THE HIGH COURT
JUDICIAL REVIEW

2003 No. 369 JR

BETWEEN

E.M.S.

APPLICANT

AND
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Clarke delivered 21st day of December, 2004.

1. In these proceedings the applicant seeks leave to issue judicial review proceedings which application for leave is, by virtue of s. 5(2)(b) of the Illegal Immigrants (Trafficking), Act 2000 required to be on notice to the respondent. Furthermore it is accepted by the parties that the higher threshold for the grant of such leave variously described as being equivalent to "reasonable", "arguable" and "weighty" but not "frivolous" or "tenuous" is applicable. In passing it should be noted that the question of the applicability of the notice and threshold requirements of s. 5 to this application has already been the subject of a determination of both this Court and the Supreme Court which resulted in a final determination to the effect that s. 5 did apply.

2. The applicant seeks to challenge a decision by the respondent Minister refusing consent under s. 17(7) of the Refugee Act, 1996 which consent was necessary to enable the applicant to make a further application for a declaration of Refugee Status under that Act. While the precise relief sought is expressed in a number of different ways in para. 4 of the intended statement grounding an application for judicial review and while the grounds are specified in some considerable detail in para. 5 of the same document, in substance the applicant contends that on a reading of the reasons given on behalf of the respondent Minister for the refusal concerned it is clear that the decision was made either:-

> (a) On the basis of an erroneous view of the law which led to a failure to take into account appropriate matters; or
>
> (b) If all proper matters were taken into account was irrational.

The Standard to be applied

3. There was some debate in the course of the hearing as to the appropriate standard to be applied by the Minister in the case of an application for consent under s. 17(7) of the Refugee Act, 1996. It was accepted by counsel for the respondent that the Minister could not resile from the test specified on his behalf in the refusal letter of 2nd April, 2003. That test is stated to be as follow:-

> "As you will be aware in coming to a decision as to whether to allow an applicant to make a further application for asylum, the deciding officer compares the new application with the application earlier rejected. Excluding material which is irrelevant or material on which the applicant could reasonably have been expected to rely in the earlier application, s/he decides if the new application is sufficiently different from the earlier application as to amount to an application warranting further investigation by the Office of the Refugee Applications Commissioner."

4. It should be noted that the decision, including the specification of the above test, was in fact taken by a deciding officer to whom the Minister's powers were delegated. Nothing in this case turns on that fact.

5. Counsel for the applicant suggests that the appropriate test is that adopted by the Courts in the United Kingdom where the case of *R v. The Secretary of State for the Home Department ex parte Onibiyo* (1996) 2 A.E.R. 901 is a convenient starting point. In *Onibiyo* Sir Thomas Bingham M.R. stated at page 497:-

> "There is an overriding obligation to which states party to the convention commit themselves. The risk to an individual if a state acts in breach of this obligation is so obvious and so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages of the administrative and appellate process."

6. At page 499 the judgment goes on to state:-

> "The obligation of UK under the Convention is not to return a refugee (as defined) to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of a return. A refugee (as defined) has a right not to be returned to such a country, and a further right not to be returned pending a decision whether he is a refugee (as defined) or not."

7. Based upon that logic the Master of the Rolls approved the dicta of Stewart-Smith L.J. in *Singh (Manvinder) v. Secretary of State for the Home Department* (8th December 1995 CA) to the following effect:-

> "in my opinion in deciding whether or not a fresh claim to asylum is made, it is necessary to analyse what are the essential ingredients of a claim to asylum and to see whether any of those ingredients have changed. A useful analogy is to consider a cause of action. In order to establish a cause of action a plaintiff must prove certain ingredients. How he proves them is a matter of evidence. If he changes the essential ingredients, he is asserting a different cause of action. What are the essential ingredients of a claim for asylum?. First that the applicant has a well founded fear of persecution; secondly that he has that fear in relation to the country from whence he came; thirdly that the source of persecution is the authorities of that state or, alternatively, some other group or local population where the actions of the group are knowingly tolerated by the authorities or that the authorities refused or are unable to offer effective protection (see the handbook of the United Nations High Commissioner for Refugees, para. 65); finally that the persecution is by reason of the applicant's race, religion, nationality or membership of a particular social or political group. In my view it is only if the applicant asserts that one or more of these essential ingredients is different from its earlier claim that it can be said to be a fresh claim."

8. Having agreed with the above passage Bingham M.R. went on to formulate an acid test as follows:-

> "The acid test must always be whether comparing the new claim with that earlier rejected, and excluding material on

which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

9. Furthermore relevance was made to the speech by Lord Steyn in *Shah and Islam 1999* AC 629 at 639 where explanation is given for the relevance of other human rights instruments in interpreting the Geneva Convention.

10. There is a potential difficulty in applying the jurisprudence of the Courts of the United Kingdom in refugee matters to the Irish situation having regard to the difference in the manner in which the respective jurisdictions have legislated for the protection of those seeking refugee status (see my comments on the above issue in *Xayle v. The Refugee Applications Commissioner and Anor* – unreported Clarke. J. 10th December, 2004) I am nonetheless satisfied that there are substantial arguable grounds for taking the view that the relevant jurisprudence of the United Kingdom Courts would be followed in this jurisdiction.

11. While it is clear that the Geneva Convention is not directly applicable in Irish domestic law it is equally clear that the jurisprudence of the Irish courts has regarded it as appropriate in certain circumstances to construe Irish legislation which appears to be designed to give effect to Ireland's International Law obligations in a manner, where possible, so as to ensure compliance with such obligations. While it is clear therefore that a measure contained in the Geneva Convention which is not directly enacted into Irish Law is not enforceable within Ireland and further that the Convention could not be used to surplant the clear wording of an Irish Statue it nonetheless is arguable that the Geneva Convention can be used as an aid to construing relevant Irish legislation designed to implement its provisions. As s. 17(7) does not specify any criteria by reference to which the Minister should exercise his discretion to grant consent to re-enter the process it is at least arguable that the test formulated by the Courts in the United Kingdom (which in turn is based on ensuring compliance by the United Kingdom with its obligations under the Geneva Convention) would also be required in this jurisdiction having regard to the need to interpret s. 17(7) in such a manner as to ensure, insofar as it is possible, compliance by Ireland with its obligations under the Geneva Convention.

12. It seems to me, therefore, that at the leave stage, it is appropriate to regard the Minister as being subject to a test analogous to that adopted by the Courts of the United Kingdom and insofar as that test might arguably be more stringent than that which the Minister has imposed upon himself in the letter of 2nd April, for the purposes of this application the more stringent test should be applied.

The application for re-entry

13. Under cover of a letter of 14th February, 2003 the applicant's solicitors forwarded to the Minister a detailed application seeking, amongst other things, the Minister's consent under s. 17(7). The application was accompanied by a large volume of documentation.

14. The basis of the application made to the respondent Minister was stated to be the availability of new information, material facts and change of circumstances regarding the applicant's fear of persecution. This information was stated not to have been available to the office of Refugee Application Commissioner or the Refugee Appeal Tribunal and was stated not to have been available and/or presented when considering her application for a declaration of refugee status.

15. The principal items were then set out as follows:-

> "(a) our client's pregnancy recently confirmed
>
> (b) our client's significantly deteriorated medical condition
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> (c) country information allegedly not previously available and/or presented
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> (d) our client's psychological condition
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> (e) the requirement to consider our client's fear of persecution and discrimination amounting to persecution by reason of her membership of the social group comprising persons from South Africa with HIV infection (and/or women including pregnant women with HIV) and in respect of which group the state of South Africa fails to provide adequate protection against persecution
>
> (f) fresh information concerning an error and discrepancy in the content of the recommendation of the Tribunal member in our client's appeal."

16. A significant volume of supporting documentation including medical reports in respect of the applicant and country information in respect of South Africa with particular reference both to AIDS/HIV and the efficacy or otherwise of the criminal justice system with particular reference to the victims of rape was also supplied. In addition further documentation, as deposed to in the various grounding affidavits, was supplied as supplementary to the above and formed part of the documents before the Minister when the application was considered.

17. The decision under s. 17(7) was taken by a duly authorised deciding officer on behalf of the Minister and the results of same were set out in a letter of 2nd April, 2003 to which reference has already been made. In response to the points made on behalf of the applicant in favour of the respondent Minister granting consent pursuant to s. 17(7) of the 1996 Act the following answers were given.

> 1. It was stated that the issue of the applicant's pregnancy and her present medical condition were not relevant to a section 17(7) application on the basis that they did not refer to persecution for a convention reason.
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> 2. It was stated that the country of origin information had been considered and it was noted that inadequacy of medical treatment in the country of origin was not relevant.
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> 3. With regard to the applicant's membership of a social group the inadequacy of medical treatment in the country of origin was also stated not to be relevant.
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> 4. In relation to the alleged error in the recommendation of the Refugee Appeals Tribunal reference was made to the fact that the applicant was legally represented at the appeal hearing and that the solicitor concerned had received a copy of the recommendation. In the circumstances it was stated that it was "inconceivable" that if there were an error it would not have been raised. It was also stated that it was clear that the Tribunal member's decision did not rely on the

particular fact when making his decision.

5. In respect of the point concerning the inadequacy of the enforcement of the law in South Africa in relation to rape it was stated that the point was dealt with in the previous refugee application hearing.

18. On the basis of the above the deciding officer stated that he was satisfied that the evidence submitted did not warrant further investigation by the Office of the Refugee Applications Commissioner and that the application under s. 17(7) of the 1996 Act was refused.

19. It is as against that refusal on those grounds that leave is now sought to seek judicial review.

The Law

20. At this leave stage it is important to note that the court is concerned with propositions of law which are arguable having regard to the test referred to above. On that basis it is not necessary for the court to reach any concluded views as to any areas of law which may be in dispute between the parties but rather the court must determine whether there are arguable grounds for the propositions necessary to give rise to a finding that the applicant has established a sufficient case to meet the relevant threshold.

21. The first three grounds relied upon by the deciding officer related to the contention of the applicant that she was a member of a social group being persons suffering from HIV/AIDS in South Africa (and/or women including pregnant women with HIV) and the alleged legitimate fear of the applicant of persecution and discrimination amounting to persecution by reason of her membership of that group.

22. In that context it is necessary to consider the extent to which there may be an arguable case that persons may be entitled to refugee status for what might loosely be termed health reasons. The applicant has referred the court to the case of *Kuthyar v. Minister for Immigration and Multicultural Affairs* (2000) FCA 110 being a decision of the Federal Court of Australia. While that case was concerned with Australian law it is clear that at least insofar as the court was considering issues arising out of the applicant's HIV status it was concerned with compliance with the Geneva Convention. On that basis it is at least arguable that the courts in this jurisdiction should regard the authority as persuasive.

23. The court at paragraph 79 stated as follows:-

> "The applicant asserted that the Tribunal ignored reports he had provided which were recounted various discriminatory circumstances imposed on HIV sufferers in India. However the Tribunal in its reasons did consider a range of independent information on HIV in India and accepted the substance of the reports. It conceded that there were few resources available but that the material did not reveal a motivation on the part of the Indian authorities to harm sufferers of the disease, a situation which would have been persecution for a convention reason. The Tribunal therefore considered that the different level of health care available in India could not be said to constitute persecution for a convention reason. This finding was not legally erroneous but the true question here was, and is, whether the Indian authorities are in a position or are trying to protect HIV sufferers from the persecutory discrimination which it appears to be admitted does occur. It seems that the Tribunal simply failed to consider whether the applicant was reasonably unwilling to return because he could not avail himself of any such protection. In my view this omission manifests an error of law, under s. 430 and s. 476(1) as explained by Justice Gummow in Eshetu and discussed in *Triple A*.

24. The applicant in this case makes further reference to the unreported decision of this court in the case of *A.O. v. The Refugee Appeals Tribunal and the Minister for Justice Equality and Law Reform* (High Court 26th May, 2004) where having made reference to *Kuthyar* (above) and also to the Canadian HIV/AIDS Policy and Law Newsletter Peart J. went on to hold as follows:-

> "It is beyond any doubt that she has been diagnosed as HIV positive, and it therefore became a possibility once she articulated this in the limited way she could, that there might be discrimination against the group of HIV positive sufferers, and that the sharing of the burden of proof then kicked in, so to speak in the sense that it then became necessary to pass on to a further stage of investigation of the application, perhaps by obtaining any available country of origin information about the condition or plight of HIV positive sufferers in Nigeria. It, at the least, merited investigation. She might as a result be part of a particular social group exposed to discrimination in Nigeria."

25. Against the above authorities, counsel for the respondent submits that in the A.O. case the failing on the part of the Tribunal was identified as being one in respect of having given no consideration to the question of the HIV aspect of the case. In respect of *Kuthyar* it is submitted that from the passages above quoted it is clear that a health issue taken by itself and in particular where it appears to stem from the lack of resources within a country, cannot amount to the type of discrimination that might amount to persecution.

26. It seems to me that this argument is well founded but only to a point. It is clear that the Federal Court of Australia in *Kuthyar* took the view that a finding by the Tribunal in that case that the different level of health care available in India could not be said to constitute persecution for a convention reason was not legally erroneous. It seems to me, therefore, that the fact that a person may be subjected to a lower level of care in a different country does not, of itself, amount to discrimination. However that is not to say that the standard of health care provided in such country might not be a matter which might lead, in an appropriate case, to a conclusion that there was a degree of discrimination against a social group such that it amounted to a sufficient level of discrimination to amount to persecution. Where there is, therefore, an inappropriately low level of health care given within that country to a group who form a social group for the purposes of refugee law and where, having regard to the level of health care provided within that country, the treatment of that group from a health perspective may be regarded as discriminatory to a significant degree, it seems to me to be arguable that same amounts to a sufficient level of discrimination to give rise to a claim for persecution. Having reviewed the voluminous material that was placed before the Minister I have come to the view that it is at least arguable that some of this material could give rise to a conclusion that by virtue of a view taken by the authorities within South Africa the level of treatment being given to persons suffering from AIDS within that jurisdiction falls below the level which could reasonably be expected having regard to the seriousness of the problem of AIDS within South Africa and the resources available within that country. While it is true to say that some of the materials go no further than establishing that persons may have different views as to how South African health resources should be allocated or to showing that the level of health care in respect of AIDS sufferers within South Africa is lower than that available in many developed countries nonetheless I am satisfied that there is, at the least, an arguable case that the materials go further and show a possible basis for arguing that the level of health care is such that it is sufficient to establish the following matters:-(a) that AIDS sufferers are, having regard to the level of resources available within South Africa, treated in a discriminatory manner; and (b) that the above is at least in part due to a policy view in relation to AIDS taken by the South African authorities.

27. I am also satisfied that it has been established that there are, at least arguably, materials contained within the documentation supplied to the Minister that would place the Minister on inquiry as to whether there might not be other discrimination in the form of shunning or exclusion which the authorities are unable or unwilling to counteract. The reasons for refusing consent under s. 17(7) need to be looked at in the light of the above. On reading the deciding officer's reasons in respect of the health matters it seems to me that it is at least arguable that the deciding officer took the view that the information concerning treatment in relation to AIDS in South Africa raised purely a health issue and could not under any circumstances amount to an issue of discrimination sufficient to give rise to persecution for the purposes of the 1996 Act. For the reasons indicated above if that was the view taken by the deciding officer then it was arguably wrong in law.

28. Alternatively if the deciding officer did apply his mind to the possibility that in certain circumstances discriminatory health treatment and other discrimination might amount to persecution on convention grounds then it seems to me, having regard to the review of the material referred to above, that such a decision was arguably irrational even by reference to the test formulated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. For the reasons which I have set out in the case G*ashi and Ors v. The Minister for Justice, Equality and Law Reform and Anor* (Clarke J. unreported 3rd December, 2004) I am satisfied that it is at least arguable that where constitutional or human rights are at stake the standards of judicial scrutiny set out in O'Keeffe may fall short of what it is likely to be required for their protection. On that basis, it is also arguable that the above decision was irrational.

29. In the circumstances I am satisfied that the applicant has made out a sufficient case to pass the relevant threshold in respect of the health issues. I now turn to the other two issues in the case.

30. The so called error issue concerns the contention put forward by the applicant which specified that there had been an error in the determination of the Refugee Appeals Tribunal which had potentially affected its judgment and which should, in the circumstances, give rise to a consent being granted under s. 17(7) to enable the matter to be reconsidered. In that context I was referred to *R. v. Secretary of State for the Home Department ex parte Nazir* (1999) I.N.L.R. 92 where Lord Wolfe MR stated as follows:-

> "It seems to me that the Secretary of State is not required to treat the situation here as a fresh claim, albeit that if I was considering the matter on the basis of the applicant's personal credibility the situation would be otherwise. If the situation turned on the applicant's credibility, the Secretary of State would have had to consider the new material put before him, apply an approach indicated by the Master of the Rolls in the case of Onibiyo and determine whether in those circumstances there was a fresh claim which had a reasonable prospect of success".

31. For the reasons indicated above I am satisfied that it is at least arguable that the *Onibiyo* test should be followed in this jurisdiction. It follows that it is, at least in principle, open to argument that the Minister should give his consent under s. 17(7) where there is demonstrated to be an error which might have affected the result even where that error may be said to be due to a mistake on the part of the applicant's legal advisors. This stems, in part, from the fundamental obligation, explained by Sir Thomas Bingham in *ex parte Onibiyo* which is that there is a requirement to give proper consideration to every potentially genuine asylum claim even where the applicant has previously made such a claim without success. Thus if there is a reasonable possibility on the facts that the original decision was wrong then the obligation to allow a fresh claim is arguably present. It does not appear to me to be clear, as is asserted in the letter of the 2nd February, that the error concerned did not affect the reasoning of the Refugee Appeal Tribunal. When the Tribunal, in the course of its decision, makes a finding of lack of credibility on the part of the applicant it does not specify in that portion of its determination precisely what factors motivated it to come to that conclusion. It is therefore a matter of inference as to what matters contained within the body of the remainder of the decision led it to form its view as to the applicant's credibility. It is arguable that the statement that the error did not form part of the reasoning which ultimately led to the judgment is incorrect. It is also arguable that in stating that the matter would not be re-opened because it was "inconceivable" that the applicant's previous lawyers did not spot the error, the deciding officer failed to comply with the appropriate test derived from *Onibiyo* and referred to above.

32. Finally it is necessary to consider the last point of rejection contained in the letter of 2nd February. This ground amounted to a refusal to re-open the question of whether there might be said to be discrimination in South Africa in relation to a social swap who might be characterised as rape victims having regard to the alleged unwillingness or inability of the South African authorities to take adequate steps for the prosecution of those who might be guilty of rape. It is clear that this issue was, in general terms, raised at the original hearing before the Refugee Appeals Tribunal. It is also clear that even applying the principles developed by the courts in the United Kingdom, there is no obligation to allow a re-opening where same would amount to a mere repeat application. The basis upon which the applicant sought re-opening in this case was that that there was new information available in the form of a further and more detailed report which seemed to verify that the subjective concerns of the applicant to the effect that South African authorities would not, or could not for whatever reason, deal effectively with rape was objectively justified. I have had some doubt as to whether the report concerned, even on an arguable case, basis amounts to a sufficient level of new material to justify holding that there is such an arguable case that the deciding officer's determination is legally unsustainable. However having regard to the possibility that the appropriate test of review may be somewhat more stringent than that set out in O'Keeffe I have come to the view that it is arguable that the court might be required to intervene by way of judicial review under this heading as well.

33. In the circumstances I am persuaded that the applicant has made out an arguable case of sufficient weight under each of the headings contended for and I would propose granting leave to the applicant to seek each of the reliefs set out in the intended statement to ground the application for judicial review and upon each of the grounds there in specified.