THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 425 J.R.]

BETWEEN

F.D. (NIGERIA)

APPLICANT

AND

THE INTERNATIONAL PROTECTION OFFICE, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2018

1. The applicant arrived in the State in June, 2009 and claimed asylum. That was rejected. On 27th October, 2009, an appeal to the Refugee Appeals Tribunal was refused. The tribunal member Mr. Fergus O'Connor B.L. held "*I do not believe the applicant ever had any difficulties in his country of origin*". In November, 2009, refugee status was formally refused by the Minister and a three-option letter was sent. That letter indicated that an application for subsidiary protection should be made within fifteen days. That was not done.

2. The applicant claims in the grounding affidavit that he asked his former solicitor, Mr. James Sweeney, to seek leave to remain and subsidiary protection. In November, 2009, that solicitor sought leave to remain only. In September, 2010, a deportation order was made. The analysis refers to the applicant's connection with the State as being an asylum claim. There is no reference to a subsidiary protection claim. The covering letter refers to the reason for the Minister's proposal being the refusal of a declaration of refugee status. There is no reference to refusal of subsidiary protection. The applicant then evaded for a lengthy period. In April, 2016, new solicitors Burns Kelly Corrigan sought revocation of the deportation order. Mr. Paul O'Shea B.L. for the applicant says that the applicant did not know at that point that the subsidiary protection application had not been made; but that proposition defies logic. It would have been one of the first things that any experienced solicitor would have done, to examine what previous protection applications had been made. Indeed in exchanges with the court Mr. O'Shea had to accept that the first port of call is to see what previous decisions were made and in the deportation context that would involve seeing what the analysis of file would say. It is hard to imagine that Burns Kelly Corrigan would not have looked for the analysis if they had not got it, or that they would not have read it and the covering letter and seen that there had been no reference to subsidiary protection.

3. Much of Mr. O'Shea's submission as to what the applicant did or did not know is mere gloss by counsel and is not expressly backed up by averments by or on behalf of the applicant. Mr. O'Shea is forced into the position of accepting that the applicant through Burns Kelly Corrigan did not take up the option which opened up following the *Danqua* decision of making a further application during a limited time-window, and says he does not know why that option was not taken up.

4. The applicant has not put in anything on affidavit as to why the applicant through Burns Kelly Corrigan failed to avail of this crucial opportunity. That arose because on 20th October, 2016 in Case C-429/15 *Danqua v. Minister for Justice and Equality*, the CJEU held that the fifteen-day time limit already referred to was not in accordance with EU law. The European Union (Subsidiary Protection) Regulations 2017 (S.I. No. 409 of 2017) were then introduced, which allowed 30 working days from 2nd October, 2017 for persons who previously were unable to, or had failed to, apply for subsidiary protection. That period elapsed on 13th November, 2017, but provision was made for an extension if there were special circumstances or if it would be unjust not to permit such a late application.

5. In March, 2018, the applicant's third set of solicitors, Trayers and Company, obtained a file from the applicant's first solicitors and established that no subsidiary protection application had been made. They then sought permission to make a late application, which was refused on 13th April, 2018. On 9th July, 2018, leave in the present proceedings was granted, the primary relief being an order of *certiorari* directed to the decision of 13th April, 2018. There is a fall- back claim that the 2017 regulations are contrary to EU law.

6. I have received helpful submissions from Mr. O'Shea for the applicant and from Mr. John P. Gallagher B.L. for the respondents.

Evidential shortcomings in applicant's case

7. The applicant's grounding affidavit is skeletal to the say the least, given the complexity of the matter and given the number of assertions that have been made by way of submission on his behalf, many of which are not grounded in any way on the evidence. Where an applicant's case is failure of duty by former solicitors there is a particular onus on an applicant to lay the evidential basis for that (see also the comments of Hedigan J. in *A v. Refugee Applications Commissioner* (Unreported, High Court, 18th December, 2008) and Abbott J. in *A.B.O. (Nigeria) v. Refugee Appeals Tribunal* [2010] IEHC 331 (Unreported, High Court, 21st September, 2010) regarding putting solicitors on notice in such a situation).

8. Full files and attendance notes are not exhibited, dates of instructions are not referred to, the former solicitors are not put on notice, there is no affidavit from any of the former solicitors regarding their state of knowledge (for example from Burns Kelly Corrigan who presumably are entirely available to provide such evidence). It has not even been established in the material before the court that the applicant's claim that he gave an instruction to apply for subsidiary protection is correct. In fact, I would infer from the terms of the letter exhibited dated 15th May, 2010, that it is more probable than not that the subsidiary protection application was still in the course of preparation at that point.

9. The applicant has not averred as to when he knew that no subsidiary protection application was made and Mr. O'Shea's claim that he only knew this in March, 2018, is entirely without evidential foundation. As it is put by Mr. Gallagher at para. 6 of the respondent's written submissions, the applicant "*has presented only the bare bones of an assertion*". Nor has the applicant enlightened the court as to the full range of contact with Mr. Sweeney or any other details "*which would throw light on the degree of his own culpability*" (respondent's submissions, para. 6). In short, the evidential basis for the proceedings has not been laid. In case I am wrong about that, I will go on to consider the other issues.

The applicant's failure to avail of the 2017 regulations is fatal

10. The introduction of the 2017 regulations was a seismic development in the law relating to subsidiary protection and the promulgation of that instrument put all competent legal representatives on notice that it was imperative to check whether a subsidiary protection application had been made, and if not to do so at that point. The regulations were gazetted in *Iris Oifigiúil* on 26th September, 2017 and advertised in the *Irish Times, Irish Independent and Irish Examiner* on 23rd September, 2018. A copy of the regulations and a notice regarding them was placed on the websites of INIS and the IPO on 22nd September, 2018. As it is put in

the respondent's submissions at para. 10 "*the applicant again missed the further opportunity in 2016/2017 to submit his long neglected application for subsidiary protection*" and one "*cannot say with any certainty whether the failure to comply with the new time-limits was intentional or merely a consequence of the applicant disengaging with his immigration issues once again*". The applicant's unexplained failure to take up the opportunity to apply for subsidiary protection in 2017 precludes relief now.

Applicant's disengagement from the process is fatal
11. The applicant's abuse of the immigration system does not militate in his favour. His real complaint is humanitarian. The credibility of his protection claim was completely rejected by the tribunal. The eleventh-hour nature of the attempt to seek an extension of time to make a subsidiary protection application does not inspire confidence. It seems on the material before me that the applicant's difficulties in making a subsidiary protection application are significantly related to his disengagement with his immigration obligations and are linked with his lengthy period of evasion. That would certainly provide a natural explanation for his failure to follow matters up and his complete failure to explain on affidavit his inactivity in relation to pursuing the proposed application. In the circumstances this conduct precludes relief on a ground that is enmeshed with the applicant's own wrongdoing including his having ignored and contravened his immigration-related legal obligations.

Complaint that the application met the requirement of "special circumstances" warranting extension of time.
12. This complaint has not been made out. The Minister considered the reasons why the applicant did not avail of the 2017 regulations and held that the applicant had not met the requirement of special circumstances. That has not been shown to be irrational or unlawful. As it is put in Mr. Gallagher's characteristically elegantly phrased submission "*the applicant invites this Court to supplant the impugned decision with one of its own, to second-guess the decision which has not found favour with the applicant because it was* 'the wrong decision'" (para. 4).

13. Even assuming in favour of the applicant that there may have been some grounds for latitude being afforded to him in 2010, he has not explained the full period of delay: see by analogy *C.S. v. Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 343 [2004] IESC 44.

The validity of the 2017 regulations
14. This challenge does not arise given the evidential shortcomings in the case overall, but in case I am wrong about that I will deal with it now. The 2017 regulations are not contrary to EU law. The overall principle is that of national procedural autonomy, subject of course to the principles of equivalence and effectiveness: see Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989 and *T.D. v. Minister for Justice and Equality and Law Reform* [2014] 4 I.R. 277 [2014] IESC 29. The applicant is not arguing equivalence and in any event that was rejected in *Danqua*. The regulations do not infringe the principle of effectiveness.

15. There is nothing to suggest that the 30-day period was inadequate to facilitate the applicant here in his practical context, which is the primary test as the applicant does not have standing to argue any other person's case. But in any event the regulations do not provide an ineffective remedy for applicants generally. Furthermore, they have the required flexibility which is a new feature of the 2017 regulations: see Case C-295/04 *Manfredi v. Lloyd Adriatico Assicurazioni SpA* (CJEU, 13th July, 2006). Mr. O'Shea claims the "special circumstances" exception is unduly vague, relying on Case C-83/11 *Secretary of State for the Home Department v. Rahman* (CJEU, 5th September, 2012) para. 26. However, an exemption clause such as special circumstances has an inherently open-ended texture. The basic rule is clearly defined. Such an open-textured exception does not render the exercise of EU law rights unduly difficult in practice and thus does not contravene the principle of effectiveness. Mr. O'Shea reflexively seeks a CJEU reference but that does not get off the ground for obvious reasons. The failure to lay evidential foundations and the massive gaping holes in the applicant's affidavit are fatal. In any event, the definition of effectiveness has already been clarified in CJEU caselaw.

Injunction
16. Insofar as the injunction seeks indirectly to challenge a deportation order out of time, it fails to comply with s. 5 of the Illegal Immigrants (Trafficking) Act 2000: see *X.X. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 475 [2016] 7 JIC 2931 (Unreported, High Court, 29th July, 2016), *X.X. v. Minister for Justice and Equality* [2018] IECA 124 and *B.S.S. v. Minister for Justice and Equality* [2017] IECA 235 (Unreported, Court of Appeal, 31st July, 2017).

Order
17. The application is dismissed.