Neutral Citation [2014] IEHC 385

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 890 J.R.]

BETWEEN

T.A.R. AND I.H.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered the 30th July, 2014

1. The applicants are nationals of Iraq who have lived there since birth. The first applicant is retired and is in receipt of a pension, and the second applicant is a teacher employed on a fulltime basis by the General Directorate for Education in Baghdad. The applicants' son, Marid Talal Al Shawi, is a naturalised Irish citizen who has resided in Ireland since 2006. He is employed, married and has four Irish citizen children who are the grandchildren of the applicants. The applicants wish to travel to the state for a period of four weeks in order to visit their son and grandchildren and applied for a visitor's visa to do so.

2. On 23rd May, 2013, the applicants were notified by the Irish Naturalisation and Immigration Service (INIS) that their application for an Irish visa had been refused for the following reasons:-

> "F:-
>
> Finances:-
>
> Evidence provided is deemed insufficient or incomplete – six months bank statements required.
>
> ID:-
>
> Insufficient documentation submitted in support of the application:- please see link to "documents required" as displayed on our website – www.inis.gov.ie – evidence of medical/travel insurance, written undertaking from applicant to observe conditions of visa, utility bill for host.
>
> OB:-
>
> Obligations to return to home country have not been deemed sufficient.
>
> OC:-
>
> Condition – the applicant may overstay following proposed visit.
>
> R:-
>
> No clear link to reference has been shown."

3. The applicants appealed by letter dated 17th July, 2013. The appeal consisted of a detailed seven page letter and accompanying documentation (43 pages) in which the applicants sought to address the reasons for the refusal as far as they could be ascertained.

4. By letter dated 6th September, 2013, the applicants were informed that their appeals had been refused. The letter stated:-

> "The applications have been re-examined by the Appeals Officer and having taken all documentation and information provided into consideration, it was decided that the original decision to refuse the visas should be upheld.
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> The reasons for refusal are as follows:-
>
> OB:- Obligations to return to home country have not been deemed sufficient;
>
> OC:- Condition – the applicants may overstay following proposed visit."

5. The respondent has furnished the court with extracts from information regarding immigration matters concerning applications for short stay "C" visas which seek entry for visiting family or friends as published by INIS on its website. The information demonstrates that there is no right to a visa nor is there one set of documents or circumstances that will guarantee the approval of an application. However, the website listed documents normally required in support of an application and also stated that the applicant would need to show clearly:-

> "That you will leave Ireland before your visa/permission to remain expires;

That you have sufficient resources to look after yourself while you are here;

That you are of good character and have told the truth in your application and have not left out anything important;

That you are not using a visa to Ireland as a way of getting around lawful entry to the United Kingdom or the rest of the EU."

6. It was particularly emphasised by the respondent that evidence of the applicants' obligations to return to their country of permanent residence must be demonstrated, including as stated in the Guidelines:-

> • "If you are employed, a letter from your employer stating how long you have been employed there, the dates you will be on annual leave from, the date you will be returning to work in that employment, and your three most recent payslips..."

It was submitted to the court by the respondent that this particular matter was of concern to the decision-maker on the appeal.

7. It was emphasised that the short form initialled reasons and the short explanation furnished in the refusal at first instance and on appeal reflect the usual practice when explaining reasons for refusal of visas. The website also contains a key to an understanding of the lettering applicable to each reason. The relevant explanations in respect of the reasons given in this case are:-

> "OB:- Obligation to return to home country not shown *e.g.*
>
> • No social, economic or professional ties in home country shown.
>
> • Obligations shown have not been deemed sufficient."

In this case it was accepted by counsel for the respondent that the first of those explanations in respect of the absence of social, economic or professional ties in the home country shown was not relied upon or given as a reason for the refusal.

8. The second reason is also explained in the Guidelines:-

> "OC:- Observe the conditions of the visa *e.g.*
>
> • The visa sought is for a specific purpose and duration, and the applicant has not satisfied the visa officer that such conditions would be observed.
>
> • The applicant may overstay following his/her proposed visit.
>
> • The applicant may work illegally in the state.
>
> • The applicant may branch into the common travel area.
>
> • The potential cost of this trip is high in comparison to the applicants' means, and given that no compelling reasons for the trip have been displayed, the visa officer is not satisfied of your intentions to leave the state following your visit."

The reason given in this case referred only to the fact that "the applicant may overstay following his/her proposed visit".

9. The Guidelines furnished are not exhaustive.

10. Further guidance was given in the notes accompanying the Guidelines which counsel for the respondent submitted was relevant to the consideration of the obligation to return home. The applicants were advised that when presenting evidence of employment from an employer concerning the duration and nature of employment and other information:-

> "All letters should be on official company headed paper and give full contact details for verification purposes. These must include a full postal address, name of contact, position in company, telephone number (landline) and email address where relevant. (Email addresses such as Yahoo or Hotmail are not accepted). Website address should also be included, if available."

11. Leave to apply for judicial review was granted (McDermott J.) on 9th December, 2013, on the following grounds:-

> "(i) The decision was unreasonable and/or irrational and breaches the principle of fair procedures and natural and constitutional justice when considered in the context of the evidence which (was) before the respondent. There was no reasonable, rational, lawful or evidential basis upon which the respondent could have reached the decision that the applicants had neither sufficient obligations to return to Iraq following the proposed visit or that the applicants might overstay following the proposed visit and the decision is thereby invalid.
>
> (ii) The decision is void for uncertainty and/or failure to provide adequate reasons. The lack of reasons provided by the respondent for the refusal of the visa applications combined with the lack of any published policy in respect of the criteria to be applied to the consideration of visa applications by the respondent is such as to deprive the applicants of any meaningful opportunity either to make a new application for the visas or to challenge the decision on substantive grounds. The applicants are unaware of the actual basis of the reasons for the refusals and how they might be addressed and the reasons provided are not adequate or lawful and the decision is thereby invalid as a consequence of the failure to provide adequate reasons and/or void for uncertainty."

12. All persons who are not citizens of Ireland and not nationals of a "visa exempt" country are required to have a valid Irish visa to land in the state in accordance with s. 4(5)(b) of the Immigration Act 2004. The respondents contend that the onus is upon the applicants to establish on the balance of probabilities "that they have sufficiently strong family, social or economic ties to a place of residence in a country other than Ireland, and to assure the visa officer assessing the application that the projected stay in Ireland will be temporary in accordance with the duration and conditions of the permission granted on arrival". The issues to be addressed by the decision-maker are whether the applicant will leave Ireland at the end of the visit and whether there are sufficient resources to support the visitor in the state without accessing public funds and furthermore, whether proof of return or onward travel

arrangements has been furnished. It was claimed that much of the evidence submitted by the applicants was subjective and/or lacked independent corroboration or authority.

13. Mr. Barry O'Connor in an affidavit on behalf of the respondent set out the very extensive documentation supplied by the applicants in the course of the application for the visa as follows:-

> "A. Translation of identification card of M.A…
>
> B. Signed summary sheet of T.A.
>
> C. Signed summary sheet of I.M.
>
> C. Guidelines.
>
> D. Translation of certificate of nationality of M.T.A.
>
> E. Notice of assessment for year ending 2012 of M.A.
>
> F. Tax clearance certificate of M.A.
>
> G. Translation of letter from Mrs. I.M's employer dated 14/03/2013.
>
> H. Translation of pension ID of T.A. dated 28/03/2013.
>
> I. Translation of Iraqi Teachers Union ID of I.M.
>
> J. Letter from Padraig O'Malley & Company dated 02/04/2013.
>
> K. Invitation letter from M.A. dated 02/04/2013.
>
> L. Credit Union statement of M.A. dated 02/04/2013.
>
> M. Copy of information pages of passport of M.A.
>
> N. Vodafone bill of M.A. dated 05/05/2013.
>
> O. Naturalisation certificate of F.A.
>
> P. Written undertaking from T.A. undated.
>
> Q. Written undertaking from I.M. undated.
>
> R. Written undertaking from M.A. undated.
>
> S. Translation of support letter from the General Directorate for Education Baghdad in respect of I.M. dated 02/06/2013.
>
> T. Vodafone bill of M.A. dated 05/06/2013.
>
> U. Letter from John O'Mahoney T.D. dated 10/06/2013.
>
> V. Insurance Certificate of T.A. and I.M. dated 12/06/2013.
>
> W. Translation of certificate of pension entitlements of T.A. dated 27/06/2013.
>
> X. Copy of Credit Union statement of M.A. dated 28/06/2013.
>
> Y. Translation of support letter from the General Directorate for Education Al Karkh in respect of I.M. dated 02/07/2013.
>
> Z. DHL receipt dated 06/07/2013.
>
> AA. Western Union receipt undated.
>
> BB. Appeal letter from M.A. dated 16/07/2013.
>
> CC. Letter from T.A. with evidence of links to reference (M.A.) in Ireland undated.
>
> DD. Letter from I.M. with evidence of links to reference (M.A.) in Ireland undated.
>
> EE. Appeal letter from T.A. undated.
>
> FF. Appeal letter from I.M. undated."

14. There is no suggestion that any of the documents submitted or any of the submissions made by or on behalf of the applicants are other than truthful.

15. The respondent contends that the reasons furnished to the applicants for the refusal are clear, adequate and lawful. It provided what was clearly a "meaningful opportunity" to take an appeal or challenge the decision concerned as is evidenced by the appeal actually taken and the extensive nature of the submissions made in respect of the grounds for refusal at first instance. I am satisfied that the reasons as expressed demonstrate that the decision-maker was not satisfied by the applicants that they would return home, and that they would observe the condition that they should not overstay following the proposed visit. I am, therefore, satisfied that the decision is not void for uncertainty.

16. Two other matters remain for consideration namely, whether the reasons furnished were adequate in the circumstances and/or whether the decision itself was unreasonable and/or irrational in that there was no reasonable, rational, lawful or evidential basis upon which the respondent could have reached the decision that the applicants had neither sufficient obligation to return to Iraq following the proposed visit, or that they might overstay.

17. In essence, the respondent has informed the applicants that they have failed in their application for the two reasons advanced, but contends that she is under no obligation to elaborate upon those reasons or inform the applicants why those conclusions have been reached.

18. The respondent submits without prejudice to that contention, that it is, in any event, clear that the evidence regarding their proposed return offered by the applicants was limited. This claim is set out in the statement of opposition. The decision-maker in the appeal has not furnished any evidence that any of the matters set out in para. 11 of the statement of opposition formed the basis of the decision.

19. In respect of the first applicant, it is said that the only evidence of his proposed return, based on the fact that he was a pensioner, was a letter to that effect. Though he asserted a pension payment of 822,000.00 Iraqi Dinar (€517 approximately), the frequency of such payments was unclear. No accounts or independent financial information was furnished in that regard.

20. In legal argument a further claim was advanced that the first applicant failed to provide a letter concerning his pension containing an appropriate address and full contact details for verification purposes. The letter furnished contained details of the pension, including a pension number and emanated from the Ministry of Finance, National Retirement Authority Republic of Iraq and was signed by the manager of the authority. The particular suggested deficiency was advanced by way of submission and was not verified on affidavit by the decision-maker as in any way relevant to the decision.

21. The second applicant was employed fulltime at the Al Intifada Boys Secondary School by the General Directorate for Education – Al Karkh 1, Baghdad. The letter verifying this was signed by the manager of the school. Another letter was furnished from the Director General for Management, Human Resources Department, Ministry for Education, which confirmed her fulltime employment. The letter was certified by the Ministry of Foreign Affairs, Iraq on 2nd June, 2013. The letter confirmed that she had been granted eight weeks annual leave to visit her son and his family in Ireland and also confirmed that she obtained a monthly salary of 1,500,000 Iraqi Dinars, and that her work was continuing for the year 2013/2014. The leave would commence following a grant of a visa, a facility clearly intended to be flexible in the light of the uncertainty surrounding the application for a visa. The statement of opposition complains that the only evidence of the second applicant's employment consists of letters submitted which refer to single academic years 2012/2013 and 2013/2014, but lack an indication of future employment beyond that timeframe. No payslips or other documentation of an independent nature was offered to support the stated occupation. There was a concern that no permanency was indicated. It was said no contact details regarding the letters were furnished. The suggestion was made that the school could not be located on an internet search. None of this was verified on affidavit emanating from the decision-maker as relevant considerations to the decision made. Indeed, it is clear from the documents, translations of which were furnished to the court, that addresses and contact names were available on the face of the documents from two different sources.

22. A third issue raised concerns about the applicants' contention that they owned property in Iraq, which was offered as a further reason for their intended return home following the visit. The statement of opposition contends that no evidence was submitted supporting the assertion of property ownership. It was pointed out to the court that the letter of appeal from the solicitors did not mention any documents of title. The matter was not mentioned in the affidavit of Mr. O'Connor. It was pursued in submissions before the court as demonstrating the limited evidence of the proposal to return. While it is clear that the title documents were not referred to in the letter of appeal, nevertheless both letters from the applicants furnished as part of the application referred to the fact that they had land in respect of which they submitted land registry certification at a previous stage of the process. If this was an issue of importance to the decision-maker, and letters from the applicants clearly indicated their understanding that such certification had been sent, a letter seeking a further copy of the certification might have been sent as a matter of courtesy and as a matter of fairness if it was intended to base an adverse finding upon the absence of the document.

23. The attempts by the respondent to explain evidential shortcomings which led to the refusal underlines, in my view, the inadequacy of the reasons furnished to the applicants in the refusal. The court has considered the background and context of the decision made including the documentation submitted in the course of the appeal. The court is invited to conclude that the findings of the decision-maker on appeal were unreasonable or irrational. The threshold for unreasonableness as formulated by Henchy J. in *The State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 is a high one. He stated:-

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and commonsense. If it does, then the decision-maker should be held to have acted *ultra vires*; for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights and duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or commonsense in reaching his decision."

In determining whether the decision is unreasonable, the court must not determine the matter on the grounds that it is satisfied that on the facts as found it would have drawn different inferences or conclusions or, that the case against the decision made by the Minister was much stronger than the case for it. Furthermore, the court must consider the nature and extent of the discretion being exercised by the Minister in granting non-nationals liberty to enter the country on a limited visa.

24. The shortness of the reasons given render it difficult for the court to understand the basis for the decision and, therefore, to exercise its jurisdiction as to whether the determination was unreasonable within the meaning of the *Keegan* test. There is no evidence available from the decision-maker as to how or why the extensive evidence advanced on behalf of the applicants fell short of proof on the balance of probabilities that they would return home after their visit. Attempts to identify potential inadequacies that may have formed part of that decision highlight the lack of clarity in the reasons given and render it extremely difficult for the court to exercise its jurisdiction to determine whether the decision was unreasonable or irrational. In particular, it is not possible on the basis of the course of correspondence or the material submitted to ascertain from the course of dealing between the parties or the context in which the decision was made, what the shortcomings in proofs were and consequently, whether the conclusion reached in respect of the applicants was reasonable. I am, therefore, not satisfied that adequate reasons were furnished to the applicants in this case sufficient to enable the court to exercise its jurisdiction by way of judicial review. In making this determination, the court is not to be taken as condemning the use of a short form reason in such decisions as evidenced in the affidavit submitted by the respondent. The sheer volume of applications submitted for visas suggests that such an approach may well be prudent in most cases.

25. It is well established that the reasons given for a particular decision must be clear and cogent. They should give the applicants

such information as is necessary to enable them to consider whether they have a reasonable chance of appeal or judicially reviewing the decision. The decisions should enable the applicants to arm themselves for such a hearing or review and understand whether the decision-maker had directed his mind adequately to the issue which he had to consider or was obliged to consider, and also to enable the courts to review the decision. The respondent repeatedly emphasised that it was open to the applicants to reapply with additional evidence for a visa. However, in order to know how they might address any suggested deficiencies in their proofs, they would need to know how they fell short of establishing their case if they were to have any prospect of future success. In order to submit a further application, a more detailed explanation of the evidential shortfall would be required if the applicants were to have any prospect of establishing an intention to return home to the standard of probability required by the respondent. In that regard, the court should be circumspect about allowing material gaps in the decision to be filled by evidence or the submissions of counsel made on judicial review (see *Mulholland v. An Bord Pleanála (No.2)* [2006] 1 I.R. 453 and *R. v. Westminster City Council* [1996] 2 All. E.R. 302 *per* Hutchinson L.J. at pp. 309 and 312).

26. The consequences of a failure to give reasons to an applicant who had applied for a certificate of naturalisation and was entitled to reapply, notwithstanding an initial refusal, was considered by the Supreme Court in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59. Fennelly J. emphasised the importance for the applicant of knowing why the certificate had been refused for the framing of any future application:-

> "64. In the present case, the applicant points to the effective invitation to the appellant to "reapply for the grant of a certificate of naturalisation at any time". That statement might reasonably be read as implying that whatever reason the Minister had for refusing the certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope that a future application would be successful. While, therefore, the invitation is, to some extent, in ease of the appellant, it is impossible for the appellant to address the Minister's concern and thus to make an effective application when he is incomplete ignorance of the Minister's concerns.
>
> 65. More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review.
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> 66. In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been unable to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

I am satisfied that the same reasoning may be applied to the respondent's invitation to the applicants to reapply in this case. (See also *A.P. v. the Minister for Justice and Equality (No.2)* [2014] IEHC 241).

27. I am satisfied that though reasons were given, it is not possible to determine accurately what the reasons meant in the context of the particular case. It was not possible for the applicants to readily determine from the terse nature of the reasons or the materials submitted in the course of the application why it had been refused. Undoubtedly, there are cases in which a brief reason, which may even be described as formulaic may be adequate, in particular where a large number of persons apply, on individual facts, for the same relief, and the nature of the authority's consideration and the form of grant or refusal may be similar or identical. (*F.P. v. Minister for Justice* [2002] 1 I.R. 164). However, I do not consider this to be such a case because, as emphasised by the respondent, the very many applications for visas may involve widely differing facts and histories which require individual consideration. Many such decisions may adequately be conveyed in a short or terse expression of the reasons. However, in the circumstances of this case the decision was not so susceptible. The reasons given were inadequate for the purposes of judicial review and any further application for a visa by the applicants.

28. The court notes that in this case, a letter or phone call or email from the decision-maker's office indicating that a particular document, for example, concerning land certification was missing or that some further documentation concerning income would be of assistance might have avoided the unhappy chain of events which led to these proceedings and might, indeed, have addressed and resolved the respondent's concerns in respect of the applicants.

29. I am satisfied that the applicants have established that the decision of the respondent is fundamentally flawed and, therefore, grant an order of certiorari of the appeal decision.