Neutral Citation Number: [2011] IEHC 406

THE HIGH COURT

JUDICIAL REVIEW

2008 1183 JR

BETWEEN

L. H.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 28th day of October, 2011

1. In the motion before the Court, the applicant seeks leave to apply for judicial review of a decision made by the respondent on the 17th October, 2008, refusing his consent to the making of a second application for asylum by the applicant.

2. The applicant is a national of Georgia who arrived in the State on the 29th January, 2001, and applied for a declaration of refugee status. Having lodged his application with the Refugee Applications Commissioner, he was provided with accommodation at Hillcrest, Pembrokestown in Wexford. He was subsequently sent a letter dated the 27th November, 2001 at that address summoning him to an interview at the office of the Commissioner on the 10th January, 2002. He failed to attend. He was again written to at that address by letter dated the 11th March, 2002, summoning him to the interview on the 26th March, 2002. He again failed to attend. Both letters were apparently returned to the office of the Commissioner marked "Gone Away". On the 10th April, 2002, letters were sent to that address and to an address at Viking Lodge Hotel, 24/36 Francis Street, Dublin, (an address at which he had apparently been lodged for a few days following his arrival and before being sent to Wexford) in which he was informed that in view of his failure to attend the interviews or to provide a reasonable explanation for non-attendance, the Commissioner proposed to recommend to the Minister that he should not be declared to be a refugee. Again, both letters were returned marked "Gone Away".

3. By a report and recommendation dated the 10th April, 2002, under s. 13 of the Refugee Act 1996, (as amended) the Commissioner recommended to the Minister that the applicant should not be declared to be a refugee. In accordance with s. 11(11) of the Refugee Act 1996, (as amended) the application for a declaration of refugee status was deemed to have been withdrawn for failure to attend the interviews. On the 21st June, 2002, the applicant was written to (again at both above addresses,) and given formal notice of the respondent's decision to refuse the declaration of refugee status pursuant to s. 17(1) of the Act of 1996. The letter also notified the applicant that the Minister was proposing to make a deportation order and he was advised that in accordance with s. 3 of the Immigration Act 1999, he might make written representations giving reasons as

to why he should be allowed to remain temporarily in the State. No representations were received and a deportation order was subsequently made in respect of the applicant on the 9th September, 2002, and notified to the applicant at both addresses on the 1st November, 2002. The documents sent to the applicant by registered post were returned on the 6th November, 2002, and the applicant failed subsequently to present as required at the Garda National Immigration Bureau in Dublin on the 8th November, 2002.

4. Insofar as the Minister and the GNIB were concerned, nothing further was known as to the whereabouts of the applicant until he was apprehended and detained in Cloverhill Prison on the 29th September, 2008, following a visit he made to the offices of the Commissioner. On the 9th October, 2008, Ivan Williams, solicitor, wrote to the Department on the applicant's behalf, requesting that the applicant be permitted to make another application for asylum pursuant to s. 17(7) of the 1996 Act. In the letter Mr. Williams explained that the applicant had stayed at the Wexford address until October 2001, but then moved to Dublin because, it was said, he needed medical treatment and the house in Wexford was 8km away from a hospital and he had no means of getting to the hospital otherwise than on foot. As a result, he was no longer at the Wexford address when summoned for interview. In that letter the basis of the proposed application for asylum if consent was forthcoming was given as follows:

> "Our client is from the Akmeta region of Georgia which is close to the Chechen border. He left Georgia in late 2000, in order to escape local militia who were insisting that he fight in the war against Russia. The reason pressure was being applied to him was that his mother is Chechen, although our client considers himself to be Georgian, and we enclose herewith a copy of his birth certificate and RAC identity card. In view of the urgency of this matter we have not been able to get a translation of the birth certificate but our client advises that the fourth line of the right hand column sets out his mother's name . . . which is Chechen. Out client lives in fear that, if returned, to Georgia, he will be imprisoned or tortured as a result of his failure to engage in the war against Russia."

5. Although the documentation relating to the original asylum application has not been put before the Court, it does not appear to be disputed that the claim thus outlined is identical to the claim originally made in January 2001.

6. In the memorandum setting out the analysis of the application for consent and the recommendation of the Ministerial Decisions Unit of the Department, the basis for the application is set out, followed by a summary of the outcome of the original asylum application. The "Examination of Application" is then as follows:-

> "I have examined the case put forward by the applicant. He states that he was taken to his accommodation centre in Wexford by bus, he left there and went to live in Dublin to be near a hospital as he was suffering from a medical condition. He failed to inform the ORAC of his change of address at this time. He subsequently arrived in ORAC on the 29th September, 2008, asking at what stage his asylum case was at. This was some seven years after he first applied for asylum, no explanation has been provided to ORAC or (the Unit) as to (the applicant's) whereabouts for the past seven years."

7. The material supplied to the applicant in January 2001, is then listed, including the information leaflet outlining the procedures for processing applications for refugee status. The officer then gives the following conclusion and recommendation:

> "No new convincing evidence has been supplied to indicate that a favourable view might be taken if L. H. was readmitted to the process. Therefore, I recommend that L. H.'s application for readmission under s. 17(7) of the Refugee Act 1996, be refused."

8. It is in the context of that history and those circumstances that leave is sought to apply for an order of *certiorari*quashing the Minister's refusal of consent. The four grounds upon which it is proposed to seek such relief can be summarised as follows:-

1. The refusal is irrational and thereby unlawful in that no proper consideration has taken place at any stage of the applicant's application.

2. The refusal and the intention of the respondent to deport the applicant are, or have the potential to be in breach of the prohibition of non-refoulement in s. 5 of the Act of 1996.

3. The refusal was made in disregard of Article 13 of Council Directive 2004/83/EC of the 29th April, 2004.

4. Inadequate or insufficient or no consideration of the applicant's refugee claim.

9. On foot of those grounds, the central argument advanced on behalf of the applicant at the hearing of the motion could be expressed as follows. The fundamental obligation of the Minister under the Geneva Convention, under the Act of 1996, and in compliance with the standards required by the above Council Directive is to ensure that an application for asylum is fully investigated, assessed and determined. Because the original application in this case was deemed withdrawn, there has been no such investigation or assessment and the Minister is accordingly obliged to give his consent to the application being made even at this remove from the date of the original claim. It is argued that the Minister applied a wrong test in basing his refusal on the fact that "no new convincing evidence" had been supplied which could lead to a favourable view being taken of the asylum claim. There is no such criterion or condition in s. 17(7) and the scope of that provision must be capable of extending to cases where the claim proposed to be made is identical, but has never in fact been investigated previously.

10. This case is somewhat unusual in that the Court has before it no direct testimony on the part of the applicant himself. The grounding affidavit has been sworn by Mr. Williams based upon his instructions from the applicant. It is accepted, however, that it was entirely due to the applicant's own fault in failing to notify the Commissioner of his change of address in October 2001, that he failed to attend for interview and his application was deemed withdrawn with the result that the claim for a declaration was refused. In the letter of 9th October, 2008, on which the application for consent was based, no attempt was made to give any explanation of the applicant's whereabouts or how he had survived in the seven years prior to his presenting himself on 29th September, 2008, at the ORAC.

11. Although the applicant has not sworn any affidavit in these proceedings, Mr. Williams in the grounding affidavit explains that the applicant brought with him to the ORAC, in September 2008, "a typewritten summary of his claim and his experiences dated 2008/09/22,"which is then exhibited. This is a detailed two page statement in English most of which is devoted to his personal history and the basis of his claim in the persecution he says he experienced during the Chechen war. In the later part of the statement, however, he explains the circumstances in which he left Wexford to "stay with my countrymen that I met in Dublin". He says that he got medical treatment for about three months and then: "later found a job and started to collect money to bring my family over". He then describes how his family were killed when Russian forces bombed the family house. He continues: "I worked in one factory for three years as a general operative. Then about one year in construction in Malahide and another year worked decorating private houses. There I met a man with whom I was working for the rest of the time in a big house where I worked and stayed as well". He then explains why he decided to reactivate the asylum claim and revisit the office of the Commissioner. It

was on account of his medical condition and his need for medical treatment including an operation. He says: "I am not young anymore, I am 53. I have still got the bleeding, but I try to do the diet as much as I can. This is the only remedy. . . . all this needs is serious treatments and me being in illegal state is not possible anymore. I was taking care of myself until I physically could. Never bothered anyone. And this has to be solved to get proper medical attention. This is the main reason I have come back. I am asking you to create some sort of condition for me where I could stay in Dublin, see doctors for consultation and seek medical attention. Unlike what happened back in 2001, I have been living here for eight years and I always was respected citizen. I am also willing to comply of all given conditions".

12. It is clear to the Court from this statement that the applicant was indeed conscious of having been living in the State illegally since 2001, and it is apparent that he would probably have continued to do so had it not been for his need of medical treatment.

13. It is accordingly necessary to determine whether the grounds and argument set out above constitute any substantial ground for considering that the Minister's refusal of consent is unlawful and ought to be quashed.

14. Prior to the recent amendment referred to below, S. 17(7) provided as follows:

> "A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister."

15. The Minister is thus given a discretion as to whether to grant or withhold consent although, of course, that discretion must be exercised consistently with the objectives of the Act of 1996, and in a manner compatible with constitutional justice. (See *East Donegal Co-op v A.G.* [1970] IR 317).

16. The subsection does not prescribe any conditions or criteria in relation to the exercise of the discretion, but the appropriate test has been considered in a number of cases over the years. These include, notably, the judgment of Clarke J. in *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] IEHC 398) . In that judgment, having reviewed cases both from this jurisdiction and other common law jurisdictions, Clarke J. considered that a test articulated by Bingham M.R. in *R. v. Secretary of the State for the Home Department ex parte Onibiyo* [1996] 2 All E.R. 901 should be followed. That test was expressed in these terms:

> "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

While recognising the "potential difficulty" in applying the jurisprudence of the United Kingdom courts in this area, Clarke J. expressed himself "nonetheless satisfied that there are substantial arguable grounds for taking the view that the relevant jurisprudence of the United Kingdom courts would be followed in this jurisdiction". He added, "It seems to me, therefore, that at the leave stage it is appropriate to regard the Minister as being subject to a test analogous to that adopted by the courts of the United Kingdom and insofar as that test might arguably be more stringent than that which the Minister has imposed upon himself… for the purpose of this application the more stringent test should be applied."

17. Counsel for the applicant submits that this is an incorrect test and that the test that ought to be applied is that articulated by Clark J. in *A.A. v. Minister for Justice, Equality*

and Law Reform (Unreported, [2009] IEHC 436). In that judgment Clark J. takes the *Onibiyo* case as a starting point and concurs with Clarke J. in EMS in considering that it is "undoubtedly a helpful case". She adds however that the *Onibiyo* case does not impose the particular language of the "acid test" as the test in this State. She expresses the view that the Minister's discretion under the subsection is constrained also by the prohibition on refoulement in Article 33 of the Geneva Convention as reflected in s. 5 of the Act of 1996 and considers that s.17 ought to be construed consistently with the obligations of the State under the Convention and that article in particular. She points out that the Minister in that instance appeared to have accepted that the information put forward in the application under the subsection was "new" as compared with the original asylum application but that he refused consent because he considered that the "new evidence could, with due diligence, have been produced during the course of the processing of the applicant's original asylum claim if it was considered relevant or helpful to his claim". (See paragraphs 17-18.) She then says; "I do not believe that it was sufficient for the Minister to consider only the applicant's failure to assert his fear of persecution by reason of his HIV status during his first asylum claim." (It should be noted that Clark J. was considering a case in which the original application for asylum on two specific Convention grounds had been fully processed and not one where the claim had been abandoned or deemed withdraw.)

18. At paragraph 25 she sets out the test upon which counsel for the applicant now relies: "To ensure that no person is returned to the frontiers of a state in which his or her life or freedom is at risk, in breach of the overriding prohibition of refoulement set out in s. 5 of the Act of 1996, the Minister must first consider whether the information on which the s. 17(7) application is grounded has already been fully considered whether by ORAC, the RAT or the Minister. If the Minister is satisfied that the information on which the s. 17(7) application has raised no genuinely new facts that have not previously been fully considered, then he can be satisfied that there is no risk of refoulement and he has fulfilled his obligations. If, however, the Minister is not satisfied that the information grounding the s. 17(7) application has already been fully considered, he must go on to consider whether there is any substance in that new information. If he concludes that there is substance in the new information, he should refer the matter for investigation by ORAC."

At paragraph. 26 of the judgment Clark J said:

> "As the Minister has a wide discretion to grant his consent under s. 17(7), his refusal to consent will be unlawful only where he fails to consider the substance of the information, evidence or documentation that has not previously been fully considered."

19. Thus in the "acid test" of *Onibiyo* there were two elements: whether the new claim is sufficiently different from the earlier claim that a favourable view might now be taken of it; and secondly, whether it is based upon material that could not reasonably have been expected to have been presented in the earlier claim. It is submitted that the test applied by Clark J in*AA* requires that once new evidence is produced to the Minister even if it is evidence which goes to the same ground for coming within the definition of refugee, the Minister is obliged to permit it to be examined and that this is particularly so where, as here, the original claim itself received no substantive assessment or examination because of its deemed withdrawal.

20. If the two-limb "acid test" of *Onibiyo* as accepted in the *E.M.S.* case remains the correct test to be applied to the exercise of the Minister's discretion, it is clear to the Court that his refusal in this case was justified. The claim to a fear of persecution put forward now is identical to that on which the original application for asylum was based. Furthermore, with the possible exception of the reference to the bombing of the family house which occurred after he had left, there is no new material relied on which places

the claim on a different basis of fear of persecution if returned to the country of origin. In this regard it is important to bear in mind the distinction between the claim made as to refugee status and the evidence or information put forward as proof that the claim is well-founded. (The distinction is adverted to in the EMS case in the passage cited by Clarke J from the judgment of Stewart-Smith L.J. in *Singh (Manvinder) v. Secretary of State for the Home Department* (8th December 1995, CA).

21. An application to the Minister under s.17(7) is made in respect of a "further application for a declaration" and not for the reopening of an earlier application on the basis of new supporting evidence or information. The application for consent made in the letter of 9th October 2008 (see paragraph 4 above,) was based on the applicant's claim to fear persecution if returned to Georgia because of his failure to engage in the war against Russia. It is not claimed that this claim is any different to that made in 2001. (The information about the bombing of the house – which is not mentioned in the letter of 9th October 2008 - is not a "new claim" but additional information in support of the original claim.) The applicant does not dispute that it was entirely through his own fault and due to his decision to abandon the asylum application and live illegally in the State for seven years that the original application was deemed to be withdrawn and he was refused the declaration of refugee status. Thus, even if the judgment of Clark J in the AA case is to be read as abandoning from the "acid test" the requirement that the "new information or evidence" could not have been presented in the original process, there was no new claim nor any new information or evidence put forward in that letter.

22. While it is, of course, the case that the construction of the Act of 1996 must be consistent with the State's obligations under the Convention of 1951, it is important, in the view of the Court not to conflate the definition of "refugee" with the concept of "refoulement". Article 33 of the Convention obliges the Contracting States not to "expel or return ("*refouler*") **a refugee** …to the frontiers of territories where his life or freedom would be threatened…" In s. 5 of the Act of 1996 this is given a wider effect: "(1) A **person** shall not be expelled from the State or returned … to the frontiers of territories where, in the opinion of the Minister the life or freedom of that person would be threatened …" (Emphasis added.) Thus, the prohibition on refoulement in s.5 is not confined to refugees so declared but applies to all persons to be deported from the State and it applies at all stages up to the moment of removal of the person.

23. Whether the Minister grants or refuses his consent under s.17(7) in a given case he remains bound by the obligation to comply with s.5 of the Act of 1996. Accordingly, if one leaves aside the issues of a "new claim" as compared to the original application for asylum and of failure to make it earlier, when the Minister is asked to consider an application under the subsection the essential issue to be addressed is whether the material he is asked to examine as the basis for a further application contains potentially the ingredients required to establish that the applicant comes within the definition of "refugee". Does the material point to the possible existence of a well-founded fear of persecution: does that relate to the country he has fled; is its source a state authority or some source tolerated by state authorities; and does the reason for the persecution have a Convention nexus? While there is an obvious overlap between the ingredients of a claim to refugee status and the circumstances that may attract the prohibition on refoulement, the Minister is not, in the view of the Court, considering the possible application of that prohibition but only whether, if remitted to the Commissioner for investigation, the further application may establish that the applicant is a refugee.

24. Although the provisions in question were not enacted in October 2008 when the Minister made the contested decision in this case, it is appropriate to draw attention to the amendments since made to s.17 because they derive from provisions which give effect to the Common European Asylum System and the period for their transposition into national law had expired at that point. Section 17 of the Act of 1996, has been

substantially amended by the European Communities (Asylum Procedures) Regulations 2011, (SI No. 51/2011) ("the 2011 Regulations",) which came into effect on the 1st March, 2011. These amendments have the effect, *inter alia*, of putting criteria for the exercise of the Minster's discretion under sub-section 7 of s.17 on a statutory basis and thus of superceding the criteria hitherto established by way of case law. The 2011 Regulations are expressed to be adopted to give "further effect" to Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the "Procedures Directive"). This directive complements Council Directive 2004/83/EC of 29 April 2004 (the "Qualifications Directive").

25. The amendments to s. 17 of the Act of 1996 in the 2011 Regulations were introduced in order to meet a series of deficiencies in the transposition of the Procedures Directive identified by the European Commission in the proceedings which led to the judgment of the Court of Justice of 4th April, 2011, in Case C-431/10 *Commission v. Ireland* [2011] E.C.R. 1-000. The amendments comprise the substitution of the word "subsequent" application for "further" application in subs. (7) followed by the addition of new subsections (7A) to (7H). They are concerned with giving effect to the minimum standard for procedures for dealing with a second or later application for asylum in the same Member State by the same applicant and give effect principally to the provisions contained in Articles 19, 20, and 32 of the Procedures Directive. These new provisions are, in the view of the Court, to be construed in the context of the minimum standards sought to be adopted for the Common European Asylum System and consistently with the objectives and principles of that system. In other words, the objective of the directives is that an application for asylum made within the Member States of the Union should be examined, investigated and determined on the same basis irrespective of the identity of the particular Member State in which the process takes place. Ideally, the outcome of a claim to asylum ought to be the same wherever it is made and there ought not to be differences in the substantive qualification and procedural standards applied which will give rise to different results from one Member State to another.

26. This approach is reflected, for example, in the new subsection (7A) which prescribes on the one hand when the Minister's consent **may** be given and, on the other hand, the basic condition which determines when the consent **must** be given. The subsection is as follows:-

> "The consent of the Minister referred to in subs. (7) –
>
> > (a) may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person, and
> >
> > (b) shall be given if, following the preliminary examination referred to in paragraph (a) new elements or findings arise or are presented by the applicant, which significantly add to the likelihood of the applicant qualifying as a refugee."

27. Clearly, para. (a) above gives effect to the mandatory preliminary examination required by Article 32.3 of the Directive and it is not disputed that in the scheme of the Act of 1996, it is the Minister's consideration of an application for his consent to re-admittance to the asylum which constitutes that preliminary examination. It is also to be noted that the essential test for the preliminary examination and the grant of consent is that "new elements or findings arise or are presented which significantly add to the likelihood of the applicant qualifying as a refugee". In the regard it is to be noted that Recital (15) of the Directive explains:-

> "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."

28. Under these provisions the preliminary examination is required where "new elements or findings" arise or are presented and it is not therefore necessary that an entirely new or different claim to refugee status be presented. It is clear from Article 32.1 of the Procedures Directive that the new elements may be presented while the original claim is still being processed and the preliminary examination may be carried out in that process. The first limb of the "acid test" of *Onibiyo* – a new claim - is therefore superceded in this amendment.

29. Subsection (7B) lists the materials or information which should accompany an application for consent under subs. (7); and subs. (7C) lists the content of a written statement which the Minister is to furnish to an applicant upon receipt of an application.

30. Significantly in the particular circumstances of the present case, subs. (7D) then prescribes that the Minister shall consent to a subsequent application for asylum being made where satisfied that –

> "(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and
>
> (b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his previous application for a declaration (including, as the case may be, any appeal under s. 16)." .

(The reference in subs. (7D) to a notice under subs. (5) is to the notice given to an applicant by the Minister of the refusal of the declaration of refugee status).

31. The second limb of the "acid test" of *Onibiyo* is thus replicated in this amendment. The Minister has no obligation to grant consent to a subsequent application even where new elements or findings are adduced in support of an original claim if he is satisfied that they might have been presented during the course of the processing of the original claim.

32. Accordingly, under s.17 as thus amended the Minister is only compellable to grant his consent to a new asylum application being entertained and determined when two conditions are fulfilled namely, that new elements or findings have arisen making it significantly more likely that the new application will be successful; and that these new elements or findings could not have been presented for the earlier application through no fault of the asylum seeker. In the judgment of the Court, save for the distinction between "new claim" and "new elements or findings", there does not appear to be any practical difference between these criteria and those of the "acid test" of the *Onibiyo* case approved by Clarke J. in the*E.M.S*. case, and particularly the test as to whether a "realistic prospect of a favourable view could be taken". If anything, the introduction of the requirement that the new elements or findings should "significantly add to the likelihood" of the application being successful raises the threshold the application for consent must overcome. More importantly, contrary to the submission made on behalf of the applicant in the present case in reliance upon the approach adopted by Clark J. in the*A.A.* case, as the section now stands, the Minister is not only entitled to have regard to whether those new matters could have been relied upon at an earlier stage, he must be satisfied that it was through no fault of the applicant that they

were not in fact presented during the course of the processing of the earlier application including any appeal to the RAT.

33. It is also appropriate to draw attention to the relationship between the procedures provided for in Articles 19 and 20 of the Directive and those in Article 32. Article 19 allows the Member States to provide for the possibility of an application for asylum being explicitly withdrawn but requires them to ensure that the file is, in effect, finalised by ensuring that the determining authority makes a decision either to discontinue the examination or reject the application. The Member States may also, however, provide that the determining authority can decide to discontinue an examination without taking a decision. Article 20, on the other hand, deals with cases of deemed withdrawal. Here again the Member States are required to ensure that the file is finalised so that when there is reasonable cause to consider that an application has implicitly been withdrawn or abandoned, the determining authority must take a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with the Qualifications Directive. Amongst the situations in which Member States will be entitled to assume that the application has been implicitly withdrawn or abandoned is that in which the asylum seeker has "absconded or left without authorisation the place which he/she lived or was held, without contacting the competent authority within a reasonable time, or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate". It is undisputed that this is what occurred in the present case and that being so, it would be entirely compatible with Article 20 of the Directive (had it been in force in national law at the time,) for the Minister to have refused the declaration upon the basis that the applicant had not established an entitlement to it by virtue of his disappearance without notification of change of address and failure to attend interviews.

34. It follows, in the view of the Court that it is consistent with scheme of Article 32 of the Procedures Directive that the preliminary examination procedure envisaged in para. 3 can be applied in a case where refugee status has previously been refused because the original asylum application has been deemed withdrawn as a result of the asylum seeker's failure to co-operate with it.

35. In the judgment of the Court it follows that the applicant's central argument as summarised in para. 9 above does not raise any substantial ground as the validity of the Minister's refusal of consent. He refused consent because the letter of 9 October 2008 advanced no new evidence that would indicate that a favourable view of the further application might be taken if remitted to the Commissioner for assessment. There was no new claim nor was there any new evidence. Whether the issue is approached on the basis of the two-limb "acid test" of the EMS case, on the allegedly one limb test of the AA case, or on the basis that the test of the Procedures Directive was applicable from 1 December 2007, the Minister was only required to decide whether what was adduced was new. The Minister's obligation was not altered by the fact that the original application had not been fully processed but had been abandoned by the applicant and deemed withdrawn. The refusal of the declaration under s.17(1) remains a definitive determination of the original application and an applicant is not entitled to exploit his own failure to prosecute his original application in order to compel the Minister to consent to what is, in effect a reopening of the original claim with no new evidence, argument elements or findings.

36. For the avoidance of doubt the Court would add that the above provisions of the 2011 Regulations have been referred to for the sole purpose of comparing the terms of the test applied in the *EMS* case with the criteria adopted as the common minimum standard in the Procedures Directive for the processing of subsequent applications. This is not a case in which the applicant seeks to rely on the direct effect of that directive as against the State nor could the respondent have invoked the terms of its Article 32 as

against the applicant when the provisions had not been transposed by the State when the decision to refuse consent was made in October 2008.

37. The application for leave is refused.