Ireland, M v Minister for Justice and Equality, (C-277/11 and C-560/14)

Area of law
Asylum and Immigration

Subject matter

Core issues

- Whether an applicant for subsidiary protection has a right to view and comment on a provisional draft decision rejecting his/her application prior to it being made final.

- Whether an applicant for subsidiary protection has the right to an oral hearing and the right to call and cross-examine witnesses prior to the adoption of a final decision.

Summary Facts Of The Case

The applicant was a Rwandan national of Tutsi origins. Subsequent to obtaining a law degree from the National University of Rwanda he claims he was obliged to take a post in the Military prosecutor's office. He left Rwanda to study for a Master in Laws from an Irish university during which he completed research on the treatment of genocide allegations. Upon the expiry of his student visa he applied for asylum from the Irish authorities, claiming he was at risk from the Rwandan authorities due to information he possessed in relation to the conduct of prosecutions (or failure to prosecute) following the Rwandan genocide. His asylum claim was rejected, as was an appeal before the Refugee Appeals Tribunal (RAT), based primarily on credibility findings by the authorities. He then made an application for subsidiary protection to the Minister. A written application and correspondence took place but the application for subsidiary protection was likewise rejected, based substantially on the credibility finding of the RAT.

He lodged a complaint before the High Court of Ireland, claiming that the administrative decision refusing subsidiary protection was contrary to EU law. In particular to the right to be heard which he claimed was contained in Article 4(1) of the Qualification Directive stating that 'In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application'. The use of the words 'in cooperation with the applicant', the applicant claimed, implied a right to be informed of and a right to comment on any provisional negative decision regarding his application.

- *Specificity of the Irish system on international protection*

It should be noted that the Procedures Directive applies to asylum applications. It also applies to

applications for subsidiary protection where a single procedure is used to assess applications for asylum and subsidiary protection (a ‘one-stop shop’ system). Ireland at the material time operated a dual system, in which the procedures are separated out. An applicant must therefore first make an application for asylum to the Office of the Refugee Applications Commissioner. This procedure involves an interview and written representations and the possibility of an appeal before the Refugee Appeals Tribunal with an oral hearing. Only once this has been processed and rejected is he or she entitled to apply for subsidiary protection to the Minister for Justice. While there is a written application and representations may be made there is no further interview or possibility for an oral hearing. Instead evidence collected during the asylum application is used. There is no appeal.

First preliminary reference sent by the High Court of Ireland (C-277/11), M, In its initial judgment, referring the matter to the Court of Justice, the High Court was inclined to find against the applicant, relying specifically on a prior case of the High Court, *Ahmed v Minister for Justice, Equality and Law Reform* (High Court, 24 March 2011), in which it was noted that an application for subsidiary protection took place following a failed asylum application and that during the course of such an application, which frequently deals with the same substantive claims as any subsequent subsidiary protection claim, there is extensive correspondence and interaction with the applicant. Viewed as a continuation of the asylum application there is therefore sufficient procedural rights to ensure that any obligation under Article 4(1) of the Qualification Directive is met. There is therefore no obligation to provide a copy and an opportunity to comment on any draft decision for subsidiary protection.

The High Court however noted the *existence of a Dutch Council of State Decision from 2007 that appeared to contradict the Irish High Court in Ahmed and provided precisely for a right to comment on a draft decision*. In light of the importance of the Dutch Council of State and a desire to ensure consistency within the Common European Asylum System (CEAS) Hogan J decided to refer the matter to the Court of Justice.

At this stage there is no mention of the CFR.

- *Reasoning of the CJEU*

In its reply, the Court of Justice dismissed the contention of the applicant that Article 4(1) of the Qualification Directive implied a right to view and comment on a draft decision. The meaning of the word ‘cooperation’ referred more broadly to the joint responsibility of the authorities and the applicant to establish the facts relevant to his/her application, when the elements provided by the applicant are not complete. It noted that the Procedures Directive did not apply to a system such as the Irish one, in which the asylum and subsidiary protection applications were separate.

However, in an effort to give a more useful answer the Court of Justice went beyond the question posed by the High Court and considered the application of the general principle of Union law of the right to be heard, now codified in Articles 41 (right to good administration), 47 (right to an effective remedy) and 48 (the presumption of innocence). As part of the CEAS the granting of subsidiary protection must comply with general principles and the CFR.

Importantly, the Court held that Member States must not only interpret their national law consistently with EU law, but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with other general

principles of EU law (Para 93).

- *The follow-up judgment of the High Court of Ireland (MM v Minister for Justice (No 3)* [*January* 2013] IEHC 9)

In the follow up judgment disposing of the case, the High Court applied the findings of the Court of Justice and quashed the decision of the Minister to refuse subsidiary protection.

In its judgment the High Court was unclear of the precise implications of the Court of Justice judgment. While noting it required that the right to be heard be respected in the subsidiary protection procedure, it was unclear what form this right would take and in particular if it necessitated an oral hearing or if a written 'hearing' would suffice. Ultimately the High Court determined that following the judgment of the Court of Justice the decision-maker in the subsidiary protection claim is not entitled to rely on prior findings of credibility made in the context of an asylum application without giving the applicant the opportunity to contest these findings. Similarly, the applicant must be given a fresh opportunity to revisit all aspects of the case relevant to the subsidiary protection application and a fresh assessment of any such factors must be made. *An oral hearing would not always be required but may be required in certain circumstances.*

The High Court noted that this would necessitate far reaching changes to the current procedure for subsidiary protection applications and invited the Oireachtas to consider the dual nature of the Irish protection system.

- *Second preliminary reference sent in the case M v Minister for Justice and Equality, by the Irish Supreme Court*

The case was appealed to the Irish Supreme Court by the government and cross-appealed by *M*. *M* in particular argued that the right to be heard as recognised by the Court of Justice implied a right to an oral hearing and a right to call and cross-examine witnesses. The Supreme Court, unclear regarding the precise implications of the right to be heard recognised by the Court of Justice in its initial judgment, stayed the matter and made a fresh reference to the Court of Justice.

- *Second preliminary ruling C*ase C-560/14 *M v Minister for Justice and Equality* EU:C:2017:101.

In contrast to the reasoning of Advocate General Bot, the Court of Justice found that the right to be heard, which flowed from the general principle of EU law of the right of the defence, did not imply a right to a personal interview or an oral procedure within the context of an application for subsidiary protection. The purpose of the procedure was to ensure that the decision maker had full and complete access to the facts and understood the underlying factual matrix. This could be achieved by means of written submissions. Additionally, while noting the separate nature of the two procedures, the Court of Justice, noted that the personal interview conducted during the context of the asylum application, could be relevant and be used in the context of an application for subsidiary protection.

However, the Court did find that in certain circumstances, such as where an applicant is particularly vulnerable, the right to a defence could necessitate a personal interview, this would be applicable where a personal interview would be necessary in order to ensure that the decision maker had a full understanding of the facts relevant to the application and to the assessment of whether a serious threat existed that would qualify the applicant for the status of subsidiary

protection.

Finally, the Court of Justice found that the right to be heard did not imply a right to call and cross-examine witnesses, such a right not normally constituting part of the right of the defence in the context of administrative procedures.

Relation to the scope of the Charter

- Article 41- right to good administration

Following the first judgment of the Court of Justice, the case was deemed to fall within the scope of the Charter. The status being granted fell within the CEAS under the Qualification Directive. The right to be heard (contained in Articles 41, 47 and 48) therefore applied, despite the non-application of the Procedures Directivein the present case. It is important to note that Article 41(2) right to good administration was referenced.

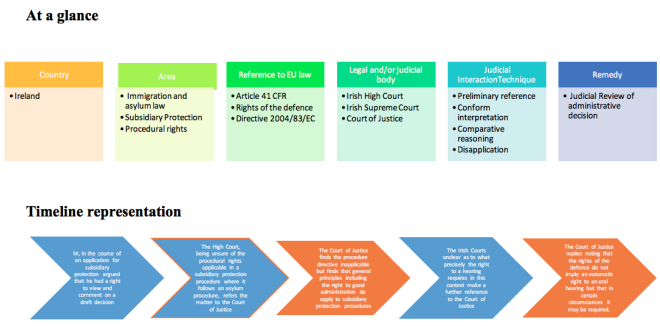
In its second judgment the Court of Justice relied exclusively upon the general principle of EU law and in particular the right of the defence to found a right to be heard in subsidiary protection applications. Althought the Charter was referenced, the CJEU applied the right to be heard on the basis of the general principle of rights of defence. The Charter was therefore not relied upon. It is worth noting the discussion of the AG Bot of the right to be heard in the present case. He notes firstly that a debate is currently underway regarding the applicability of Article 41 CFR to the member states but that secondly in any case the right to be heard could be founded alternatively on Article 41 CFR and the general principle of the right to the defence.

Notes on the remedies dimension

Final outcome not yet determined.

Diagram

Vertical Judicial cooperation - preliminary ruling



Notes on the remedies dimension

Final outcome not yet determined.

Impact on Jurisprudence

Following the judgment of the ***Court of Justice*** in Case C-277/11 *MM* new regulations were adopted in Ireland for use in subsidiary protection procedures. These new regulations, operational from 24 November 2013, provided more extensive rights to be heard in the context of subsidiary protection procedures, including a right to be informed of any recommendations to grant or refuse subsidiary protection, to be sent any supporting documentation and to request an oral hearing and to call witnesses upon appeal.

Furthermore, regulations were updated in 2015 to replace the dual system with a single procedure for assessing asylum and subsidiary protection claims in parallel. This was carried over into legislation in the context of a general overhaul and replacement of the legislative framework for asylum and subsidiary protection in the International Protection Act 2015. The main part of the Act was commenced on 31 December 2016.

Sources - CJEU Case Law

- C-277/11 M. M. v Minister for Justice, Equality and Law Reform and Others
- *C- 560/14 M v Minister for Justice and Equality Ireland*
