

### Theme 3 Working Group on the Protection Process

#### Proposals in relation to the backlog in the 'Asylum' Judicial Review list.

At the meeting of the Theme 3 Working Group which I attended on 19 January, I was asked by the Refugee Applications Commissioner to submit proposals in relation to the 'Asylum' (Judicial Review) list in the High Court and, in particular, the backlog of cases awaiting a hearing which, a few months ago, amounted to over 1000, and stretched back to 2009.

To begin with, it is important to point out that the Court backlog is in fact being cut down quite quickly by the High Court under the stewardship of Mr Justice Mac Eochaidh and Court Registrar Pádraig Mac Criostail.

I was at what is termed the 'positive call-over' of cases 30/1/2015 and the cases being listed for hearing over the next few months were all from 2011 and (early) 2012. The cases from 2009/2010 are practically finished with, either settled, withdrawn or heard/determined. Mr Mac Criostail has informed me that, by next Friday, 20 February 2015, 720 cases from what was the 'Asylum' list to fix dates (i.e. cases that are supposed to be ready for hearing) will have been called on in 4 positive call overs since last October.

In my view, the reasons the list is now being cleared so rapidly are:

- a) Withdrawal of older cases because the points have been decided by the Supreme Court/CJEU and/or the scheme whereby leave to remain has been granted to persons more than 5 years in the protection system;
- b) 'Telescoped' hearings of the leave and substantive Judicial Review. It was only in 2014, that the respondents accepted that there should be 'telescoped' hearings, with the leave and substantive judicial review application heard as one, at the same time, in the majority of cases. Prior to this, there was two separate, fought applications for challenges to Deportation Orders, Refugee Appeals Tribunal (RAT) decisions etc.;
- c) The allocation of 3 new judges to the 'Asylum' list by the President of the High Court. With 4 judges working on the list, it remains possible to list up to 5 cases a day/20 a week. This should mean that in or around 600 cases come on for hearing a year and, on this basis, the backlog in its entirety should be cleared within by the end of 2015;
- d) Settlement of older cases that have been reviewed in light of more recent (2012 - 2014) High Court decisions.

The backlog of RAT Judicial Reviews should certainly be cleared over the next 6 months because there was a long period where there were no appeal decisions at all in 2013 and, therefore, no Judicial Reviews.

#### **Proposal 1**

This would suggest that the best policy for the Working Group might be **to leave well enough alone**. This would be my first proposal. However, there are several caveats in relation to this approach:

- a) It is not guaranteed that there will be 3/4 judges available for the foreseeable future;
- b) I noticed at the 30/01/15 positive call over that not nearly as many cases were withdrawn as had been at previous positive call-overs (of 185 cases called by the Registrar, only 3

were struck out/withdrawn and 10 were adjourned for ruling/settlement). This would suggest the progress through the list will slow. It is significant that most of the *D (Dokie)* type cases I mentioned at the meeting are now out of the list;

c) The appetite for early settlement (before the case gets a hearing date) appears to have diminished. Very few cases were settled in the most recent positive call over;

d) There are also other new cases relating to immigration, citizenship/ naturalisation, visas, EU Treaty Rights etc. coming into the 'Asylum' list for hearing having been granted leave for Judicial Review each Monday. These are not part of the backlog as such and, in some cases, can run for days or even weeks;

e) There are a large number of Subsidiary Protection (SP) Judicial Reviews, 30 in the most recent positive call over (30/10/2015) which involve what might be termed the 'M.M.' point (which is that the SP system as it was until November 2013 did not allow the applicant to be heard in relation to credibility issues raised in the context of the asylum application). This point has been referred to CJEU again for clarification. The 30 cases were adjourned and not given dates for hearing. I believe there may well be 200 or more of these cases from 2010/2011/2012 that will remain in the list while the matter is under consideration by the CJEU.

## Proposal 2

The alternative to leaving the list to operate as it has since last year, is to **revoke or withdraw the ORAC/RAT decisions under challenge** and permit the applicants to return to the ORAC and/or RAT for a new hearing of the application (i.e. settle more cases on a 'no fault' basis). This might also be possible for SP decisions, allowing persons who challenged decisions under the old system to access the new system, with a hearing, an oral appeal etc. It is difficult to see why any applicant challenging a protection decision would reject the offer of another hearing as this really is as much as they could hope to get from the Judicial Review.

As I mentioned at the meeting, there would have to be some reasonable contribution towards fees/expenses to the solicitors and barristers involved for this approach to work. While it wouldn't be appropriate for me to say how much should be offered as a contribution towards costs, it is worth bearing in mind that the cost of issuing a Judicial Review is reported to be in or around €1000 between stamping and filing fees, town agents etc.

At first glance, this approach may appear costly but looking at the high number of losses (and settlements) of substantive Judicial Review applications and telescoped hearings for the RAT in 2013/2014, there would be a very considerable saving in settling early before the cases had a date on a 'no fault' basis. The costs of a substantive 'Asylum' list Judicial Reviews run and lost by respondents, or settled at the very last minute, are in the region of €20000 - €30000 (plus VAT) per case, not including the cost of the respondents' lawyers. Then there is also the financial and human cost of the time the applicants spend waiting for the Judicial Review to get on, often in Direct Provision accommodation.

Another advantage of this approach is that it could (potentially) deal with the M.M. cases which could well sit in the list for another few years even though the system has in fact already been changed as a result of the first M.M. decision. It is quite bizarre that we have hundreds of cases on the issue (essentially) of whether the SP applicant should have the **opportunity to be heard clogging up a Court list in 2015, when we introduced a new system** in November 2013 which provided SP applicants with full oral appeal hearing.

There is one further related issue that strikes me. I mentioned at the meeting that I didn't notice many ex-parte applications for leave in respect of ORAC/RAT decisions in the High Court being made over the last few months. I said that I thought this may be because the decision making has improved and the decisions are 'better' than before. I should have pointed out that it may also be because there are far fewer decisions being made. I believe there is now a very considerable backlog of cases awaiting an appeal hearing at the RAT and it can take many months to get a hearing date (and a decision). I don't know why this is occurring given the number of Tribunal Members appointed but it would be a shame if the backlog in the Court ended up being replaced by a backlog at the RAT. There is little doubt that this bottleneck is an issue that is going to lead to new litigation in the near future.

I suppose a large number of 'no fault' settlements of RAT and SP Judicial Review would add to the pressure upon the RAT as there would be 400 or 500 cases coming back into the system at the same time (on top of the existing backlog and cases returning to Tribunal due to successful Judicial Reviews).

### **Proposal 3**

I haven't really dealt with Judicial Reviews in relation to Deportation Orders above. I can understand why the Minister/INIS would be reluctant to enter into any form of 'no fault' settlement of these cases. Revoking deportation orders is problematic and raises tricky issues about the immigration status and 'private life' of the person during the life-span of the revoked Order. In a few cases, the unfortunate applicant has already been deported. However, all of these issues also arise where the Order is quashed by the Court. I can only suggest that it is in the interest of the Minister to look at Deportation Order challenges very closely for early settlement. It is unsatisfactory that a deportation order would remain in place for 3 - 4 years while the case waits in the Court list, to then end up being quashed by the Court. As well as living in fear of deportation, the person against whom the deportation order was made, who may be a child, has no immigration status and cannot work or access social services during these years.

I hope that these proposals are helpful and would be happy to appear before the Working Group again to explain them in more detail.

**Colm O'Dwyer SC**

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