THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 725 J.R.]

BETWEEN

M.E. (LIBYA)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of May, 2018

1. The applicant was born in Libya in 1987. He left his own country in August, 2010, and went to the UK for a five-year period. On 21st October, 2012, he applied for asylum in the UK. That was refused. On 12th October, 2015, he reapplied in the UK. That was also refused.

2. On 16th December, 2015, he arrived in Ireland and applied for asylum. On 11th March, 2016, the Refugee Applications Commissioner decided to transfer that application to the UK under the Dublin III regulation. He appealed that decision to the Refugee Appeals Tribunal which affirmed the decision on 17th August, 2016.

3. On 26th August, 2016, the applicant's solicitor wrote setting out that the applicant had a medical condition and seeking the exercise of discretion under art. 17 of the Dublin III regulation in order to allow the applicant to remain in the State.

4. On 21st October, 2016, I granted leave in the present proceedings. On 17th July, 2017, O'Regan J. gave judgment allowing the applicant to amend the proceedings in order to challenge the failure to consider the art. 17 discretion issue: *M.E. v. Refugee Appeals Tribunal (No. 1)* [2017] IEHC 464 (Unreported, High Court, 17th July, 2017).

5. Shortly thereafter on 24th July, 2017, the CSSO wrote stating that "*the respondent*" (unspecified, but apparently referring to the Minister) "*now proposes to consider your client's request for the exercise of discretion under art. 17(1)".*

6. On 27th August, 2017, the applicant's solicitors resubmitted an application for art. 17 relief to the Minister. The Minister failed to make a decision on that application and on 29th January, 2018, the applicant brought a second set of judicial review proceedings, *M.E. v. Minister for Justice and Equality* [2018 No. 84 J.R.] seeking *mandamus* to require the Minister to determine the art. 17 claim. Those proceedings are currently in the asylum holding listing awaiting the outcome of the reference to the CJEU in *M.A. v. Minister for Justice and Equality* [2017] IEHC 677 [2017] 11 JIC 0801 (Unreported, High Court, 8th November, 2017).

7. The Issue in these proceedings is now one of costs only. I have heard helpful submissions from Mr. Eamonn Dornan B.L. (with Mr. Paul O'Shea B.L. and Mr. Michael Conlon S.C.) for the applicant and from Ms. Sarah-Jane Hillery B.L. for the respondents.

Costs follow the event

8. While the thrust of the original statement of grounds was that the tribunal should have determined the art. 17 issue (see ground 1), the proceedings did go somewhat beyond that (see ground 2 which seems to suggest that some person (not necessarily the tribunal) should determine that issue).

9. The thrust of the amended statement of grounds is certainly that there should be some mechanism for the determination of the art. 17 application by somebody (see in particular ground 9). The Minister, following that amendment, agreed to decide that application. That rendered the proceedings moot. The Minister's agreement is, therefore, the event; and it is clearly one related to the proceedings, thus costs favour the applicant. As noted, the point now made was in some shape or form in the proceedings from the beginning and did not simply arise once the amendment was granted.

10. A significant complication exists here in the sense that while the Minister has agreed to consider the art. 17 issue, I held in *M.A. v. Minister for Justice and Equality* that he is not entitled to do so. Hogan J. has since weighed in in a similar vein, albeit merely dealing with the question of arguability, in *H.N. v. International Protection Appeals Tribunal* [2018] IECA 102 (Unreported, Court of Appeal, 19th April, 2018). For the reasons set out in *M.A.*, it seems to me that the Minister's agreement to consider the art. 17 discretion is not capable of being lawfully implemented as the legislation currently stands. But the State will have to implement at least the spirit of its offer by ensuring that someone should do so.

11. Perhaps I might be allowed to add that it is a matter of significant concern that by changing its position on the art. 17 discretion issue, the State seems to have single-handedly managed to grind the outgoing Dublin III system to a juddering halt. So far, there is no particular indication that the Department of Justice and Equality might be prepared to clarify matter through either primary or secondary legislation, despite the fact that they have not just my judgment in *M.A.* but Hogan J.'s in *H.N.* suggesting that they are driving down a dead-end with their current approach. The issue seems to me to be crying out for clarifying legislation. It is a matter of concern that insofar as outgoing requests from this country are concerned, an EU regulation has simply broken down due to the unsatisfactory manner in which the implementing secondary legislation is phrased combined with the change of mind by the State as to the meaning of that legislation; abandoning a workable and it seems to me correct interpretation in favour of an unworkable and incorrect one. I would, therefore, seriously suggest that the Oireachtas give urgent consideration to clarifying this matter if the Department does not prepare regulations under the European Communities Act 1972 to do so.

Order

12. Accordingly, the order will be to strike out the proceedings with costs to the applicant including reserved costs to be taxed in default of agreement.