Neutral Citation Number: [2012] IEHC 225

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 14 J.R.]

BETWEEN

D. M. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND J. M. T.) AND S.M. A. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND J. M. T.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 7th day of June, 2012

1. By notice of motion dated the 14th May, 2012, the respondents have applied to the Court for an order dismissing this proceeding in whole or in part upon the ground that the statement of grounds does not disclose any stateable ground for judicial review and does not comply with the requirements of O. 84, r. 20(3) of the Rules of the Superior Courts. In the alternative, an order is sought dismissing the proceeding because it is frivolous, vexatious and has no reasonable prospect of succeeding.

2. The circumstances in which the judicial review proceeding has been brought can be summarised as follows. The above named father and next friend is a national of Cameroon who claims to have fled that country in 2003 as a result of having been persecuted for his political activities and opinions. He claims to have married a Polish national in this jurisdiction in December 2005, but that they were later divorced. As a result, on some unspecified date, it is said that he "lost his residency".

3. The two minor applicants are sons of the above named next friend, who were born in this country respectively on the 31st May, 2009, and 29th February, 2008. Their mother is not their father's former Polish wife, but another national of Cameroon, who arrived in the State in May 2007, and met the father in this country. Both father and mother made applications for asylum but have been unsuccessful. The mother had based her claim for asylum on an account of having had to flee Cameroon to escape from a forced polygamous marriage to a retired police commissioner, an elderly friend of her father, who had abducted her and imprisoned her in his compound for several months during which she was beaten and raped. The mother's claim for asylum was rejected, largely upon grounds of lack of credibility in the account she gave of her reasons for flight from Cameroon but also upon the ground that protection would have been available should she return to Cameroon by relocating from Douala where the alleged persecution occurred to Yaounde where she had been for a month without problems before leaving the country.

4. The asylum claim of the father was also rejected primarily on grounds of disbelief of the account he gave of his persecution for his political opinions and activities, in large part due to discrepancies in the evidence he gave at his interview under s. 11 as compared with that which he gave on appeal. It is notable that the appeal decision of the Tribunal contains a detailed analysis of the evidence given by the applicant leading to the conclusion by the Tribunal member that he lacked general credibility and had "contrived a story for the Tribunal which I reject, and his failure to tell the truth during his appeal has been exposed in cross examination".

5. As mentioned above, the minors were born in February 2008, and May 2009, but it was not until September 2010, that applications for asylum on their behalf were made. The father's explanation for this was that it was only when he "lost his residency" as a result of divorce from his Polish wife that he realised that "the children should seek asylum". As was conceded by the parents at the appeal hearings on the asylum application on behalf of the minors, the applications were based exclusively upon the fears of persecution which had been advanced by each of the parents. The applicants' father claimed that his political problems in Cameroon would impact upon the sons should he be returned; on return he would be arrested and he did not know what would happen to his children. The mother on the other hand, claimed that the man whose forced marriage she had resisted and escaped from would kill them because he did not want her to have any children.

6. This, therefore, is the context in which the motion is brought to dismiss, for the reasons indicated above, the applications for leave to seek judicial review of the two decisions of the Refugee Appeals Tribunal on the applications by the sons for asylum.

7. In the statement of grounds, seven specific grounds are advanced and may be paraphrased as follows:-

> (1) The asylum applications "have not been determined at first instance" according to a procedure compliant with Council Directive 2005/85/EC of 1st December 2005 (the Procedures Directive) because they are deprived of an effective remedy before a Court or Tribunal in accordance with Article 39 of the Directive with the result that the Minister lacks jurisdiction to make a decision under s. 17(1) of the Refugee Act 1996;- the arguments under this heading have been rejected as unfounded in a series of High Court judgments and cannot therefore constitute the basis of a substantial ground for the grant of leave;
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> (2) The Tribunal failed to "make any determination of the core elements of the applicants claim, and instead determined the appeal on the basis of adverse credibility findings previously made in the applicant's parents. Prejudgment cannot be discounted";
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> (3) Facts were not assessed in accordance with the Refugee Act 1996, the UNHCR Handbook and/or the European Communities (Eligibility for Protection) Regulations 2006, the Procedures Directive or Council Directive 2004/83/EC (the Qualifications Directive);
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> (4) The Tribunal erred in taking into account matters irrelevant to its determination and failed to take into account

relevant considerations;

(5) The Tribunal erred in failing to "lawfully speculate" on the likelihood of the exposure of the applicants to persecutory risk on refoulement to Cameroon;

(6) The Tribunal ignored the provisions of the UN Convention on the rights of the child in the Charter of Fundamental Rights and Freedoms;

(7) Pursuant to the Community (sic) law principle of effectiveness, time, for the purposes of the limitation period provided under s. 5 of the Illegal Immigrants (Trafficking) Act 2000, cannot begin to run as s. 5 is not in compliance with the principles of equivalence and effectiveness.

8. There can be little doubt but that the grounds advanced in the statement of grounds as formulated as of the 11th January, 2012, when this proceeding was commenced, fall far short of the requirements now contained in the amended text of 0. 84, r. 20, which came into effect on the 1st January, 2012. For example, ground (2) above alleges a failure to make any determination of "the core elements" of the claims without identifying what those elements are. Similarly, ground (3) alleges a failure to perform the function of assessment of facts without identifying which facts have not been assessed. Ground (4) alleges generally the taking into account of irrelevant matters and the failure to take account of relevant considerations without specifying which of the matters included in the decisions are irrelevant and what relevant considerations have been ignored. Again, ground (5) makes a general allegation of a failure to "lawfully speculate on the likely exposure to persecutory risk" of the minor applicants without identifying what that risk might be. Ground (6) alleges that there has been an ignoring of the provisions of the UN Convention on the rights of the child and the Charter of Fundamental Rights without any statement as to which provisions are relied upon.

9. As has been pointed out in judgments delivered before 0. 84, r. 20 was amended with effect from the 1st January last, both a respondent and the Court are entitled to be provided, by the statement of grounds presented when leave is sought, with sufficient information to identify the precise illegality or flaw in an impugned decision. This is so in order to enable the respondent, on the one hand, to defend its position and, on the other, to enable the Court to draw up an order in the terms of the reliefs sought, in the event that there is no appearance for a respondent, where the Court is fully satisfied, as a matter of public law, that the impugned decision ought to quashed. (See, for example, the judgments of this Court in *Lofinmakin (a minor) & Ors v Minister for Justice & Ors* [2011] IEHC 38 at paragraphs 7-8 and *Saleem v Minister for Justice* [2011] IEHC 55.) The grounds quoted above at least are wholly lacking in the degree of detail required to enable a respondent to defend itself or the Court to issue an order of *certiorari*. This is so independently of the amendment of Order 84 r. 20.

10. Nevertheless, had there been no more to the present application than this criticism of the draftsmanship of the grounds, the Court would have been inclined not to deprive the applicants of their access to judicial review but to direct the introduction of an amended statement of grounds fully compliant with the new rule. The Court would have been so inclined upon the basis that the statement of grounds was presented on the 11th January, 2012, and on the assumption that it may well have been drafted in some haste at or around the time when the new rule came into force and before the significance of the new rule might have been appreciated.

11. The second argument put forward as to why the application is bound to fail is basically a pleading point. It is submitted that the judicial review application has been commenced out of time and no application for a necessary extension of time has been included in the statement of grounds notwithstanding the proposal to advance ground (7) quoted above (see para. 7) and the inclusion of relief in the form of a declaration that the time limit of s. 5 of the Act of 2000 "is not in compliance with the principles of the equivalence and effectiveness".

12. This attack upon the basis of the proceeding is essentially founded upon the proposition that the father and next friend has admitted at para. 11 of the grounding affidavit that notification of the decisions of the Tribunal refusing the appeal was received "on or about the 4th November, 2011". The time limited by s. 5 of the Act of 2000, would, accordingly, have expired fourteen days later and the proceeding was not commenced until the 11th January, 2012, a little over seven weeks thereafter. It is accepted that in paragraph 13 of the grounding affidavit the next friend seeks to explain this lapse of time, saying that three weeks elapsed before his previous legal representatives indicated that assistance for judicial review proceedings was not forthcoming and that it was only upon getting advice from fellow residents of the accommodation centre that he made contact with a new solicitor on the 21st December, 2011. He says counsel was instructed for the purpose of an opinion on the 5th January, 2012, and that immediately it was received the proceedings were commenced. The respondents' position, however, is that however well that may be, there is no application before the Court for an extension of time so that the Court must eventually on the leave application dismiss it as being out of time. The Court finds this argument unconvincing.

13. Section 5(2)(a) of the Act of2000, provides that the application for leave must be made within fourteen days of the day on which the impugned decision was notified "unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made". This implies, in the view of the Court, that it is a matter for the High Court to decide whether there is good and sufficient reason for granting an extension upon the basis of the information before it whether or not an extension has been formally acknowledged as necessary and has been sought in the initiating documentation. In this regard it seems to the Court that in the area of administrative law, a distinction falls to be made between statutory conditions which deliberately exclude the jurisdiction of the Court if not complied with on the one hand, and conditions which place the Court in a position of opting to decline jurisdiction if they are not complied with, on the other. In the judgment of the Court the fourteen day time limit of s. 5 is a precondition of leave for judicial review which the Court is entitled to raise of its own motion whether or not it has been acknowledged as necessary and sought in a statement of grounds. An applicant may be unaware that the fourteen day time limit has expired, as, for example, in a case where an acting solicitor has been copied with the text of a decision but only after a lapse of time since the original was sent to the client with the result that grounding papers are drafted for an application on the assumption that an extension was not necessary but in ignorance of the fact that actual notification to the client may have occurred a few crucial days earlier. For this reason the Court considers that it would be disproportionate and an excessively formalistic application of s. 5 to dismiss as bound not to succeed, a judicial review application which has been commenced with reasonable expedition upon the sole ground that a formal application for a relatively short extension of time has not been included in the statement of grounds.

14. The central issue, however, which is raised by this application to dismiss is directed particularly at the essential characteristic of the case namely, that the claim made by these minor applicants is based exclusively upon the previously rejected asylum claims of the parents. These minors were born here and have never been to Cameroon. They have never personally suffered any past persecution. If their parents' claims to asylum have been definitively rejected as lacking all foundation because of disbelief, is there any possible basis upon which these minors could mount any stateable challenge to the decisions of the RAT they seek to impugn?

15. In the judgment of the Court no such basis exists. First, it must be borne in mind that the mother's claim on behalf of the minors as made to the Tribunal was that "the man she had difficulty with in Cameroon will kill the applicants as he did not want her to have children". She may well hold that subjective view, but it cannot be said that it was unreasonable for the Tribunal member to consider it implausible and devoid of objective justification. According to her account, she arrived here in May 2007, having been abducted and detained in May 2006, by the man in question. She will, if deported to Cameroon with her children and their father at least five years later, find herself in an entirely different situation. Quite apart from the question of the availability of protection by way of relocation, it is unrealistic to consider that the man in question is likely to be intent upon killing children of whose existence he is probably unaware and to be capable of doing so against the wishes and in the face of the protection of their father and mother and the authorities to which they have recourse.

16. The fear expressed for the minors by the father on the other hand was that on repatriation they would all be arrested because of his past activities. The father, however, has a daughter whom he left behind in Cameroon and no suggestion has been made that she has been arrested or otherwise subjected to any harm on account of her father's activities. Thus, the case made for the minors by the father is also implausible and lacks objective justification.

17. Secondly, it was expressly conceded by each parent that the claim made for the minors was based entirely upon the claims they had made for themselves. Those claims have been definitively rejected in each case for lack of credibility and in the case of the mother by the same Tribunal member as decided the appeals of the minors. In other words, the basic facts and events upon which the parents' claims for asylum were based, have been found incredible and have been rejected on the basis that those facts and events are considered never to have happened as the parents described.

18. Accordingly, the Court is satisfied that the appeal decision of the Tribunal has been lawfully arrived at and is eminently sound in substance. On that basis no purpose is served by allowing this judicial review proceeding to continue any further when it is bound to fail. The respondents' motion must therefore be granted.