Neutral Citation Number: [2012] IEHC 18

THE HIGH COURT

JUDICIAL REVIEW

2011 768 JR

BETWEEN

S. P.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY,

IRELAND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 20th day of January 2012

1. The Court has decided to refuse to grant leave to the applicant to seek judicial review in this case for two reasons.

2. The first reason is that the reliefs proposed to be sought by way of *certiorari* of the decision dated the 23rd February, 2011, refusing the application for subsidiary protection and the decision to make the deportation order dated the 2nd March, 2011, are reliefs which are at the discretion of the Court and it is well settled, at least in cases where such a relief is sought against administrative or quasi judicial decisions on the civil side, that the Court is entitled to refuse to entertain an application for judicial review where it is satisfied that the proceeding is tainted by a lack of candour or by bad faith or that it otherwise involves an abuse of process or a misuse of the administrative procedure concerned – in this case the asylum process. (See *Elukanlo v. Minister for Justice* [2006] I.E.H.C 211 and C.R.A. v. Minister for Justice [2007] 3 I.R. 603).

3. The applicant in this case claims to have arrived in the State in August 2006, from Sierra Leone and to be a national of that country who had been forced to flee because of threats and violence from a uncle who had been attempting since 2000, to force her to marry an older Muslim acquaintance of his from whom he had received a "bride price".

4. Shortly after her arrival, she gave birth on the 10th September, 2006, to a son whose father she claims was the boyfriend in Sierra Leone who arranged for her to escape from her uncle and to travel to Ireland. She claims that she later learned that the boyfriend had been stabbed to death by, she suspected, her uncle or agents acting for him.

5. The applicant's asylum claim was recommended to be refused in a report of the Refugee Applications Commissioner under s. 13 of the Refugee Act 1996, dated the 15th December, 2006. This was appealed to the Refugee Appeals Tribunal and following an oral hearing on the 19th August, 2008, the negative recommendation was confirmed by a decision dated the 15th June, 2009. Both the s. 13 Report and the appeal decision found that the account of past persecution at the hands of the uncle and those she claimed to have attacked her on his behalf or on behalf of the older man she was supposed to marry, was lacking in credibility.

6. Following upon the respondent's refusal of a declaration of refugee status in those circumstances, solicitors on behalf of the applicant made an application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 ("the 2006 Regulations") together with an application for leave to remain under s. 3 of the Immigration Act 1999 on the 14th August, 2009. These applications were supplemented by a five page handwritten memorandum from the applicant forwarded to the respondent by her solicitors under cover of a letter dated the 19th October, 2009. These submissions comprise a series of comments on or rebuttals by the applicant of the various findings of lack of credibility in her story as contained in the Tribunal decision.

7. By a letter of the 25th February, 2011, the Repatriation Unit of the respondent's Department determined that the applicant was not eligible for subsidiary protection and enclosed a memorandum entitled "Determination of Application" setting out the analysis of the application and the conclusions reached on it by reference to the headings required to be considered under Regulation 5 of the 2006 Regulations. In particular, the Minister considered the question of the applicant's credibility as required by Regulation 5(3)(viii) and quoted the negative findings in the RAT decision.

8. By letter of the 11th March, 2011, the applicant was informed of the rejection of her application for leave to remain and furnished with a copy of the deportation order made by the Minister on the 2nd March, 2011, together with a memorandum entitled "Examination of File under s. 3 of the Immigration Act 1999" which set out the assessment of the representations and of the statutory considerations required to be taken into account under that section.

9. According to a supplementary affidavit sworn by the applicant on the 15th December, 2011 in reply to affidavits lodged on behalf of the respondent, it appears to be accepted by the applicant that she received the above letters of the 25th February, and 11th March on the 28th February and the 14th March, 2011, respectively.

10. Notwithstanding the requirements of O. 84 Rule 20 (2) of the Rules of the Superior Courts and the non-application to the subsidiary protection refusal decision of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, no *ex parte* application for leave was made to the Court to seek judicial review of the decision communicated by the letter of the 25th February, 2011. Instead on the 24th August, 2011, the papers for the judicial review proceeding which is now before the Court were filed in the Central Office of the High Court and a notice of motion in respect of an application for leave to seek judicial review of both decisions was made returnable for the 3rd October, 2011, - the first day of the Michaelmas Term.

11. In moving the application for leave to seek judicial review of the subsidiary protection decision, particular emphasis has been placed by counsel for the applicant both in the written legal submissions and in oral argument upon the allegedly unlawful, unfair and

irrational reliance placed by the respondent on the issues of lack of credibility in the Tribunal decision; on the respondent's use of country of origin information and on the alleged disregard by him of the representations or submissions presented in the application for subsidiary protection. It is claimed that the rejection of the claim by the Tribunal "was based purely on conjecture and without any proper regard to other factors".

12. On the 22 September, 2011, shortly before the return date of the motion seeking leave, an affidavit sworn by Chris Carroll on behalf of the respondent was filed and served. In addition to putting before the Court the documentation relating to the full asylum process in the case, this affidavit exhibited correspondence which the respondent had exchanged with the UK Border Agency in August 2011. This disclosed that a woman whose fingerprints matched those of the applicant furnished by the respondent had sought to enter the United Kingdom on the 23rd November, 2002, using a valid Nigerian passport issued to a Muyibat Doyin Olaleye. According to the information supplied by the UK Border Agency that passport holder had sought to enter the UK on foot of a visa delivered in person to her in Lagos on 15 November 2002 and valid for multiple visits to the UK from that date until 15/11/2004. The Agency stated:

> "The visa was issued on 15th November 2002 and used to enter the United Kingdom on 23rd November 2002. The passport holder was then refused entry on 29th November 2003 as the visa had been subsequently falsified. Removal directions were set for her return to Nigeria but she failed to attend as required and has been treated as an absconder."

13. On the 24th August, 2011, the Minister had written to the applicant putting this information to her and inviting her within fifteen days to make any observations or comments she might have as to why she ought not to be returned to Nigeria. The applicant and her solicitors do not appear to have replied to that letter.

14. On the 15th December 2011, however, the applicant swore a replying affidavit dealing both with the grounds for obtaining an extension of time for the leave application (see further below) and by way of answer to the information given in the affidavit of Chris Carroll. Because of its importance to the reason why the Court has decided to refuse to grant leave, it is necessary to quote in full the applicant's explanation for her admitted visit to the United Kingdom at a time she claimed to be living with an uncle in Sierra Leone and her non-disclosure of that fact at any stage in the asylum process.

> "I say and reiterate that I am a citizen of Sierra Leone. In November 2003, I had a boyfriend in Sierra Leone. His first name was Camara, I do not recall his surname. He invited me on a holiday and together we left Sierra Leone in November 2003 and we firstly flew to Cote D'Ivoire then to Saudi Arabia and then to London. He was wealthy and paid for all the expenses and also supplied me with the documentation for travelling. As far as I can recollect I had a different passport for each leg of the trip and none of them were (sic) genuine. On arrival in London the 'Nigerian passport' which had been given to me by my boyfriend was taken from me by the immigration authorities. I understand that it was obvious that it was a false passport, because the photograph showed me wearing headgear which would not have been permitted in the normal course for a passport photograph. I was let into the UK and told by the authorities at the airport to 'come back tomorrow'. My boyfriend became very frightened – I believe he may have been involved in trafficking and that is why he appeared to have a plentiful supply of 'travel documents' available. He was anxious to leave the UK quickly and did not take me back to the authorities the following day, but rather took me back to Sierra Leone approximately two days later. This holiday in total lasted only for approximately one week. I accept that I said at Part 4 of my Questionnaire . . . . that I had not previously travelled out of Sierra Leone and I said this because I was afraid because I thought that short trip would be very hard to explain and also that it was not of any relevance to my claim for asylum in Ireland as it pre-dated the events leading up to my asylum application. . . . Upon my return to Sierra Leone, I went back to my uncle in Kono District and lived there. My uncle was putting pressure on me to marry a friend of his and that is the period that the experience related by me in my asylum claim commenced."

15. It is thus clear that although the applicant claims to have been in the UK in 2003 rather than in 2002 and only for a week, she does not now dispute that she was the woman who attempted to enter the UK using a Nigerian passport and a name other than the name she now uses. Furthermore she accepts that the visit in question was entirely voluntary for holiday purposes and thus wholly unrelated to any persecution or harm she now claims to have suffered prior to that date. In the view of the Court, this is of fundamental significance for the admissibility of the present judicial review application. In essence, there has clearly been not only a material lack of candour and truthfulness on the part of the applicant throughout the entire asylum and deportation process but the grant of leave to seek judicial review in these circumstances upon the grounds sought to be advanced would require the Court to sanction the prosecution of a substantive judicial review hearing upon a basis which would effectively be false. There are numerous factors which compel the Court to this conclusion.

16. First, the affidavit of the 15th December, 2011, is significantly disingenuous and unforthcoming as a response to the information from the UK Border Agency. It leaves unanswered a series of questions:-

> (a) If her passport was confiscated in London how did she leave the United Kingdom two days (or a year and two days) later without a passport?
>
> (c) If she had no Sierra Leone passport, how did she re-enter Sierra Leone?
>
> (d) By what flights and through which airports did she return? She remembers clearly her route to the UK.
>
> (e) What evidence is there that she ever left the United Kingdom?
>
> (f) She says the passport was obviously false because "the photograph showed me wearing headgear" but she does not deny that it is her photograph;
>
> (g) If it is her photograph, she fails to explain how the passport with the visa was delivered to her in person in Lagos on 15th November 2002.

17. Secondly, the argument advanced in extenuation of the non-disclosure of the UK visit, both in the affidavit as quoted above and by counsel at the hearing, cannot be accepted. It is suggested that the fact of the travel to, and return from, the UK in 2002 or 2003 is insignificant and not inconsistent with the challenges made to the refusal of subsidiary protection or the deportation order. In response to a direct question by the Court on this issue, counsel for the applicant asserted that the challenge was not based upon her account of persecution she had claimed to have suffered prior to the date of her visit to the United Kingdom, but only upon her mistreatment in the form of threats of serious harm from her uncle following the applicant's return from the United Kingdom. Counsel endeavoured to support this distinction by pointing to a sentence in the decision of the Tribunal where the Tribunal member refers to

her claim to have been kidnapped by the rebel Revolutionary United Front Force (RUF) in 1999, taken to a forest and raped. The Tribunal member points out that the applicant had said the rebels did not follow her and did know where she was and says: "In any event the applicant does not claim that she is at any further risk from the RUF if returned to Sierra Leone".

18. This attempt to excuse the non-disclosure, however, overlooks the fact that the past persecution by those rebels continued to be relied upon throughout the claim for international protection and is explicitly mentioned in the subsidiary protection application at para. 8, which, as required, sets out "fully all of the grounds relating specifically to your circumstances upon which you are relying in support of your application". Furthermore, even if the applicant can be taken as no longer relying upon a fear of serious harm from the RUF, the claim for subsidiary protection made no distinction between the mistreatment and threats of violence from the uncle before and after either of the possible dates of the visit to London. At no stage at any part of the asylum process whether in the s. 11 interview, or in the application for subsidiary protection was any suggestion made that there had ever been a cessation in the persecution or serious harm threatened by the uncle between 2000 and 2004.

19. Thus, in the s. 11 interview the following exchange is recorded in relation to the applicant seeking refuge with her uncle after the RUF attacks in 1999:-

> "Q.63 When did you go there?
>
> - January 2000.
>
> Q.64 How long did you stay with him?
>
> - Four years.
>
> Q.65 Why did you leave?
>
> - Because he was forcing me to marry a Muslim.
>
> Q.70 What date did you leave your uncle's?
>
> - August 2004."

20. Even after the refusal of subsidiary protection had been received, additional representations for the purpose of the s. 3 leave to remain application were made on the 11th March, 2011, which again emphasised the continuity of the serious harm she claimed to have suffered from January 2000 until she arrived in Ireland in September 2006. Submissions referred to her first escaping from the rebels in 1999 and then to escaping on three separate occasions from the serious harm visited upon her by her uncle and those acting on his behalf.

21. Finally, the holiday visit to London is clearly incompatible with these claims to have been at risk of serious harm between 2000 and 2004. On her own account as it now stands, she voluntarily left Sierra Leone (if not Nigeria) with her wealthy boyfriend in either 2002 or 2003 and voluntarily returned there without availing of the opportunity to claim international protection in the United Kingdom.

22. Accordingly, the applicant has not only lied in the asylum application when she said that she had never previously left Sierra Leone, but the deliberate non-disclosure of the London holiday visit means that all of the decisions made throughout the process by the Commissioner, the Tribunal and the Minister have been made on a false basis. Nor as was sought to be suggested, can this situation be excused as a mistake made by a woman coming from a rural African background with little education to a wholly strange country and new culture in circumstances of great of stress. Quite apart from the applicant's connivance in the arrangements for the holiday visit to the United Kingdom which she clearly knew to be unlawful, the handwritten memorandum of comment and rebuttal of the Tribunal decision referred to above (see paragraph 6,) clearly demonstrates that the applicant is fully able to read a Tribunal decision and to formulate responses to identified findings of credibility.

23. Accordingly, to grant leave in this case for a substantive hearing of a judicial review application would be to countenance an assessment of the validity in law of two contested decisions by reference to the state of information available to the respondent when those decisions were made, when both sides are now aware that a specific fact material to the fundamental basis of the applicant's claims throughout could not be taken into account in the judicial review. It is in that sense that a substantive hearing of a judicial review upon the terms demanded by the present application would be fundamentally false.

24. When pressed by the Court on this issue at the hearing, counsel for the applicant argued that if the fact that the London visit was to influence the Court in a concern as to whether the applicant came from Sierra Leone or from Nigeria, the proceedings ought to be adjourned in order to enable the applicant to make inquiries with the United Kingdom authorities as to when and where the applicant's fingerprints had been taken, because, it was suggested, the only occasion on which she had given her fingerprints was on arrival in the United Kingdom. In the judgment of the Court, such an adjournment would be unjustified and serve no purpose. The application ignores the significance of the information. The applicant herself admits in her affidavit as quoted above that she did indeed voluntarily visit the United Kingdom using a passport which she claims was false: the UK authorities do not say that it was; only that its visa was falsified. Quite apart from the crucial doubt which is thereby raised for the respondent at this stage as to whether the applicant is indeed from Sierra Leone and not from Nigeria, what is significant is that she admits to having been able to leave Sierra Leone voluntarily in 2002 (or 2003) at a time when she now claims to have been the subject of persecution by her uncle. She further asserts that she then returned voluntarily to Sierra Leone to that uncle and that source of persecution.

25. In the judgment of the Court it would be manifestly unreasonable and inequitable to require the respondent to meet a case which purports to challenge the reliance on the applicant's lack of credibility in the asylum process as described in paragraph eleven above when that process has itself been falsified by the applicant's deliberate concealment of a significant event relevant to both her claim and her personal history.

26. While the Court's primary reason for refusing to entertain this application for judicial review is its exercise of its discretion to refuse, as explained above, the Court would also refuse for a second reason. The application is out of time.

27. As described in para. 9 above, the refusal of subsidiary protection is admitted to have been received on the 28th February, 2011, and the deportation order on the 14th March, 2011. The former is not covered by the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, such that the time limit for application for judicial review to seek an order of *certiorari* in respect of the refusal is a period of six months from that date. That application must, nevertheless, be made "promptly" as required by Order 84. Because it

is an application for leave to seek judicial review not covered by s. 5 of the Act of 2000, O. 84, r. 20(2) requires that it made *ex parte*. As mentioned in para. 10 above, no *ex parte* application was made. It is settled law that for the purposes of that rule the time does not cease to run until the *ex parte* application is moved in Court. In *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 at p. 136, Finlay C.J. held: "Under O.84 providing for the judicial review procedure, an application for leave to apply for judicial review was to be made by motion *ex parte*. The provision for a motion on notice is inserted by the [Local Government (Planning & Development) Act 1992] in regard to planning decisions. There can be no doubt in my mind that an application to the court made by motion *ex parte* cannot be said to be made until it is actually moved in court."

28. The earliest date, accordingly, upon which it could be suggested that time had ceased to run in respect of this application for leave to quash the refusal of subsidiary protection is the 3rd October, 2011, when the notice of motion in respect of both applications came before the Court.

29. The Court can, of course, under O. 84 extend time where "the Court considers that there is good reason for extending the period within which the application shall be made". In the present case, the Court is satisfied that no good reason has been advanced.

30. The only explanation for the delay in this case is that given by the applicant in her replying affidavit of the 15th December, 2011. She says:

> "After receipt by me of the subsidiary protection refusal on the 28th February, 2011, I was advised by my then solicitor Ms. Jeanne Boyle that there was nothing she could do and I should await a decision on my s. 3 application. Shortly after receipt of my deportation order on the 14th March, 2011, I was advised by Ms. Boyle that she could not help me and she gave me the number of my present solicitor, Mr. Brian Burns. Perhaps a week or so after receipt of Mr. Burns's number, I managed to get through to him and explain my position. I explained to him also that I was also awaiting a decision in respect of a s. 3 application in respect of another child of mine, namely, Aaliyah . . . he said to me that he was unsure if he could assist me at that time and suggested I wait until I got the aforesaid decision in respect of Aaliyah. I was happy to do so and in or about mid August this year an acquaintance informed me that she understood there had been some developments in relation to subsidiary protection refusal and advised me to make further contact with Mr. Burns, which I did at that time and met with Mr. Burns in or about mid August and provided him with copies of my papers and that is how it came about that these proceedings were not issued until the 24th August, 2011."

31. In other circumstances, the Court might have considerable reservations about accepting this explanation. Mr. Burns is one of the most experienced practitioners in the asylum list. It is difficult to accept that if informed in March 2011, that a prospective client had already received a refusal of subsidiary protection and a deportation order, that such a practitioner would so casually advise taking no action without at least first looking at the documents in question and considering the actual circumstances of the case. However, given that Mr. Burns is acting for the applicant and is the solicitor identified in the jurat of that affidavit as the individual who identified the applicant to the solicitor taking the affidavit, the Court must accept that Mr. Burns knows and approves of these averments.

32. In circumstances where an applicant has access to legal representation and no steps were taken even to examine the prospects of an application for judicial review at a point when it might have been done within or closely after the expiry of the statutory period, there can be no justification, in the view of the Court, for conceding an extension of time particularly when it is the most extensive six month limitation period rather than the fourteen day period of section 5. of the 2000 Act.

33. Counsel for the applicant also submitted that the delay in seeking leave to challenge the refusal of subsidiary protect could be excused because it was only on 18 May 2011 with the delivery by Hogan J of his judgment in *M.M. v Minister for Justice* that it was realised that the ground of challenge now sought to be relied upon in grounds 1, 2 and 3 of the Statement of Grounds, namely the alleged failure of the State to transpose the "cooperation" requirement of the Qualification Directive, might be raised on the applicant's behalf. Quite apart from the fact that the happenstance of possible inspiration in later case-law does not constitute good and sufficient reason for granting extensions of time, the submission in this case ignores the fact that the proceeding as now brought seeks to rely on 12 other entirely distinct grounds.

34. The same reasons are valid so far as concerns an extension of time to challenge the deportation order where the s. 5 limitation does apply. Although in that instance the application is deemed to have been brought on the 24th August, 2011, when the notice of motion was issued and served upon the Chief State Solicitor, it is nevertheless well outside the fourteen day period limited by s. 5 and a deliberate decision was taken on legal advice not to do anything when it might have been done. Counsel for the applicant, however, argues that the fourteen day time limit of s. 5 is no longer enforceable against the applicant and relied upon the judgment of Hogan J. of 25th January, 2011, in *T.D. & Ors. v. Minister for Justice, Equality and Law Reform and Others* [2011] I.E.H.C. 37, a case in which a certificate of leave of appeal to the Supreme Court under s.5. was subsequently granted on the issue as to whether the fourteen time limit of s. 5 is compatible with the principles of equivalence and effectiveness in European Union Law.

35. In the view of this Court, the principles discussed by Hogan J. in the judgment granting leave to seek judicial review in that case have no bearing on the position of the applicant in the present case so far as concerns the application to review the deportation order. In that case the applicants had sought to apply for judicial review in order to obtain *certiorari* not only of deportation orders and refusals of subsidiary protection, but also to challenge the validity of the appeal decision of the Refugee Appeals Tribunal together with that of the Minister refusing to grant a declaration of refugee status under s. 17 of the Refugee Act 1996. (See para. 5 of the judgment). The time for the applications in respect of the latter decisions had long since expired. While it is not entirely clear from the judgment itself whether any distinction was drawn in the order subsequently made as between the applications in respect of the challenge to the deportation order and the challenges to the other measures concerned, it is clear from the discussion of the case law of the Court of Justice of the European Union set out in the judgment that the conclusion reached as to the incompatibility of the fourteen day time limit in s. 5 of the Act of 2000 with the principles of effectiveness and equivalence in Union Law is based upon the principle that a Member State cannot rely as against an applicant upon such a time limit where the result is to deprive an applicant of adequately effective protection of rights conferred by Union Law as compared with the comparable protection conferred by national law in respect of equivalent rights.

36. While that proposition may be sound as Hogan J. held in respect of rights derived from directives, including the European Communities (Eligibility for Protection) Regulations 2006 and the Qualifications Directive (2004/83/EC) and the Procedures Directive (2005/85/EC), it has no relevance, in the view of this Court, to remedies in respect of a decision made to deport a person illegally present in the State under s. 3 of the Immigration Act 1999. That provision is a stand-alone provision of national law which is wholly independent of any competence or obligation derived from Union Law. To the extent that the provisions of Irish national law giving effect to the State's assurance of international protection (in both of its forms) derive from those three Directives can be said to "implement" them for the purposes of Article 51 of the Charter of Fundamental Rights, their effects terminate at the definitive

conclusion of the international protection process with the refusal of subsidiary protection.

37. The fourteen day time limit, with its possibility for extension where there is good and sufficient reason, has been held to be compatible with the requirements of the Constitution by the Supreme Court in its judgment in *Re Article 26 and the Illegal Immigrants (Trafficking Bill) 1999* [2000] 2 IR 360. For these reasons the Court considers that the ruling of Hogan J. in the T.D. case has no application to the issue of the extension of time necessary in the present case to challenge the deportation order and, for the reasons already given above in relation to the challenge to the subsidiary protection refusal, the Court considers that no extension can be granted in respect of this aspect of the application for leave either.

38. For all of these reasons, the application for leave is refused.