts and circumstances in accordance with Chapter 2 which refers to who may or may not be an actor of serious harm and then proceeds to define serious harm in Chapter 5 and in Chapter 6 the State should grant protection for persons eligible in accordance with Chapters 2 and 5.

28. It is unfortunate that the Irish Statutory Instrument does not contain any similar proviso directing the decision maker as to the basis upon which he should make his decision as is clearly set out in the Directive ("in accordance with Chapters 2 and 5"). The court holds, however, that the Irish decision maker must decide the issue based upon the substantive articles of the Statutory Instrument subject to their definitions – see Regulation 4(3).

29. The respondent argues that if the applicant is correct, the term "actors of serious harm" which appears in the definition section only is superfluous and there is a presumption that every word in a statutory provision (including a regulation) has a purpose – *County Council of the County of Cork v. Paul Whilock & Anor* [1993] 1 I.R. 231.

30. This anomaly was commented upon by Hogan J. when granting leave and he further stated:-

> "While the Directive is not perhaps as completely clear as it might have been in ensuring that the 'serious harm' must have been committed by either a State actor or by a third party in circumstances where the State was unable to offer effective protection (in the sense envisaged by Article 7(2)), the fact that Article 6 and Article 7 are to be found in the substantive provisions of the Directive and not simply in the definition provisions of Article 2 all suggest that these provisions must be read in

an inter-locking fashion, so that the references to 'serious harm' in the Directive must be read in the light of the substantive provisions of Article 6 and Article 7."

31. I do not see a conflict in reality, however. The Directive does not qualify the definition of "serious harm" any more than the Regulations do. The Directive clearly sets out factors to be taken into consideration by the decision maker before granting subsidiary protection. The process for the Irish decision maker is the same.

32. The court is not of the view that either in the Directive or in the Regulations is "serious harm" to be defined in a way that "serious harm" must only have been carried out by actors of serious harm.

33. Whether or not a particular act was carried out by a "actor of serious harm" is of relevance under the Directive and also to an Irish decision maker (because otherwise the definition would be superfluous) but it does not necessarily operate of itself to exclude from consideration for subsidiary protection, somebody who's harm was inflicted by someone other than an actor of serious harm. If the Directive or the Regulations had meant to say that it would have done so.

34. The court is of the view that the meaning of the definitions is clear, serious harm means what is says, it is not to be confined only to harm carried out by actors of serious harm.

35. Clearly, however, where harm has been carried out by persons who are not actors of serious harm is of great relevance to the decision in ascertaining whether the applicant will ultimately entitled to a subsidiary protection decision. The definition of persons eligible for subsidiary protection is as stated quite clear as being (persons in) "...respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin...would face a real risk of

suffering serious harm...and is unable, or owing to such risk unwilling to avail themselves of the protection of that country."

36. Accordingly, if the harm is inflicted by persons who are not "actors of serious harm" then that will be a significant matter for the Minister to consider as to whether or not the applicant is unable or owing to such risk unwilling to avail himself of the protection of that country.

37. The court holds that the statement by the Minister that "serious harm can only be carried out by actors of serious harm within the meaning of Regulations 2.1, I do not find any evidence that the applicant has suffered treatment in her country of origin that would come within the definition of serious harm as defined in Regulation 2(1)", is manifestly false.

38. Serious harm is what it says in the Regulations and remains "serious harm" without qualification. However, the only persons eligible for a subsidiary protection are those in respect of whom substantial grounds have been shown for believing that the person concerned if returned to his or her country of origin...would face a real risk of suffering serious harm... and is unable or owing to such risk unwilling to avail themselves of the protection of that country."

39. Ms. Butler on behalf of the respondent submits that if I come to that conclusion then nothing follows from it as even if the Minister misdirected himself as to the statutory definition of "serious harm" that the applicant had clearly failed to demonstrate after exhaustive analysis by the Minister that she could not avail of either State protection or relocation given that the abuse and torture she suffered from was carried on by her husband and his associates.

40. This, it should be said, is an applicant whose credibility has not been doubted and who accordingly has suffered a number of acts of rape and threats and assaults which have left scars on her physically as well as psychologically damaged.

41. It is clear that while the harm that she has suffered does not in any way amount to the sort of genocide and ethnic cleansing referred to by Cooke J. in *MST* (above), nonetheless harm was significant and indeed "serious" and in this case though the trauma was different from genocide *etc*. the Minister might well consider that the focus of the trauma remains extant in her country of origin for this applicant and might well consider that protection could be granted under the "added tail" to Regulation 5(2).

42. The respondent by first holding that the applicant had not suffered "serious harm" clearly would have failed to consider whether the grounds set out in the additional clause in Regulation 5(2) were engaged at all, i.e. "compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection".

43. Whereas this clause does not create any new category of entitlement, in circumstances when the Minister has decided that the applicant had not suffered "serious harm", the clause could not arise at all in the Minister's consideration (given that the Minister's erroneous definition of "serious harm" had excluded the particular harm the applicant had suffered). Also, the Minister has decided that there was no "serious harm" then the fact that the applicant had indeed by any use of the English language suffered serious harm would not have been and was not considered by the Minister under the main body of Regulation 5(2) so he could not form the view that it was "serious indication" of the applicant's "well founded fear of persecution" or "real risk of suffering serious harm".

44. The court holds that the erroneous definition of "serious harm" may also have infected the Minister when he was assessing the facts and circumstances under Regulation 5(1) as under 5(1)(b), the Minister is obliged to considered the statements of the applicant as to whether she has been or may be subjected to persecution or serious harm and under 5(1)(c) the Minister is obliged to consider the personal circumstances *etc.* of the applicant to establish as to whether she could be exposed to what would amount to "serious harm".

45. Whereas "serious harm" was not defined within the Minister's considerations of 5(1), it still remains likely that the definition that the Minister gave under 5(2) would have been the same definition that he would have used when making his considerations under 5(1) and may well have infected his decisions in that regard.

46. It is not for the court to speculate upon the Minister's ultimate decision. It is for the Minister to decide whether the applicant is qualified for subsidiary protection. When the Minister is coming to that conclusion, he ought not to exclude from his considerations the fact that the applicant has suffered "serious harm" because of the fact that "serious harm" was not inflicted by an actor of serious harm. Whether or not harm was inflicted by an actor of serious harm or may well be relevant when considering the question of the eligibility for subsidiary protection but the fact that the harm suffered by the applicant was not perpetrated by an actor of serious harm does not make the harm any less "serious" or does not exclude it from the definition of "serious harm" as set out in the Regulations.

47. Furthermore, the Minister is obliged to consider whether compelling reasons arising out of previous serious harm alone might notwithstanding the fact that the applicant would otherwise not have been entitled to subsidiary protection still warranted determination that she is eligible for this protection.

48. Furthermore, the court holds that because the Minister approached his decision with an unwarranted view of what was "serious harm" that the entirety of the decision cannot be upheld and accordingly, the applicant is entitled to reliefs claimed.

Order

49. I will grant an order of *certiorari* quashing the decision of the respondent as notified by letter of 29th October, 2010, to refuse the application for subsidiary protection made in respect of the applicant on the grounds:-

(a) The respondent in the analysis conducted erred in law in concluding, that because State protection was available in respect of the actions of non-state agents who inflicted serious injury to the applicant, the said injury could not amount to "serious harm" within the meaning of the European Communities (Eligibility for Protection) Regulation 2006 (S.I. 518 of 2006).

(b) The respondent misconstrued and/or misapplied the provisions of Regulation 5(2) of the S.I. 518 of 2006 in failing in the assessment conducted to consider whether, arising out of the previous serious harm suffered by the applicant, compelling reasons existed to warrant a determination that she was eligible for subsidiary protection.

Affirmed
No further Redaction
needed

1/3/14