THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 993 J.R.]

BETWEEN

H.A. (CHAD)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of January, 2019

1. The applicant is a national of Chad and was born in 1984. He was in possession of a passport from his own country issued on 5th September, 2005. On 14th July, 2007 he was issued with a visa to enter the U.K. That visa was issued on his presentation in person at the U.K. diplomatic and consular mission in Yaoundé, Cameroon. In his asylum application he later denied having travelled outside his country of origin and denied having a visa. Instead he claimed he left Chad in October, 2007 *via* Libya with a dramatic story involving groups of prisoners, not having a passport and smugglers taking over. However, the documentary material makes clear he came to Ireland *via* Cameroon and the U.K.

2. The applicant arrived in the State on 16th November, 2007. He applied for asylum. That was rejected by the Refugee Applications Commissioner. He appealed to the Refugee Appeals Tribunal. That appeal was also rejected, although the decisions have not been produced by either party. It is clear from the subsidiary protection decision, which was produced, that the commissioner raised many issues of credibility and plausibility and the tribunal concluded that "*the appellant was not credible in relation to core aspects of his evidence"*. He was notified on 11th September, 2009 that the Minister proposed making a deportation order and on 1st October, 2009 he applied for subsidiary protection and for leave to remain.

3. On 20th January, 2012 the U.K. border agency confirmed to the Department of Justice and Equality that the applicant had been issued with a U.K. visa. On 10th February, 2012 in a response to this revelation, his solicitors at the time, the Legal Aid Board, wrote to the Department stating that "*our client instructs his expression of regret to the Minister for providing false information in relation to his asylum application*". The applicant then further abused the protection system by improperly leaving the State without permission and going to the U.K. That put his protestations of remorse into some context. There he applied for asylum on 23rd May, 2012. It was then decided on 26th June, 2012 to return him to the State under the Dublin system. The Minister then rejected the subsidiary protection application on 3rd July, 2012 and made a deportation order against the applicant at the same time. The analysis discussed the issue of *refoulement* and notes that the documents submitted by the applicant had been dealt with "*comprehensively*" by the commissioner. It concludes in the light of the applicant's false statements that *"it is reasonable to consider that the applicant's statements in relation to his claimed fear of returning to Chad are not credible*". That was not, however, the sole ground for that conclusion. Reliance is also placed on country information and on the availability of state protection. The applicant instituted judicial review proceedings in the U.K., challenging his return under the Dublin system, although neither papers nor even the identity of the solicitors he used have been put before the court. As a result of the U.K. judicial review proceedings, the applicant was not returned to the State until 27th January, 2014. He has not thought it necessary to instruct his lawyers as to the details of his application or to provide a copy of the judgment which, for the avoidance of doubt, is not something that his present lawyers can be held responsible for in these particular circumstances; the fault in that regard is that of the applicant.

4. In June, 2015 the McMahon report on direct provision and related issues was published. A revocation application was then made by new solicitors on behalf of the applicant, Daly, Lynch, Crowe and Morris, on 1st March, 2016. The letter referred to the policy dealt with in the McMahon report, although that report was not mentioned by name. Instead, reference was made to the policy of allowing leave to remain after five years' presence in the State. That s. 3(11) application was refused by the Minister on 23rd March, 2017. A second revocation application was made by the applicant's current solicitors, Trayers & Co., on 7th August, 2018. That was refused on 15th October, 2018. The applicant was so notified on 18th October, 2018. The present proceedings were filed on 28th November, 2018 seeking *certiorari* of that refusal, and I granted leave on 3rd December, 2018. On the first return date on 14th January, 2019 I provided an accelerated timetable for the respondents' opposition papers by adjourning the matter for one week, and on 21st January, 2019 I fixed a hearing date with a stay on removal of the applicant until then. I have received helpful submissions from Mr. Garry O'Halloran B.L. for the applicant and from Mr. Tim O'Connor B.L. for the respondents.

Ground 1 - the McMahon report

5. This ground alleges that "*the decision of the Minister to affirm the deportation order is disproportionate due to the failure to strike a fair balance when assessing the relative weight of the competing factors, and including the six-year time lapse since the making of the deportation order, and the McMahon Working Group Report, and the interference with the applicant's private life".* Insofar as proportionality is concerned, the weighing of factors is primarily a matter for the Minister. The proportionality of deportation was a matter that essentially arose at the time of the deportation order. The applicant's failure to leave the State following his return under the Dublin system after the original deportation order is not a basis without more to say that the decision has become disproportionate due to lapse of time.

6. Separately from that, the McMahon report was issued in June, 2015, before the first s. 3(11) refusal. Any point under this heading was there at that time. The fact that he had the subsequent idea to make a second s. 3(11) application, having failed to challenge the first refusal, does not create a boot-strapping entitlement to now raise the point that was there at the time of a previous unchallenged decision. In any event, and independent of the foregoing, the point is without substance. The McMahon report is not government policy, but even if it was government policy it does not apply to this applicant. The McMahon report refers to four conditions. The relevant ones for the purpose of the ministerial discussion here are condition B, that the applicant would cooperate with the review of his case, and condition C, that the applicant was not an evader. The narrative basis in the decision for saying that the applicant would not have satisfied McMahon is that "*he left the State and sought to enter the asylum system in the UK necessitating his return to this jurisdiction and thereby evaded his deportation from the State for a period of time. As a result, it is apparent that even if the recommendation referred to above was a matter of government policy, that recommendation could not have been applied".*

7. There is some confusion in the wording of the decision insofar as it suggests that the applicant might have met condition C but not condition B, whereas it would seem on the face of things that that should have been phrased the other way around. So the reference to not meeting condition B appears to be a misprint and it looks like it should be a reference to condition C. But insofar as there is an error here it is a harmless error because what is clear is that the applicant did evade and that evaders are not covered by the McMahon approach. So there is no basis to quash the decision under this heading.

Ground 2 - lack of change of circumstances
8. Ground 2 pleads that "*the Minister erred in law in confining the analysis to the parameters of 2007 High Court caselaw and without any regard to subsequent decisions of the Supreme Court and Court of Appeal stating the assessment is to be based on the particular circumstances as currently exist*".

9. As pleaded this ground is somewhat opaque. The 2007 caselaw referred to in the ground appears to be *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 19 [2007] 3 I.R. 603. At para. 87 of that judgment, McMenamin J. refers to the need for an applicant under s. 3(11) to "*advance matters which were truly materially different from those presented or capable of being presented in the earlier application*". I read that as meaning not that the applicant is confined to new circumstances in any s. 3(11) application but that the Minister is entitled to refuse such an application if no change of circumstances has been shown. It is true, of course, that the Supreme Court in the judgment in *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53 [2016] 2 I.R. 403 at p. 425 para. 52 *per* Murray J. made clear that the s. 3(11) process is not confined to change of circumstances *"although any such change in circumstances would, of course, be relevant factors"*. Thus while the Minister is entitled simply to change his mind, in the absence of demonstrating an unreasonable failure to address changed circumstances an applicant is not entitled to *certiorari* of a refusal to revoke a deportation order.

Grounds 3 and 4 - *refoulement*
10. These grounds allege "*the Minister erred in law in failing to vindicate the principle of non-*refoulement" and that "*the Minister erred in law in failing to consider the principle of refoulement beyond making the bland finding that the parallel decisions of ORAT, RAT and the Minister* 'remain valid in law'".

11. The submission under these headings is as set out at para. 17 of the applicant's written submissions: "*Grounds 3 and 4 relate to the failure to consider and positively vindicate the fundamental principle of non-*refoulement. *The duty placed on the Minister not to return someone to harm is not discretionary*". In oral argument, however, Mr. O'Halloran was not suggesting that the decision was premised on the notion that *refoulement* was a discretionary issue. The essence of his submission was that that issue was not properly considered. However, any point under *refoulement* was there at the time of the original deportation order and the first s. 3(11) application. In the absence of anything significantly new, the Minister was entitled to follow the logic of the previous decisions adverse to the applicant.

Order
12. The applicant has played fast and loose with the immigration systems of both Ireland and the U.K. He has been in these islands for twelve years without ever having anything more than a temporary visa to enter into the U.K. and no ministerial (as opposed to statutory) permission to be in Ireland. He never had any basis to be here other than the precarious one of an unfounded, and fraudulent, protection application. He is now on his ninth unsuccessful application. The asylum application was rejected by the commissioner, then by the tribunal, and the subsidiary protection application was rejected by the Minister, as was leave to remain. His attempt to claim asylum in the U.K. was rejected by virtue of his transfer back here. His judicial review there failed. His first s. 3(11) application was rejected as was his second s. 3(11) application. This challenge to that latter decision has now failed. He is on at least his fourth set of solicitors, the third in this jurisdiction, and he is, as noted above, on a second judicial review across the two jurisdictions. It is not the law that as long as you keep litigating you can stay. The deportation process, if it is to have any credibility, must have an end point, and this applicant has now gone well beyond it. Having said that, the applicant has been in the State and subject to a deportation order since January, 2014 and has not actually been deported. The State has not been prevented by order from deporting the applicant, apart from the last couple of weeks. Mr. O'Connor suggested that presumably there are good operational reasons for that but that is not a matter for me anyway, and in any event the State's delay in executing a deportation order does not make it invalid or unenforceable.

13. The order therefore will be:

(i). that the application be dismissed; and

(ii). that the stay on deportation be discharged.