THE HIGH COURT

2018 No. 882 JR

X AND Y (A MINOR SUING BY HER MOTHER AND NEXT FRIEND X)

Applicant

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 5th March, 2019.

1. Ms X sought international protection on 17.09.2018. While visiting the International Protection Office (IPO) on that date, Ms X avers (this is not controverted/acknowledged) that she "***submitted an application for international protection***….[and] ***requested accommodation for my daughter and*** [myself. The]….***officer with whom I was speaking pointed at my daughter…and stated that we had obviously slept somewhere the night before and…should return there.***" On 21.09.2018, Ms X returned to the IPO, requested accommodation and was told to write to the Reception and Integration Agency (in the Department of Justice) and explain why she needed accommodation. On 24.09.2018, Ms X posted a letter to the Department seeking accommodation. This letter was inadvertently misfiled following receipt and no action taken. An email seeking accommodation was sent to the Department by Ms X's solicitor on 11.10.2018. On 12.10.2018, the Department contacted this solicitor, who submitted that Ms X had special reception needs. On 15.10.2018, in the impugned decision (the 'Decision') the Minister designated an accommodation centre outside Dublin where the applicants can avail of material reception conditions, adding, however, that "***Material reception conditions are only provided to applicants that do not have sufficient means to have an adequate standard of living. You are now requested to complete the attached declaration and return it to the Reception and Integration Agency…without delay".***

2. On 16.10.2018 the applicants' solicitor requested a "***vulnerability assessment"*** (presumably an assessment under reg.8(1)(a) of the Regulations, as defined below) and that the applicants be accommodated in Dublin. The requesting email stated, ***inter alia***. "[Ms X]…***a single mother…relies…on…her cousin*** [in Dublin] ***to take care of her daughter***….[Ms X]…***has a history of depression…in*** [Country A]…***and…Ireland….She is not currently taking… medication but…relies...on a support network in Dublin. She is frightened that her depression will return if that…network is removed (particularly her cousin)…impact***[ing] ***on her ability to care for her daughter***". The Minister acted on these submissions. On 24.10.2018, a Department official wrote to a GP requesting his "***advice in relation to the issue of this woman having to remain in Dublin".*** That GP advised on 31.10.2018 that ***"I see no medical indications for her to be accommodated in Dublin".***

3. The Decision is contended to present with various deficiencies, considered hereafter. References herein: to regulations are to regulations in the EC (Reception Conditions) Regulations 2018 (the 'Regulations'); to Articles are to articles of the Reception Conditions Directive (Directive 2013/33/EU) (the 'Directive').

4. [A]. Was the Decision made without regard to Ms X's special reception needs and in breach of reg.7(4)/Art.21? Did the Decision fail to have regard to relevant considerations?

5. Three points might be made. (1) When the Decision was made the time-limit for the reg.8 assessment had not expired. It is clear from the verb "***assessed***" (past tense) in reg.7(4) that only special reception needs in respect of which an initial assessment under reg.8(1) has been completed could be taken account of. (Once a person is given a first assessment pursuant to reg.8(1), it seems to the court that s/he is a person "***assessed in accordance with Regulation 8***", even if s/he is the subject of a separate further assessment thereunder). Thus no breach of reg.7(4) presents. To construe matters otherwise would be wrong, not least in denying the Minister the benefit of the 30 working-day period allowed by reg.8(1) for his initial assessment thereunder. (2) As to Art.21, for the reasons identified later below, it has not been wrongly transposed; so the court confines its attentions in this regard to the Regulations. (3) There is nothing to suggest that relevant considerations known to the Minister were not considered by him.

6. In passing, counsel for the Minister contends in his written submissions that: "***Regulation 8(1) requires the Minister to assess whether a recipient is a recipient with special reception needs; and permits the Minister to continue to do so after the expiry of the 30 working day period as necessary….The Minister's case is that the question of whether the applicant was a recipient with special reception needs was assessed within 30 working days; and that the Minister continues to assess this question thereafter (and was continuing to do so when the proceedings were initiated).***" Though it is not clear to the court that it is in disagreement with counsel for the Minister in this regard, it may assist for it to note that its reading of reg.8(1) is that (I) under reg.8(1)(a) a first assessment has to be completed by or before the expiry of the 30 working-day period; thereafter, (II) under reg.8(1)(b), the Minister may "***where he or she considers it necessary to do so***", undertake one or more further assessments which might be informed by the first assessment but which is/are separate from the initial assessment in legal terms, even if it/they represent in practice some form of continuous assessment.

7. [B]. Was the Decision made without regard to Miss Y's best interests and so in breach of reg.9/Art.23? The Decision states that the application ***"has been considered in line with the…Regulations"***. This includes reg.9 which duly transposes Art.23.

8. [C]. Does reg.2 fail to correctly transpose Art.21 in restricting the definition of vulnerable persons? The definition of "***vulnerable person***" in reg.2(5) accords with Art.21.

9. [D]. The international protection application was made on 17.09.2018. No accommodation was provided until 15.10.2018. Did the respondent breach reg.4/Art.17?

10. In the Decision the Minister designates accommodation; however, he also refers to the means requirement in reg.4(1) and asks that Ms X make a formal declaration as to means. He does not find that, to borrow from reg.4(1), the applicants do "***not have sufficient means to have an adequate standard of living"***, which finding would have the result that they are entitled to receive accommodation under reg.4(1). The Decision, as formulated, can at best be read as finding that the applicants may be, or even likely are (without concluding that they are) persons who do "***not have sufficient means to have an adequate standard of living"***, coupled with a requirement that the declaration aforesaid be provided so as to establish entitlement. Hence the court cannot conclude that before or at the time of the Decision there was a breach of reg.4 in terms of non-provision of accommodation to a person entitled to same. Moreover, even if the Decision stated that the applicants did "***not have sufficient means to have an adequate standard of living"***, it is at that point that the entitlement to receive material reception conditions would present under reg.4(1) and the Decision contains an offer to provide same.

11. Although there is no breach of reg.4 presenting, it seems to the court that reg.4 allows the Minister to depart from the temporal requirement in Art.17(1) that "***Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection".*** [Emphasis added]. It is open to Ireland, pursuant to Art.17(3), to introduce a means requirement such as that which features in reg.4(1), but this does not free Ireland to create regulations which allow, as here, the clearest of temporal departures from the requirements of Art.17(1). Ms X made the application for international protection sometime on 17.09.2018 and no offer of material reception conditions was made until the Decision issued. Between the making of the application and the issuance of the Decision, the Minister was in breach of Art.17(1). That he was not simultaneously in breach of reg.4 demonstrates how reg.4 allows a departure from the requirements of the Directive in this regard.

12. When it comes to the just-mentioned breach of EU law, the applicants have sought, pursuant to the ***Francovich and Others*** (Cases C-6/90 and C-9/90) and ***Brasserie du Pêcheur v. Federal Republic of Germany and R v. Secretary of State for Transport ex parte Factortame*** (Cases C-46/93 & C-48/93) line of authorities, damages for such loss as was suffered by Ms X by reason of Ireland's failure properly to implement the Directive. The applicable criteria for the award of such damages were recently considered by the Supreme Court in ***Ogieriakhi v. MJE*** [2017] IESC 52. It seems to the court that, for the following reasons, Ms X satisfies the criteria for an award of what might be styled ***Francovich***¬-style damages for the breach of EU law presenting: (i) the Directive seeks to confer rights on international protection applicants; (ii) the breach arising is serious (a lengthy temporal departure from what is permitted by Art.17); (iii) there is a direct causal link between the breach and the damage sustained (and it was submitted that damage was sustained); (iv) the EU requirement breached (Art.17(1)) is clear and precise; (v) there is no measure of discretion left to Member States by Art.17(1) (notwithstanding Art.17(3)); (vi) it does not seem to the court, given the simplicity and clarity of Art.17(1), that the breach is excusable; (vii) it has not even been suggested that some position taken by an EU institution contributed to the breach or that what has transpired arises from some interpretation of the Directive that features in other member state systems.

13. [E]. The applicants submitted their application for international protection on 17.09.2018. The time-period in reg.8 expired on 26.10.2018. Did the respondent fail to carry out a Special Reception Needs assessment in breach of reg.8(1)? When the Decision was made the time-limit for the reg.8 assessment had not expired. Whether the Minister acted in breach of reg.8(1) ***after*** making the Decision is not relevant to the within application.

Conclusion

14. The leave order of 30.10.2018 identifies that the below-mentioned principal reliefs are sought. The court indicates whether or not it is satisfied to grant the reliefs sought by reference to the reasons aforesaid and such other factors as are mentioned hereafter.

> Relief 1: an order of ***certiorari*** quashing the Decision. This relief is refused. Further designation can be effected by the Minister (following request or at his own instigation) pursuant to reg.7(5), if he considers that the criteria in reg.7(5) are satisfied.
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> Relief 2: a declaration that the Minister, between 17.09.2018 and 14.10.2018 acted in breach of reg.4 and/or Art.17 in failing to provide the applicants with material reception conditions. The court will declare that between the making of the international protection application on 17.09.2018 and the issuance of the Decision on 15.10.2018, the Minister acted in breach of Art.17 in failing to provide the applicants with material reception conditions.
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> Relief 3: a declaration that the Minister is in breach of reg.8(1)(a). This relief is refused.
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> Relief 4: a declaration that, to the extent that reg.2 restricts the definition of a recipient with special needs to a recipient who is assessed in accordance with reg.8 as being in need of special guarantees, it is incompatible with Art.21/22. This relief is refused as: (A) the mandatory requirements of reg.8(1)(a), item (i), coupled with (B) (I) the definition of "***recipient with special reception needs***" in reg.2(1) (which has the effect that the Minister must undertake a special guarantees assessment as part of his reg.8(1)(a) assessment, if he is to comply with same), and (II) the obligation on the Minister under reg.8(1)(a), item (ii), together suffice to yield compliance with the Directive.
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> Relief 5: damages, including damages for breach of EU law. The court will grant damages for the above-identified breach of EU law; the court will hear the parties as to quantum. As to damages more generally, the court, mindful of O'Malley J.'s observations in ***Ogierakhi***, para.111, does not see any behaviour by the Minister unrelated to European Union law that yields some independent cause of action for damages under Irish law.

15. For the avoidance of doubt the court notes that the Directive does not: oblige the Minister to respect an applicant's choice of direct provision location; or entitle an international protection applicant to be accommodated in a location of her choice. Nothing in this judgment should be read to state/suggest otherwise.