THE HIGH COURT

[2011 No. 8 J.R.]

BETWEEN

M. M.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 18th May, 2011

1. The object of Council Directive 2004/83/EC ("the Qualification Directive") may be said to prescribe certain minimum standards for the qualification and status of third country nationals who seek international protection. The Qualification Directive was transposed into our domestic law by means of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006)("the 2006 Regulations"). As we shall shortly see, this application for judicial review turns on a question of the interpretation of Article 4(2) of the Directive.

2. This application arises in the following fashion. The applicant, M.M., is a Rwandan refugee of Tutsi ethnicity who has sought asylum in Ireland. He contends that if returned to his home state he may be prosecuted before a military court for openly criticising the manner in which investigations into the 1994 genocide were being carried out.

3. Mr. M. studied law at the National University of Rwanda and graduated with a degree in 2003. After this graduation, he sought employment within the civil service. He contends that he alone of his graduating class was refused a position, despite his qualifications and that he was instead coerced to accept a position as a prosecutor in the office of the military prosecutor. It is said that this appointment represented an endeavour to silence him and to prevent him from divulging information regarding the genocide which might be uncomfortable for the authorities. Mr. M. claims that he was advised not to protest and that another military office was killed when he started to ask awkward questions about the conduct of the investigations.

4. In June 2006 Mr. M. was admitted to study for degree of LL.M. at the Faculty of Law, National University of Ireland, Galway. He later obtained an Irish visa in September, 2006 and thereafter studied in Ireland for just over twelve months.

5. Mr. M. graduated from NUIG in November, 2007 where his thesis work concerned the rights of victims of international crime, including the rights of persons affected by the Rwandan genocide. Upon graduating, Mr. M. engaged in further work concerning war crimes and genocide, but on 21st May, 2008, he applied for asylum.

6. His asylum application was originally refused by the Refugee Appeals Commissioner on 30th August, 2008. This decision was affirmed on appeal by a decision of the Refugee Appeals Tribunal on 28th October, 2008. In essence, Mr. M.'s claim was rejected because the applicant's individual claim of persecution was found not be credible. Thus, for example, the Tribunal concluded that:-

> "The applicant appears to have had freedom while working for the authorities and he was able to leave and return to the country a number of times in 2005 (see stamps on passports). The fact that the applicant worked for the authorities for over a year without any difficulties raises serious credibility

issues with the applicant's account and seriously undermines the well foundedness of his fear."

7. The Tribunal went on to observe that if the applicant were considered to be a real threat to the authorities "it is highly unlikely that they would have given him a position working with them, particularly where this position would allow the applicant to have access to further information on the genocide."

8. Mr. M. then applied for subsidiary protection under the terms of the 2006 Regulations and this was refused by decision of 24th September, 2010. The Minister relied heavily on the earlier asylum decisions for his conclusion that the applicant had not established that there were substantial grounds for considering that he was at risk of serious harm in the light, in particular, of the serious credibility doubts which attended the application.

9. The applicant thereafter commenced these judicial review proceedings on 6th January, 2011, in which the validity of the subsidiary protection decision was challenged. Leave to apply for judicial review was granted by this Court (Cooke J.) on 18th January, 2011.

Article 4(1) of the Directive

10. There is effectively only one issue before the Court, namely, the proper construction of Article 4(1) of the Directive. This provides:

"Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application."

11. Mr. M. contends that the effect of the latter sentence is that the authorities of the Member States are under a duty to communicate with an applicant for

international protection during the course of the assessment of an application. Specifically, it is contended that in the event of a proposed decision which is adverse to an applicant this duty of co-operation means that the authorities are obliged to supply a draft decision in advance to such applicant for his or her comments.

The decision in *Ahmed v. Minister for Justice, Equality and Law Reform*

12. Before examining the question of the construction of Article 4(1), it is appropriate to observe at the outset that this general issue was considered in some detail by Birmingham J. in *Ahmed v. Minister for Justice, Equality and Law Reform,* High Court, 24th March, 2011. Here the applicant was an Iraqi national of Kurdish ethnicity who sought asylum on the ground that he had been targeted by Islamic groups in Iraq. When this application was rejected on credibility grounds, Mr. Ahmed sought subsidiary protection.

13. Unlike the decisions of the Refugee Applications Commissioner and the Refugee Appeal Tribunal dealing with asylum, the decision of the Minister on the subsidiary protection application also dealt with the question of internal location in the three northern provinces of Iraq. The material submitted on behalf of the applicant in March 2010 included UNHCR Guidelines dating from 2007 dealing with the general security situation in Iraq; the extent to which Iraqi asylum seekers needed international protection and the question of whether internal relocation was a possibility, in particular with regard to the three northern provinces.

14. It is, of course, well known that the security situation in Iraq had improved considerably in the period between 2007 and 2010. The Minister did not, accordingly, confine his assessment to guidelines which, in many respects, had been overtaken by events, but instead referred to variety of up-dated information from country of origin

reports, including a UK Home Office report from December, 2009. The applicant was not informed that the decision maker intended to access and rely on these reports.

15. Birmingham J. rejected the argument that the reliance on this material amounted to a breach of fair procedures since he concluded that:-

> "There was no general obligation on a decision maker to return to an applicant and inform him or her of what documents have been sourced. The applicant is aware of the task facing the decision maker and must expect that he or she will prepare themselves by making sure that they are fully up to date."

16. While Birmingham J. acknowledged that there might be exceptions - such as where the decision maker had available to a private stream of information not otherwise in the public domain - this was not the case here. The judge further adopted the comments of Charleton J. in *FN v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88 who had arrived at a similar conclusion.

17. Turning next to the compatibility of this procedure with Article 4(1), Birmingham J. noted that:-

> "The applicant places particular emphasis on the phrase 'in co-operation with the applicant' and says that the procedure that was followed here, meant that there was no co-operation between the applicant and the respondent. A co-operative approach it is contended would require the respondent to update the applicant on the information that was becoming available and invite his response.
>
> In my view, the argument advanced ignores the fact that an application for subsidiary protection is not made in isolation but is ordinarily made, and this was the situation in the present case by someone who has applied for asylum, has had that application considered and been refused refugee status.

> Even before the stage of submitting an application for subsidiary protection is reached, there has already been a considerable degree of interaction between an applicant and the authorities. This has involved questionnaires being issued and completed, interviews arranged and attended the submission of a notice of appeal and the convening of an appeal hearing.
>
> In summary, I cannot see that there was anything objectionable in the respondent considering up-to-date information and I cannot say see any basis why he ought to have been confined to considering the report submitted by the applicant, the authors of which have specifically stated that it has been superseded…and is not applicable to the UNHCR's current policy concerning the international protection needs of Iraqi asylum seekers as well as its return policy. The procedure followed by the official was an acceptable one and the conclusion arrived at was one that was open to the decision maker and not one that can be categorised as unreasonable or irrational or disproportionate."

18. Birmingham J. ultimately declined to make a reference to the Court of Justice pursuant to Article 267 TFEU.

The application of the principles in *Ahmed*

19. The present case is, if anything, weaker than *Ahmed.* Unlike that case - where the security situation in Iraq had improved in the period between the first reports submitted by the applicant and the up-dated reports relied on by the decision-maker - there has been no appreciable change in the general political or security situation in Rwanda, at least so far as period between 2007 and 2010 is concerned. Thus, for example, in his application for subsidiary protection in December 2008, the applicant submitted country of origin information from 2008 (including the US State Department country report for 2007 which had been published in March 2008), albeit

that this was supplemented with some further up-dated information in a letter of 6th August, 2010. Much of this material centred on the Rwandan judicial and prosecution systems.

20. It is perfectly true that the decision-maker dealing with the subsidiary protection application relied on material which had been published in 2010, including a US State Department report on Rwanda for 2009 which had been published in March, 2010. While there is no doubt but that this country of origin information shows serious shortcomings in the Rwandan judicial, prosecutorial and policing systems along with serious human rights abuses, it cannot be said that, so far as the applicant's own circumstances are concerned, the differences between the various reports are hugely material. It must be here recalled that at the heart of the applicant's request for international protection - whether it be asylum or subsidiary protection - is that fact that the Refugee Appeal Tribunal ruled adversely to this claim on credibility grounds. Neither this decision nor the earlier decision of the Refugee Applications Commissioner have ever been impugned by the applicant in judicial review proceedings. In these circumstances, it cannot be said that there has been any breaches of fair procedures by the Minister. Besides, the applicant must be taken to be aware of the fact that the Minister is in principle permitted by the 2006 Regulations to rely on information of this kind which is generally in the public domain, given that Article 4(3)(b)(ii) expressly permits the Minister to have regard to "such other information relevant to the application as is within the Minister's knowledge."

21. The present case is accordingly governed in principle by the decision in *Ahmed* which, if followed, would lead a fortiori to the rejection of the present application. While it is true that the decision of one High Court judge cannot strictly bind another, as I pointed out in my judgment in *I. v. Minister for Justice, Equality*

and Law Reform [2011] IEHC 66, "the established practice of this Court is that, generally speaking, previous decisions should be followed": see, *e.g.,* the comments of Parke J. in *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] I.L.R.M. 50 at 53 and those of Clarke J. in *Re Worldport Ltd.* [2005] IEHC 189 and in *PH v. Ireland* [2006] IEHC 40, [2006] 2 I.R. 540. As Clarke J. put it in *Re Worldport Ltd.*:-

> "It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong....Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."

22. Against that background I must ask myself whether there are any special factors which would justify me not following that decision either so far as the merits of the application is concerned or as regards the decision of Birmingham J. not to refer the matter to the Court of Justice pursuant to Article 267 TFEU.

23. None of the special considerations identified by Clarke J. in *Re Worldport* are present here so far as the individual merits of the matter are concerned.

24. The position is somewhat different so far as the desirability of a reference under Article 267 TFEU is concerned. Here the applicant points to two discrete lines of argument which were not before the Court in *Ahmed* so far as the interpretation of Article 4(1) of the Directive is concerned, namely, (i) the various different language texts of the Directive and (ii) a decision of the Dutch Council of State of July 12, 2007. The applicant contends that these new factors justify the Court taking a different view on the desirability of a reference.

Various language texts

25. A number of different language texts were put before the court, but, for example, neither the French text («en coopération avec le demandeur») nor the German («unter Mitwirkung des Antragstellers») nor the Italian ("in cooperazione con il richiedente") provide us with any fresh insights, as these words correspond completely with the relevant English language words ("...in cooperation with the applicant …").

26. For my part, I rather think it unlikely from a consideration of the text, structure and general context of the Directive that the Union legislator contemplated through these bare words to constitute some sort of equal partnership between the application and the decision-maker as if they were, so to speak, the joint managers of a commercial undertaking. This is especially so given that Article 4(2) provides that:-

> "The elements referred to in paragraph 1 consist of the applicant's statements and all documents at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection."

27. This latter provision suggests that the reference to cooperation in Article 4(1) must be understood as merely obliging Member States to facilitate applicants who wish to make an application to seek international protection and imposing a corresponding obligation of utmost good faith and frank disclosure on the part of those self same applicants.

28. In sum, therefore, there is nothing in the different language versions which in any way detracts from the reasoning or conclusion of Birmingham J. in *Ahmed* or which would suggest in their own right that it was desirable to make a reference to the Court of Justice.

The decision of the Dutch Council of State

29. The decision of the Administrative Jurisdiction Council of the Dutch Council of State (Raad von State) of 12th July, 2007 in case numbers AWB 07/14734 and 07/14733 does, however, throw new light on a possible interpretation of Article 4(1). In that case the Hague District Court held at first instance that the Dutch State Secretary of Justice was under no obligation by virtue of Article 4(1) of the Qualification Directive to assist an alien seeking international protection to demonstrate the authenticity of a document relied on.

30. That decision was upheld on appeal, but the Council of State nonetheless observed (according to the English language translation supplied to me):-

> "As far as this subsection would already contain a directly applicable standard, there are no grounds for considering that the herein implied cooperation obligation stretches further than giving the alien the opportunity to lodge evidence in support of his asylum application, and the Secretary, after assessing to what extent these elements are relevant *and giving rise to grant this application, to inform the alien of the results of the assessment thereof, before a decision is made, so as to facilitate the alien to remedy elements that incur a negative decision.*" (Emphasis supplied)

31. The italicised words clearly support the position urged on me by the applicant. Indeed, if this particular construction of Article 4(1) is the correct one, then the applicant would plainly be entitled to an order quashing the Minister's decision. The fact that one of the leading national administrative courts has taken this view of Article 4(1) is a matter which must give one pause for thought and the applicant's reliance on this decision is admittedly a new factor which requires me to re-assess matters afresh.

32. While I am conscious of the fact that Birmingham J. declined to make a reference, the fact that the Dutch Council of State has adopted the position which it has must alter the judicial perspective on the desirability of a reference, not least given that this latter decision was not opened to the court in *Ahmed*. It must also be acknowledged that were the applicant proved to be correct in his contentions regarding the construction of Article 4(1), this would have huge implications for current administrative practice in this State with regard to the grant of subsidiary protection and this outcome would affect many other cases currently pending before this Court.

Conclusions

33. In these circumstances, I consider that it is appropriate and desirable that I refer the following question to the Court of Justice in accordance with Article 267 TFEU, namely:-

> "In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of Council Directive 2004/83/EC require the administrative authorities of the Member State in question to supply such applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?"

34. In the event, therefore, I propose to stay the present proceedings pending the outcome of the reference. I will hear counsel on any other matters which would seem to arise. For completeness, however, I should record that I respectfully suggest that for the reasons set out at paragraphs 26, 27 and 28 of the above judgment that the question referred should be answered in the negative.