

THE HIGH COURT

JUDICIAL REVIEW

2007 1204 JR

BETWEEN

Y. L.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
AND REFUGEE APPEALS TRIBUNAL

RESPONDENTS

MR JUSTICE COOKE delivered on the 11th day of February, 2009

The applicant is a Chinese national who arrived in Ireland in January 2001, on a student visa valid for six months and issued to him by the Irish Embassy in Beijing. He did not leave at the end of that period but seems to have stayed on and may have worked illegally. On 31st August, 2005, an order to deport him was made which was notified to him on 13th October, 2005. He claimed asylum on 22nd November.

In a report dated 12th April, 2006, the Office of the Refugee Applications Commissioner recommended that he be not declared a refugee. This was appealed to the Refugee Appeals Tribunal ("the Tribunal") which, by a decision dated 27th June, 2007, ("the Contested Decision"), affirmed that negative recommendation. That decision was sent to the applicant under cover of a letter dated 28th June, 2007, which appears to have been received by him a few days later. The present proceeding was commenced on 20th September, 2007, that is approximately two months and 20 days after the likely date of receipt of the decision, 13th June, 2007.

Extension of time

In these circumstances a preliminary issue arises as to the entitlement of the applicant to an extension of time. By virtue of s. 5 (2A) of the Illegal Immigrants (Trafficking) Act 2000 this application for leave to apply for judicial review should have been made within 14 days of 30th June, 2007, and can now only be allowed if this Court "considers that there is good and sufficient reason for extending the period within which the application" can be made. In the circumstances of this case the period of delay which requires to be explained and excused runs from 15th July, to 20th September, 2007, a period of some eleven and a half weeks or almost six times the statutory period prescribed by the Act.

The basis upon which the Court should exercise its discretion in extending time and the factors which should be taken into account have been considered in a number of cases in recent years both generally in the context of time limits of O. 84 of the Rules of the Superior Courts and, particularly, as regards this more draconian two week time limit. These cases include:

De Róiste v. Minister for Defence;
Guerin v. Guerin,
The reference to the Illegal Immigrants (Trafficking) Bill 1999;
G.K. v. Minister for Justice;
S. v. Minister for Justice;
C.S. and B.S. v. Minister for Justice.

A number of principles and guidelines can be seen to emerge clearly from this case law.

- A) An applicant seeking an issue of an order of *certiorari* to quash an administrative decision is under an obligation to act promptly and may forfeit any entitlement to the relief if there is an unexplained and inexcusable failure to do so.
- B) Even when the specific time limits are exceeded, however, because the remedy is discretionary the Court retains an inherent jurisdiction to extend, to be exercised according to the requirements of justice in the circumstances of each case.
- C) An applicant who has failed to move promptly within the time limit prescribed must show that there are reasons which both explain the delay and afford a justifiable excuse for it.
- D) While the 14 day time limit of Section 5 of the 2000 Act is very much shorter than the six months applied to an order of *certiorari* by O. 84, it is constitutionally valid because it is balanced by a discretion to extend the time which is wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or hers or for other good and sufficient reason to make the application within the 14 day period.
- E) Amongst the factors to be considered in the exercise of the discretion include the nature of the order or decision which is challenged; the conduct of the applicant; the conduct of the respondent; the effect of the order if made and, of course, why the delay has occurred and the explanation and excuse offered for it.
- F) Finally, the Court can have regard to the substantive claim proposed to be made. Just as the Court should seek to avoid an obvious and substantial injustice being done to an applicant if deprived of the opportunity to make the claim the Court should also not refrain from refusing to extend the time if it is clear that the proposed claim is unarguable and has no reasonable prospect of success should leave be granted.

The circumstances of the delay in this case has been explained in affidavits as follows:

1. In the applicant's grounding affidavit of 19th September, 2007, he says first that he temporarily mislaid the papers that he had received from the Tribunal and secondly that he had been told by his solicitor that the papers had been mislaid by counsel.
2. This initial explanation was subsequently expanded upon in an affidavit of the applicant's solicitor, Mr. Williams, sworn on 28th January, 2009, the eve of the hearing in the present proceeding. In this he explains that he first met the applicant on 31st July, 2007, and was given a copy of the Contested Decision. He was told by the applicant that it had been received about two weeks earlier and the applicant asked him to commence judicial review proceedings. The Court notes Mr. Williams makes no mention of having required an interpreter for this conversation with the applicant.
3. Later that day the solicitor delivered a set of papers by hand to junior counsel in the Four Courts. On some unspecified later date counsel told Mr. Williams that he, counsel, was unable to locate the papers.
4. Mr. Williams understood that junior counsel was then away on vacation throughout the month of August. It was not until early September that Mr. Williams became aware that the papers were missing.
5. By three letters of 17th September, 2007, Mr. Williams informed the Minister of his client's instructions to commence judicial review proceedings and requested copy documents from both the Tribunal and the Office of the Refugee Applications Commissioner.

While there are a number of aspects of this explanation that might raise question as to whether appropriate diligence was exercised, it is clear that the major factor appears to have been the coincidence of the holiday period of the month of August and the apparent mislaying of the papers and the need to create a new file. There is no real explanation as to why the applicant took no steps to obtain legal assistance for a month after receiving the decision. It may also appear strange that a solicitor who knows that this short time limit has expired should deliver papers to counsel without first confirming his availability during the vacation period.

Nevertheless, taking a most benign view possible and being reluctant to visit upon an applicant the failings of his legal team, it can be at least said that the applicant had formed an intention to proceed and issued instructions to that effect on 31st July, 2007, approximately 14 days after the expiry of the time limit. As will be explained, the substantive case to be raised appears at least in some respect to be arguable so that with some hesitation the Court concludes that it would be justifiable to grant the necessary extension of time in this case.

The Substantial Grounds

The Contested Decision in this case turns on the credibility of the account given by the applicant of his reasons for leaving China and for his fear of persecution if returned there. In his application the applicant claims that he was a practising member of Falun Gong since 1997. He claims to have been arrested and detained for 20 days in 2000 during which he was assaulted and injured. His family paid to have him released and arranged a passport and visa for him which enabled him to flee to Ireland.

He claims to fear that if returned to China he will be persecuted on account of his previous Falun Gong activities and because he applied for asylum in Ireland.

In the Contested Decision the Tribunal member identified several aspects of this account as the basis for finding that it should not be believed.

- a) In the questionnaire he said he became involved in Falun Gong in 1997 but at the oral hearing he said he became involved in 1990.
- b) He claimed not to have known anything about the asylum process until November 2006 but he had been in contact with other Chinese Falun Gong members in Ireland after his arrival. He appears educated and if he had fled persecution in China he would be expected to have applied for asylum far earlier.
- c) Although he claims to have been persecuted for his Falun Gong practice in China he admits that he did not practise for four years after coming to Ireland.
- d) Although a medical (SPIRASI) report indicated the presence of scars on his body the Tribunal member found it difficult to conclude that they resulted from his having been tortured six years earlier.

A final Section 7 of the Contested Decision headed "Conclusion" reads as follows:

"The Tribunal has considered all relevant documentation in connection with this appeal including the notice of appeal, the country of origin information, the applicant's asylum questionnaire, and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act. Accordingly, pursuant to s. 16 (2) of the act I affirm the recommendation of the Refugee Applications Commissioner made in accordance with s. 13 of the Act."

It is immediately apparent that there is a regrettable lack of precision in the way in which this conclusion is expressed. While it is quite obvious that the Tribunal member has not believed the applicant's account of his activities which led him to flee China it is not entirely clear whether this is based exclusively on the four particular points A to D set out above as mentioned in the decision or whether the Tribunal member has relied upon other matters drawn from the list of documents mentioned in the conclusion. He says that he affirms the recommendation of the Commissioner but not whether he is adopting the Commissioner's report in all respects. As regards the medical report, it is not clear whether the Tribunal member doubts that the scars result from torture or that the torture was as a result of Falun Gong activities.

The first ground raised as to the flaw of legal character of the Contested Decision is that it contains errors of fact. In particular, it is pointed out that in its first page it states twice that the applicant's grounds for fear of persecution are those of "race and nationality" while the asylum application and the notice of appeal clearly put the claim on the basis of persecution for religion and membership of a social group, namely the Falun Gong. The Court considers that while these mistakes appear on the face of the decision they are wholly immaterial. They are very likely the result of reliance on a standard word processor template for draft decisions together with a failure to proof-read the draft to eliminate particulars used for a previous case. The mistake clearly has no bearing on the decision itself as no mention of race or nationality factors is made in it and it is entirely based on a claim in respect of Falun Gong activities. There is, therefore, no substantial ground raised under this heading.

The second ground of challenge is that the decision fails to address and to rule upon an additional claim which is said to have been raised by the applicant, namely that he feared persecution by the authorities if returned to China because he would be sent back as a failed asylum seeker. The respondents, understandably, object that this particular issue features nowhere in the statement of grounds. The applicant points out, however, the decision itself acknowledges that while the grounds before the Tribunal were those set out in the notice of appeal the "applicant is not confined to those grounds and can raise further grounds of appeal at the oral hearing". It is, thus, at least arguable that this claim was raised before the Tribunal even if it is not identified as a basis of the fear of persecution as such in the notice of appeal. This is so because on the second page of the Contested Decision the Tribunal member records it as part of the applicant's claim as follows, "If he was to return to China he said he would be persecuted on account of his activities in China and on account of the fact that he had now applied for asylum in this country. Therefore, he said, the government would target him on account of what he had said about them in his asylum application".

It may well be that the Tribunal was not obliged to rule on this issue given the somewhat oblique way in which it was raised and this Court may ultimately hold that it is not an issue that is properly before it. However, at this stage, it is at least arguable that it was adequately raised and given that it is a specific basis of fear it is arguable that it should have been considered by the Tribunal member once it was acknowledged to be a part of the claim made.

The third more general ground raised is that no adequate objective assessment of the applicant's claim to fear persecution was made by the Tribunal because, as it is put in the argument, the Contested Decision has a "disconnect" between the well-foundedness of the applicant's alleged fear of persecution and the decisions' evaluation of credibility. It is submitted that, for example, a delay in applying for asylum does not necessarily undermine the genuine nature of the fear of persecution nor does a lapse in practice of Falun Gong for four years following arrival here, negate the credibility of his claim to have been targeted as such a practitioner in China.

For the reason already mentioned above in the observation on the lack of precision in the conclusion to the Contested Decision, the Court considers that the arguments raised in support of this ground should be more appropriately characterised as part of the ground raised as to the failure to state reasons, which is a factor common to a number of headings in the statement of grounds and particularly those in paras., iv), xvii), xviii) and xix).

In a decision of this type, amenable to judicial review before the High Court, it is settled law that the basis upon which a conclusion adverse to the addressee's interest has been reached should be explained with sufficient clarity to enable that person to know why his application has been rejected and to enable this Court to exercise its judicial review function.

In this case the Court considers that there is an arguable lack of clarity and precision in the Contested Decision as to the exact reasons relied upon for not believing the applicant's claim for fear of persecution such as warrants further consideration upon a substantive hearing of this proceeding.

For these reasons leave will be granted to seek the reliefs set out at paragraphs 1, 4 and 10 of the statement of grounds but limited to the following grounds:

1. That in the Contested Decision the Tribunal member failed to consider and to make a finding upon the applicant's claim to fear persecution if returned to China on account of his having applied for asylum in this state: and
2. That the Contested Decision contains no adequate statement of reasons as to why the applicant's claim to fear persecution on account of his activities as a Falun Gong practitioner was rejected as not being credible.

So, the order of the Court will be in those terms.