Neutral Citation Number: [2011] IEHC 446

THE HIGH COURT

JUDICIAL REVIEW

2011 907 JR

BETWEEN

E. O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND Y. O.)

APPLICANT

AND

2011 908 JR

BETWEEN

E. O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND Y. O.)

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER,

THE MINISTER FOR JUSTICE AND EQUALITY,

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 30th day of November, 2011.

1. In each of these two separate but related judicial review proceedings, two motions have been brought. The respondents apply to have the proceedings as commenced dismissed, primarily upon the ground that the relief to be sought by way of an order of *certiorari* quashing the reports of the Refugee Applications Commissioner made under s.13 of the Refugee Act 1996 in each case is misconceived, unstateable and cannot succeed. This is because in each case a valid appeal was taken to the Refugee Appeals Tribunal before the judicial review proceeding was commenced and the appeal decisions have been given, so that the s. 13 Reports are no longer susceptible of judicial review, their decisions having been subsumed into or replaced by the appeal decisions.

2. The applicants on the other hand apply to amend the statement of grounds in each case in order to introduce reliefs and grounds directed at challenging the validity of those two Tribunal appeal decisions.

3. The background to the proceedings can be summarised as follows. The minor applicants are respectively the daughter (in case No. 907 J.R.) and son (in case No. 908 J.R.) of the mother and next friend. The mother is a Nigerian national who had made an unsuccessful asylum claim in the State. The daughter was born in the State in 2006 and the son in 2007. They are not Irish citizens. Although born in those years no asylum claims were made for them until 2011. In the appeals against the s. 13 Report recommendations, the mother was said to fear her children being returned to Nigeria because:

- She feared for their safety and welfare;

- The boy needed treatment for an eye complaint and she would not be able to avail of health services in Nigeria;

- She would not be able to support them;

- They would be exposed to general ethnic, religious and communal conflicts in Nigeria.

4. The s. 13 Reports were notified by letter of the 5th September, 2011, received on 8th September, 2011. They contained the finding that the asylum applications had not been made within a reasonable time after arrival in the State so that oral hearings on the appeals were excluded by virtue of s. 13(6)(c) of the Refugee Act 1996.

5. The notices of appeal were lodged on the 14th September, 2011. On the 29th September, 2011, the present judicial review proceedings were issued. The Tribunal decisions dated the 27th September, (in the case of the son) and the 28th September (in the case of the daughter) were notified by letters dated the 30th September, 2011.

6. It is to be noted that these were not cases in which there was any attempt to characterise the commencement of the two appeals to the Tribunal as being "without prejudice" or "holding appeals". The covering letters simply enclosed the notices and requested acknowledgment of receipt.

7. The issue as to the impact of an appeal to the Tribunal and a subsequent appeal decision upon the status of the s. 13 Report as an autonomous measure susceptible of judicial review has arisen in a number of judgments in this area and the difference between the arguments advanced on behalf of the parties on these motions has been as to which of two divergent lines of approach ought to be followed.

8. In *Rusu v. Refugee Applications Commissioner and Others* (Unreported, High Court, Hanna J. 26th May, 2006), it was held that judicial review did not lie once the appeal had been taken and determined. In that case the s. 13 Report had been received on 9th January, but the judicial review proceeding was not commenced until the 18th February – well outside the fourteen day time limit of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. In the meantime the Tribunal appeal decision (made without an oral hearing,) had been made on the 14th February and notified on the 21st February –a sequence not unlike that of the present case.

9. Hanna J. held that the fact that the applicant was unaware of the existence of the appeal decision when the judicial review application was initiated did not affect the validity of that decision. Hanna J. followed the approach adopted in a number of previous judgments including that of *Savin v. Minister for Justice, Equality and Law Reform* (Unreported, Smyth J, High Court, 7th May, 2002), in holding that "any rights arising from the decision of the Commissioner are extinguished and absorbed into a valid decision of the Tribunal". A valid decision of the Tribunal "ousts, replaces and supersedes that of the Commissioner". He held that the Commissioner's decision, thereby "ceased to exist".

10. Counsel for the applicant on the other hand urged the Court to follow the approach taken by Finlay Geoghegan J. in *Adan v. Minister for Justice, Equality and Law Reform and Others* [2007] I.E.H.C. 54.

11. In that case the Tribunal decision issued before any judicial review had been commenced, although after the appeal notice had been served, correspondence had been directed to the Commissioner asking that the s. 13 Report be withdrawn and the application re-examined by another officer because of complaints that the s. 11 interview had been conducted in breach of fair procedures. The judicial review application was commenced when that request was refused and leave was sought to apply to quash both the recommendation in the s. 13 Report and the appeal determination. Finlay Geoghegan J. considered the previous judgments on this issue as to the liability of the Commissioner's recommendation to *certiorari* in the circumstances, including the judgments of Hanna J. in *Rusu* and the other case law cited. She came to the conclusion, however, that notwithstanding the affirmation of the negative recommendation by the Tribunal "there remains an extant decision of the Commissioner which, as a matter of law, could be the subject of an order of *certiorari*".

12. The Court agrees with that approach and with the reasons given by Finlay Geoghegan J. for that conclusion. In particular it is notable that under the scheme of the Act of 1996, as it then stood, the definitive decision in the case of a refusal of refugee status was that made by the Minister under s. 17(1) of the Act. The "decisions" of either the Commissioner or the Tribunal were only definitive of the outcome of the asylum application in cases where the recommendation was positive. There, the Minister had no discretion to refuse the declaration when making a "decision" under section 17(1).

13. Where the recommendation was negative on the other hand, the Minister's decision under s. 17(1) was taken on the basis that he had before him for the purpose both the Tribunal decision and the section 13 Report. Notwithstanding the negative recommendations, he was entitled to grant the declaration of refugee status. Clearly, therefore, the provisions permitted of the possibility that the Minister would be influenced not to accept the negative recommendation by considerations addressed in the s. 13 Report, which were either not relied upon by the Tribunal member or treated differently in the appeal decision. Thus the s. 13 Report was not without potential effect or legal consequence, even when its recommendation is affirmed by the Tribunal.

14. Furthermore, because the s. 13 Report may, for example, contain adverse credibility findings upon which the Tribunal member does not find it necessary to comment – because, for example, the Tribunal relies upon the availability of state protection or internal relocation – it may have continuing detrimental consequences for an unsuccessful asylum seeker when, at a later stage, an application for subsidiary protection is being considered by the Minister.

15. There is also one further consideration which has an important bearing on the issue since 2007. All of the above cases were decided prior to the coming into effect of the changes in the asylum procedure brought about by the need to interpret the 1996 Act consistently with the provisions of Council Directive 2005/85/EC ("the Procedures Directive"). By virtue of the provisions contained in Annex 1 of that measure, it is now necessary to treat the s. 13 Report of the Commissioner not merely as a recommendation, but as the "first instance determination" of the asylum application by the "determining authority". Thus the first instance determination has a decisive character not previously obvious in the original scheme of the 1996 Act.

16. The position remains however, that the fact that the s. 13 Report retains an autonomous status susceptible in principle of judicial review, does not mean that the Court is obliged to permit the recommendation to be reviewed where an appeal is available, especially where it has been availed of and the appeal procedure has concluded. (See in that regard the judgment of the Court in *A.D. v Minister for Justice* (Unreported, Cooke J. 27 January 2009.)

17. As Finlay Geoghegan J. pointed out in the *Adan* judgement, even where substantial grounds were made out to justify the grant of leave to obtain judicial review of the Commissioners recommendations, the Court would not grant leave after the determination of the Tribunal appeal unless the applicant demonstrated the existence of "special circumstances" and no such special circumstances were found to exist in that case.

18. In the judgment of the Court a similar position obtains here. The judicial review proceeding was out of time when commenced albeit by approximately seven days. However, no "good and sufficient reason" has been advanced as to why time might be extended in this case, given that the applicants were legally represented throughout the relevant period and the notices of appeal to the Tribunal were issued within six days of receipt of the report.

19. More importantly, the eleven grounds proposed to be raised as the basis for the application for judicial review are not such as would persuade the Court to exercise its discretion in favour of allowing a judicial review application to proceed in addition to the remedy of the statutory appeal to the Tribunal. Most of the grounds are either related to matters which are manifestly more apt and convenient to be dealt with by the appeal before the Tribunal (even in the absence of an oral hearing); or are formulated as general assertions which identify no specific illegality or flaw; or are grounds which have no direct bearing upon the legality of the s. 13 Report.

20. Thus, for example, grounds 1 and 13 are based upon the proposition that the asylum application has not been determined "at first instance" by means of a procedure which provides the applicant with an effective remedy before a court or tribunal as required either by the Procedures Directive and/or Article 13 of the European Convention of Human Rights and/or the Charter of Fundamental Rights of the European Union. Even if it was accepted there was some legal basis for the argument there suggested, they are not arguments which could lead the Court to quash the s. 13 Reports. Even if the legal basis of the argument has some foundation it is something that goes to the validity of subsequent steps in the asylum procedure and not to the legality of the s. 13 Report.

21. The grounds identified at paragraphs 2 to 8, and 10, are all directed at the contents of the s. 13 Report and the adequacy or

quality of the evaluations made by the Commissioner. As such they are eminently apt to be dealt with in the statutory appeal.

22. Ground 11, asserts that "the principles of equivalence and effectiveness of European Union law provide that domestic time limits cannot begin to run against the applicants until such time as the respondents are respectful of same". The significance of this assertion or its relevance to the circumstances of the case is by no means clear. The notices of appeal to the Tribunal were lodged in time and no question of disrespect has arisen. As pointed out above, the judicial review application was out of time by approximately seven days but, as matters stand, no good and sufficient reason has been asserted on the part of the applicants as to why it might not have been extended.

23. For all of these reasons, the Court considers that the applications to dismiss brought by the respondents are well founded and should be granted. It follows that it is unnecessary to consider the motions to amend the proceedings. In any event, as counsel for the respondents has pointed out, it is questionable whether it is proper to permit such amendments if they are not consented to when they effectively involve the initiation of an entirely new proceeding in respect of a distinct decision against a separate respondent. The Court notes that while the Tribunal has been included as a proposed addressee of the draft amended statement of grounds, the notice of motion does not contain any application to join it as a new respondent in the proceeding. The suggested "amendments" do not constitute amendments of the claim made in the original statement of grounds as brought against the Commissioner.

24. The applications to amend are accordingly dismissed.