THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 562 J.R.]

BETWEEN

V. J. [Moldova]

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND THE REFUGEE APPLICATIONS COMMISSIONER IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Cooke delivered the 31st day of July 2012

1. This matter comes before the Court as an application made *ex parte* for leave to seek judicial review (including an order for *certiorari*) in respect of a decision of the respondent Minister made on the 3rd April, 2012, refusing the applicant's application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 (the "2006 Regulations").

2. It is brought in conjunction with a judicial review application made on notice for leave to seek judicial review of a later deportation order of the 5th May, 2012, made in respect of the applicant. This ruling is confined to the *ex parte* application and the reliefs sought as against the subsidiary protection refusal. In that regard the statement of grounds presents a total of 26 grounds of which 13 are directed at the decision on subsidiary protection.

3. The background can be briefly summarised. The applicant is national of Moldova who arrived in the State in 2008, leaving his children behind. He applied unsuccessfully for asylum. His wife had arrived in the State in 2006.

4. His asylum claim was based on a fear of persecution for reasons of political opinion or political activity. More precisely it was a claim of imputed political opinion or activity because it was based upon his account of his wife having attempted in 2002/2003 as a member of the Democratic Party in Moldova to publish a newspaper article which implicated the son of the then President of Moldova in illegal cross-border trading in drugs and alcohol. He claimed that as result he had been assaulted by men he believed had been sent by the President and his son and his family began to receive threatening phone calls. At Easter 2003, the same people attempted to abduct his wife while holding a knife to the applicant's throat. His wife is said to have managed to escape. The phone calls continued and threats were again made at the house in June 2006.

5. He fled to Russia, but on two occasions returned to Moldova subsequently because, he said, his mother was ill. He claimed to fear both the police and the Mafia if he returned to Moldova.

6. The claim was rejected in the asylum process largely on grounds of lack of credibility. The Tribunal member found his account vague. He had little information as to his wife's activities or her role in the Democratic Party or as to the claims she is said to have made in the alleged newspaper article which he attempted to publish. The article does not appear to have actually been published and it is said that its content was leaked by the newspaper to the President and/or his son.

7. The application for subsidiary protection was based on the same facts and events, including the threats associated with his wife's alleged activities. He claimed that it was only when he returned to Moldova in 2008 that he first learned that his wife had fled to Ireland in 2006.

8. In the application for subsidiary protection it was claimed that the applicant was exposed to a risk of serious harm under two of the defined forms namely (i) death penalty or execution and (ii) torture or inhuman or degrading treatment.

9. The determination of the subsidiary protection application first sets out almost verbatim the basis of the claim as made on behalf of the applicant. The analysis deals immediately with the issue of general credibility as required under Regulation 5(3) of the 2006 Regulations.

10. It cites extensively the conclusion reached by the Tribunal member on this issue based especially on the applicant's vagueness about his wife's role and activities. The determination reaches the conclusion that the claim to a fear of persecution or serious harm if returned it Moldova was simply not credible.

11. In the judgment of the Court, that was a conclusion which the Minister was entitled and even obliged to reach. No new fact or evidence was put forward as compared with what had been placed before the decision-makers in the asylum process. On its face there was, on any common sense view, a clear lack of coherence in the account given by the applicant. The origin of the claim lay in the wife's activity in seeking to publish an article about the President's son. She had however, only "attempted to publish it". It was never in fact published nor was any copy of it produced. Although the wife was present in the State, she does not appear to have been invited to corroborate the claim by explaining the content of the article. The applicant claimed to fear persecution from the same source when he returned to Moldova in 2008, although his wife had left the country in 2006.

12. It is not the function of this Court to make findings on these issues of fact and credibility. It is however, the function of the Court to confirm that when common sense is applied to such claims by a decision-maker in the asylum process, it is impossible to deny that the conclusions thus reached on the same basis in respect of the same claim in the subsidiary protection application are obviously sound.

13. Having lawfully concluded in effect that the story about the wife's role in the democratic party and her attempt to publish the article together with the claims of threatening phone calls and the attempted abduction were simply untrue so that these events were considered never to have happened, there was no legal duty upon the Minister to give further consideration to other aspects of the claim for subsidiary protection.

14. The subsidiary protection application like the claim for asylum was based exclusively on this assertion of past serious harm in specific circumstances personal to the applicant and his wife. No reliance had been placed upon any current state of internal or international armed conflict in Moldova such as might now call for forward looking assessment of the risk by reference to appropriate country of origin information.

15. It is true that the determination proceeded to "tick all the boxes" by methodically considering the application by reference to the other matters listed as appropriate for consideration in assessing facts and circumstances under Regulation 5. However, once a decision of this kind is adjudged sound and valid on the fundamental issue before the decision-maker, it cannot be set aside by the Court in judicial review because the decision-maker has decided more than was needed and because one of the superfluous findings is possibly flawed.

16. The primary ground advanced is that the decision is vitiated by an excessive delay in making the determination on the application. Counsel for the applicant submitted that the delay was so great that it is *per se*, sufficient to invalidate the determination irrespective of the demonstration of any impact upon the substantive content of the decision by virtue of elapsed time. It is also asserted that by the time the decision was made, the lapse of time was such that the country of origin information relied upon in the application was out of date. Furthermore, before reliance was placed on any later information it should have been put to the applicant for comment or rebuttal in order to comply with the principle of *audi alteram partem*.

17. For the reason already given, reliance on country of origin information in this case had no material bearing on the substantive effect of the determination. It was irrelevant to the question of past persecution which had been dealt with by the finding that the events relied on were considered never to have happened. Country of origin information was relied upon in relation to the claim to fear persecution in the form of the death penalty but only for the purpose of demonstrating that Moldova on accession to the ECHR had abolished the death penalty. That finding is not disputed as being factually and legally correct.

18. Country of origin information was also cited in relation to the reliance placed upon the claim to fear serious harm in the form of torture or inhuman and degrading treatment insofar as the claim was based on an alleged fear of the police and mafia in Moldova. It was asserted that the "opposition" in Moldova were being subjected to abduction, detention and extra-judicial killing by government forces or their agents.

19. The final conclusion of the determination points out, however, that since the applicant and his wife fled Moldova, the then President and his regime are no longer in power and therefore no longer in a position to inflict the serious harm the applicant claimed to have feared. As a result, it was judged that the security forces would be able to afford protection to the applicant in current circumstances.

20. The remaining issues included under the heading of ground No. 1, are, in the judgment of the Court, unfounded for the same reason.

21. Ground No.2, raises the "failure to cooperate" point which has been rejected in a number of existing judgments of the Court and therefore gives rise to no arguable case. Moreover and in any event, no specific point or issue has been identified upon which cooperation might have been required or appropriate and the applicant does not purport to present any information or evidence which would have been the subject of such "cooperation" in a way which would have altered the determination as it now stands.

22. The Court is also satisfied that no arguable case is presented by ground No. 4, which alleges that the subsidiary protection decision is tainted by objective bias and prejudgment. As this Court has pointed out in a number of judgments, subsidiary protection as introduced by the Qualifications Directive is a form of international protection created by the European Union to complement the protection afforded by refugee status under the Refugee Convention of 1951. It provides an additional form of protection where an individual demonstrates the existence of a genuine risk of facing serious harm if repatriated in a case where the source or cause of the harm does not fall within the scope of the definition of "persecution" under the Convention. As is well known, in all Member States save this one a single procedure has been implemented for the examination of applications for international protection in which a single application is made for both forms of protection and, where an applicant is not qualified as a refugee, the same decision-maker proceeds immediately to consider whether on the application as presented and the facts found, the applicant nevertheless qualifies for subsidiary protection. There is, accordingly, no incompatibility and no question of bias or prejudgment by virtue of the fact that the Minister makes the assessment required as to eligibility for subsidiary protection after he has accepted the negative recommendation of the asylum decision maker by the refusal of the declaration under s. 17(1) of the Act of 1996.

23. Ground No. 5: "inadequate examination of the applicant's application" is too general an assertion to constitute a valid ground for judicial review.

24. There is, however, in the view of the Court, one ground which, on the basis upon which it was explained to the Court, can be said to raise a sufficiently arguable point to warrant the grant of leave. Ground No.3, in the statement of grounds is formulated as follows:-

> "The enmeshment of the subsidiary protection scheme operated in the State with the deportation/leave to remain procedure is in breach of European Law and renders the refusal of subsidiary protection unlawful. It was in breach of the principles of equivalence and effectiveness."

25. It seems questionable whether the concept of "enmeshment" is one known to the vocabulary of administrative law. What is being alluded to here, however, is the fact that in the way in which the Qualifications Directive has been implemented by the 2006 Regulations, the opportunity to apply for subsidiary protection has been incorporated into the procedure leading to the making of a deportation order under s. 3 of the Immigration Act 1999. Regulation 4(1) of the 2006 Regulations requires that the notification given by the Minister of a proposal under s. 3(3) of the Act of 1999, to make deportation order in respect of a failed asylum seeker is to

include a statement that if the asylum seeker considers that he or she is a person eligible for subsidiary protection, "he or she may, in addition to making representations under s.(3)(3)(b) of that Act, make an application for subsidiary protection to the Minister within the fifteen day period" stipulated in the notification.

26. In typical if not all cases, the notification under s. 3(3) is given in what is referred to as the "three options letter" in which the failed asylum seeker is informed that the Minister proposes to make a deportation order but offers the asylum seeker a choice between leaving the State voluntarily before any order is made; agreeing to submit to the making of the order and, alternatively, applying for temporary leave to remain and additionally making an application for subsidiary protection. It is argued that by placing the entitlement to apply for subsidiary protection within the context of the choice to be made between these options, the combined effect to Regulation 4(1) and s. 3 is to place an inhibition on the making of an application for subsidiary protection which is incompatible with the scheme of the Qualifications Directive and general principles of European Union law.

27. The Court will, accordingly, grant leave to the applicant to apply for judicial review upon a single ground directed towards this argument to be formulated as follows:-

"By confining the right to apply for subsidiary protection to the circumstance in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s. 9(2) of the Refugee Act 1996, has expired and a decision has been taken to propose the deportation of the applicant under s. 3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s. 3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is ultra vires Council Directive 2004/83/EC of the 29th April, 2004, and is incompatible with general principles of European Union law."

28. Accordingly, so far as concerns the judicial review sought in respect of the subsidiary protection decision dated the 3rd April, 2012, leave will be granted to apply or an order of *certiorari* upon the sole ground above.