Neutral Citation Number: [2008] IEHC 138

THE HIGH COURT
JUDICIAL REVIEW

2006 No 1521 J.R.

BETWEEN

A. F.

APPLICANT

AND
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

Judgment delivered by Mr. Justice Herbert on the 8th May, 2008.

1. The first issue which requires to be addressed in this matter is whether the court should extend the time to enable this application to be made.

2. The applicant completed the ASY 1 form, seeking asylum in this State, on the 18th October, 2005. He completed the Application for Refugee Status Questionnaire on the 27th October, 2005. The interview conducted pursuant to the provisions of s. 11 of the Refugee Act 1996, (as amended) took place on the 11th January, 2006, and on the 10th February, 2006, due to the intervening indisposition of the applicant. The Report made pursuant to the provisions of s. 13(1) of the Refugee Act 1996, (as amended), is dated the 28th February, 2006, even though it refers to a letter which was not received by the Refugee Legal Service, which then represented the applicant, until the 6th March, 2006, and was not received by the Office of the Refugee Applications Commissioner until the 7th March, 2006. However, the Recommendation itself, which completes the document, is dated the 29th March, 2006.

3. By letter dated 9th June, 2006, the applicant was advised of the result and informed that if he wished to appeal to the Refugee Appeals Tribunal he must do so within fifteen working days from the sending of the letter. The applicant accepts that he received this letter on the 12th June, 2006. The notice of motion seeking leave of this Court to apply for judicial review was filed in the Central Office of the High Court on the 20th December, 2006, six months and eight days outside the period of fourteen days, commencing on the date of notification of the decision of the Refugee Applications Commissioner, limited by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. It is further provided by that subsection that this Court may only extend the time if it is satisfied that there is good and sufficient reason for so doing.

4. In *"G.K." v The Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 81, Finnegan J. set out a number of matters to which this Court should have regard in deciding whether or not to exercise its discretion to extend the time. These matters are: the extent of the delay and the blameworthiness of the applicant, and additionally or alternatively, her lawyers, the reasons explaining and excusing the delay set out on affidavit, the strength of the application, the complexity of the legislation involved, whether language issues arise, whether the rights of any third party are affected, the evident legislative policy and any other relevant considerations.

5. The legislative policy is clearly indicated by the very brief time allowed by the subsection to an applicant to seek leave of this Court to apply for judicial review. In this case there has undoubtedly been very great delay on the part of the applicant. In the Questionnaire, the applicant stated that his first language was Kurdish, but he could also speak Farsi and a " bit of English". He stated that he was in his second year at University where he was studying mathematics, when he left Iran. I find that there is nothing in the papers submitted to this Court which would indicate that language was a problem in this case. I am also satisfied that no complex legislation was involved in this matter, nor were the rights of any third party affected.

6. Having read the s. 13(1) Report and Recommendation, which the applicant now seeks leave to impugn, the Statement Required to Ground Application for Judicial Review dated 19th December, 2006, the Verifying Affidavit of the applicant sworn on the 19th December, 2006, the written submission on behalf of the applicant filed on the 25th January, 2008, and that of the respondents filed on the 1st February, 2008, I reached a *prima facie* conclusion that some at least of the grounds advanced by the applicant in the Statement of Grounds appeared reasonable, arguable and weighty.

7. In a supplemental affidavit sworn by the applicant on the 30th January, 2008, the applicant advanced the following reasons for the delay in bringing this application:-

> "3. I was informed of a negative recommendation of the Refugee Applications Commissioner dated the 29th March, 2006, by letter dated 9th June, 2006, received by me on or about the 12th June, 2006.
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> 4. In May, 2006, I attended the Refugee Legal Service and instructed them to formulate an appeal to the Refugee Appeals Tribunal in relation to my being refused a declaration of refugee status by the Refugee Applications Commissioner. This appeal was prepared and submitted. I was not advised by the Refugee Legal Service of the possibility of challenging the decision of the Refugee Applications Commissioner by way of judicial review and understood that the only option available to me was to proceed by way of an appeal. A hearing was arranged for me before the Refugee Appeals Tribunal and was scheduled to take place on the 15th August, 2006, however, due to my mental health at this time, I was unable to attend this hearing. In this regard I beg to refer to a letter dated the 10th August, 2006, from Stephen D. Collins of the Refugee Legal Service to the Refugee Appeals Tribunal and to an attendance note from Mary Bunn of the Refugee Legal Service in relation to my situation at that time, upon which pinned together and marked with the letters and number "AF 1" I have signed my name prior to the swearing hereof.
>
> 5. In early September, 2006, I made an appointment to see my current solicitor, Brian Burns. After meeting with Mr. Burns, he requested a copy of my file from the Refugee Legal Service in order to assist me in relation to my application. There was some delay in delivering my file to my current solicitor and in fact my file was only received by him on or about the 10th October, 2006, after he wrote on two occasions seeking it. I was psychologically very unwell during this period and I failed to attend at several appointments with Brian Burns during October, 2006. I attribute this failure to attend to my general fear of persons in authority and an unwillingness on my part to face up to my position. In mid-December, 2006, I contacted Brian Burns again and he arranged for a consultation with him and counsel which took place in the Four Courts on Thursday 14th December, 2006. At this time the option of judicial review and how it would affect my case was fully explained to me and I formed the opinion that this remedy would be an advantageous one for me given the failure by the Commissioner to properly consider my case and I instructed Brian Burns to prepare the necessary papers.

> 6. As a consequence of the torture which I endured whilst imprisoned in Iran I have been under stress and psychological disorder. This has persisted throughout the asylum process and has regularly rendered incapable of thinking rationally, incapable of coming to terms with my situation, incapable of attending for formal interviews/consultations with persons in authority and incapable of seeking legal advice or having faith of persons in authority. In March 2007, I became distrustful of SPIRASI and no longer attend them. In this regard I beg to refer to a letter dated 9th March, 2007, from SPIRASI upon which, marked with the letters and number "AF 2" I have signed my name prior to the swearing hereof."

8. A medical report dated the 11th August, 2006, was sent by Dr. Ciara McMeel, a general medical practitioner who had been consulted by the applicant, to the Refugee Appeals Tribunal. She concluded that the applicant was psychologically distressed and she stated that she was very concerned for his mental and physical health for the reasons which she set out in this report.

9. As appears from the applicant's affidavit, his present solicitors, Burns Kelly Corrigan, Solicitors, by a letter dated 5th October, 2006, reminded the Refugee Legal Service that they had requested a copy of the applicant's file by letter dated 15th September, 2006, and asked that it be furnished to them as a matter of urgency. Counsel for the applicant confirmed that the documents sought were received on the 10th October, 2006, but stated that the Refugee Legal Service was insisting that it had not received any letter from Burns Kelly Corrigan, dated 15th September, 2006, requesting a copy of the applicant's file.

10. The medical records of the Centre for the Care of Survivors of Torture relating to the applicant, which were exhibited in his Supplemental Affidavit, indicate that during October, 2006, the applicant was learning to control his stress levels which had become very severe during August of that year. However, starting in the first week in November, 2006, the applicant suffered a serious reversal of his condition. On 6th November, 2006, he claims that he was assaulted and beaten by members of An Garda Síochána and suffered injury. On the 13th November, 2006, he complained to the therapist at the Centre for the Care of Survivors of Torture that he had "overheard a group talking about him in an office". This led him to believe that the Centre for the Care of Survivors of Torture had broken confidentiality in relation to his personal affairs. At the end of November, 2006, as a result of an ongoing dispute with the Refugee Integration Authority and as a result of a series of disputes with the operators of a number of Hostels who claimed, he said, that his behaviour was threatening and abusive, he was no longer welcome in any of the Hostels where he normally resided and became essentially homeless. No issue was taken by the respondents with the averment that it was not until 14th December, 2006, that the applicant became aware of the option of seeking judicial review of the decision of the Refugee Applications Commissioner. Counsel for the respondents informed the court that the respondents were not opposing an extension of time to the applicant, if the court was disposed to granting it.

11. I was satisfied, that in these circumstances there was a good and sufficient reason for extending the period to enable this application to be made. Though the failure to progress any form of application from a date prior to 11th August, 2006, onwards was almost exclusively due to matters relating to the applicant himself, I was satisfied on the evidence before the court that these were matters which were essentially beyond his control and were a product of psychological distress, stress and depression due to illness. I therefore made an order pursuant to the provisions of s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, granting the extension of time sought by the applicant.

12. It is provided by s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, that leave to seek judicial review of a Recommendation of the Refugee Applications Commissioner made under s. 13(1) of the Refugee Act, 1996 (as amended) should not be granted unless this Court was satisfied that there were substantial grounds for contending that the Recommendation was invalid or ought to be quashed. In *Re: The Illegal Immigrants (Trafficking) Bill 1999,* [2000] 2 I.R. 360 at 394/5, Keane C.J. held that, "substantial grounds" meant, grounds which were reasonable, arguable and weighty and not trivial or tenuous.

13. The court is satisfied that there are substantial grounds for contending, that even if it was reasonably and rationally open to the Authorised Officer of the Refugee Applications Commissioner to find, on the evidence before him, that the applicant was not credible, there was still material before him, which he accepted, on which the Authorised Officer should have concluded that the applicant was a "refugee" within the provisions of s. 2 of the Refugee Act 1996, (as amended), but for the fact that he failed to take that material into account. This material was as follows:-

> "1. The Authorised Officer of the Refugee Applications Commissioner accepted that the applicant was an Iranian-Kurd.
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> 2. The Authorised Officer of the Refugee Applications Commissioner accepted that the applicant was generally acquainted with the Komala Party Manifesto and was aware of significant developments within that party.
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> 3. The Authorised Officer of the Refugee Applications Commissioner cited extracts from the United Kingdom Home Office Report of October, 2005, on the Islamic Republic of Iran. At para. 4.2 of his decision the Authorised Officer referred to para. 6.215 of that Report. That paragraph includes material drawn from a March, 2003, Amnesty International Report which the applicant alleges the Authorised Officer of the Refugee Applications Commissioner failed to take into account."

14. In the course of the Section 11 interview, at qq. 67 to 74 inclusive the applicant was asked how he had travelled to this State. He stated that he travelled to Turkey across the mountains. He was four days in Turkey, including two nights in Istanbul. Then smugglers put him on a lorry. There was one change and when he opened his eyes he found himself in Ireland. The smuggler advised him to come to Ireland. His uncle paid for the trip from Iran to Turkey and his family sent him US $6,000 through and agent, which he then paid to the smuggler for the trip from Turkey to this State. He had never claimed asylum before he arrived in this State."

15. At q. 26A in the application for Refugee Status Questionnaire, the applicant gave particulars of his travel from Iran to Turkey. In reply to questions 31A to 42A inclusive, he gave particulars of his travel from Turkey to this State. He said the smugglers put him in a truck or lorry in Turkey and smuggled him into this State. In response to the question "which countries did you travel through?" the applicant answered "Iran – Turkey – Ireland".

16. It was submitted on behalf of the applicant that he had provided a reasonable explanation substantiating his claim that this State was the first "safe country" in which he had arrived since departing from Iran. He had been hidden in a truck or lorry from the time he left Istanbul to his arrival in this State which was a destination chosen not by him but by the smugglers to whom he paid his money. It was submitted by Counsel for the applicant that the Authorised Officer of the Refugee Applications Commissioner did not put to the applicant that he should have sought asylum in Turkey or in one of the several other countries, including States of the European Union, through which the truck or lorry had to travel in order to reach this State. Counsel for the applicant submitted that having regard to the mandatory provisions of s. 11B(b) of the Refugee Act 1996, (as amended), this was a very material matter affecting the applicant and fair procedures required that it be put to him. Counsel for the applicant relied on the decision of White J. in *Nguedjdo v Refugee Applications Commissioner* (Unreported, High Court, 23rd July, 2003) and *Idiakheua v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* (Unreported, High Court, Clarke J., 10th May, 2005). It was further submitted by

counsel for the applicant that if the Authorised Officer of the Refugee Applications Commissioner was referring to Turkey and, this was by no means clear, he gave no reason for his conclusion that it was a "safe country" in which an Iranian-Kurd could seek asylum nor was this opinion and the reasons for it put to the applicant.

17. The court is satisfied that there are substantial grounds for contending that the conclusion of the Authorised Officer of the Refugee Applications Commissioner, that this State was not the first "safe country" in which the applicant arrived since leaving Iran is invalid as based on unfair procedures.

18. The applicant sought asylum in this State in October, 2005. He completed the ASY 1 form on the 18th October, 2005 and the Questionnaire on 27th October, 2005. Due to the indisposition of the applicant the Section 11 Interview was conducted in two parts, on the 11th January, 2006 and on the 10th February, 2006. The following medical report from Dr. Ciara McMeel, dated the 13th January, 2006, was forwarded to the Refugee Applications Commissioner and is stamped received by the Office of the Commissioner on 16th January, 2006:-

> "Re: Mr. A. F., 24 Lower Camden Street, Dublin 2.
>
> DOB: 12/03/1977,
>
> PCN: GMS:
>
> To whom it may concern
>
> A. attended for his oral hearing with you at the ORAC. He had had difficulty sleeping the two nights previous to the arranged interview. He had a lot of jaw pain from the site of his previous jaw fracture and he was worrying about his family in Iran as he has heard that they are being questioned about him. The worry, the loss of sleep and the pain left A. feeling that he was not fit for his oral hearing. I agree. I am happy that you have agreed to rearrange this appointment. I have given him painkillers and sleeping tablets to take to prevent this recurring."

19. In addition the Authorised Officer of the Refugee Applications Commissioner had before him the following medical report from Dr. John Good of the Centre for the Care of Survivors of the Torture, dated 16th January, 2006:-

> "Mr. A. F., an Iranian national attended at this facility on 29th November, 2005. He has a second appointment today.
>
> In letters to his GP, Dr. Austin O'Carroll and to his Social Worker at St. James' Hospital, Ms. Jemma Halligan on 30th November, last, I indicated that I had concerns for Mr. F.'s ability to cope with the traumatic recall of his imprisonment and interrogation under torture. It would seem that subsequently he was overwhelmed by such recall at his ORAC interview and as a consequence was unable to engage in further dialogue.
>
> I would respectfully request the Commissioner and his duly Authorised Officer, to allow Mr. F. the privilege of some extra time, to attend at Spirasi CCST for counselling service, in order to assist him to rehabilitate, and also to engage in further and necessary dialogue with the relevant Authorities."

20. It was submitted by Counsel for the applicant that the Authorised Officer of the Refugee Applications Commissioner did not take the mental condition of the applicant sufficiently into account when assessing and weighing his evidence and concluding that his claims were incongruous, elements of his story lacked veracity, that his story was generally implausible and that he was not credible. I inferred that the gravamen of the complaint was that the Authorised Officer of the Refugee Applications Commissioner, in considering the subjective and objective elements in the applicant's claim that he had a well-founded fear of being persecuted in Iran, failed to apply the provisions of paras. 207 to 212 inclusive of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which deals with asylum claims by mentally or emotionally disturbed applicants. Subsequent Clinical Notes made by Therapists at the Centre for the Care of Survivors of Torture and the medical reports of Dr. Ciara McMeel (practice of Dr. Austin O'Carroll), dated the 11th August, 2006, – none of which were before the Authorised Officer of the Refugee Applications Commissioner and are therefore irrelevant to his decision and this argument, – show that the concerns expressed in the medical reports which were before him and to which I have already referred were not misplaced.

21. The court is satisfied that there are substantial grounds for contending that the whole approach of Authorised Officer of the Refugee Applications Commissioner in considering this applicant's claim for asylum in this State did not accord with fair procedures and was not in accord with the provisions of paras. 207 to 212 inclusive of the UNHCR Handbook which he should have applied.

22. It was submitted by Counsel for the applicant, that the only inference capable of being drawn from a number of findings made by the Authorised Officer of the Refugee Applications Commissioner is that having accepted the letter of 1st March, 2006, from the Komala Party representative in Sweden, as apparently (though not conclusively), establishing a link between the applicant and that Party, he then completely disregarded this most material evidence in reaching the following findings and conclusions all adverse to the applicant:-

> "1. That the applicant had never encountered serious problems at the hands of the Authorities before he left Iran in September, 2005, and that he was never subjected to ill-treatment amounting to persecution.
>
> 2. That the applicant had no political profile and had no involvement with the Peshmerga militia at any level.
>
> 3. That the applicant did not enjoy an association with the Komala Peshmerga to any significant degree.
>
> 4. The applicant had not submitted any identification documents and/or documents to establish his membership of the Komala Party."

23. Counsel for the applicant submitted that these were material matters and were the basis upon which the Authorised Officer of the Refugee Applications Commissioner concluded that the applicant's story was not plausible and that he was not credible and so were central to his decision. I am quite satisfied that there are substantial grounds for contending that this is so. Counsel for the applicant submitted that the Authorised Officer of the Refugee Applications Commissioner had a duty to take into account and to carefully and properly evaluate all relevant information before him. Reference was made by counsel to a decision of this Court which I believe was

the decision of Clarke J. *in Kouaype v The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 9th November, 2005). The court is satisfied that there are substantial grounds for contending that the decision of the Authorised Officer of the Refugee Applications Commissioner is invalid by reason of a manifest failure on his part to take into account relevant and material information.

24. Counsel for the respondents referred to the decision of the Supreme Court, in *Stefan v The Minister for Justice, Equality and Law Reform and Others* (Unreported, Supreme Court, 13th November, 2001), and cited the following passage of the judgment of the Court delivered by Denham J.:-

> "*Certiorari* may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of *certiorari* may be granted the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances matters, including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted, the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

25. Borrowing the phrase of O'Leary J. in *Kayode v The Refugee Applications Commissioner* (Unreported, High Court, 25th April 2005), Counsel for the respondents submitted that, "the points raised by the applicant are, by and large, matters relating to the quality of the decision rather than the defective application of legal principles". Counsel for the respondent also referred to the decision of Feeney J. in *Akpomudjere v The Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 1st February, 2007), and the decision of Birmingham J. in *Chukwuemeka v The Minister for Justice, Equality and Law Reform and The Refugee Applications Commissioner* (Unreported, High Court, 7th October, 2007). Counsel for the respondents submitted that should leave be granted to seek judicial review the Court hearing the application for judicial review, would, in the exercise of its discretion, refuse to grant relief by way of judicial review and would leave the applicant to continue with his alternative remedy - the oral hearing before the Refugee Appeals Tribunal.

26. There might be merit in this submission if the only ground of application was that relating to the alleged failure of the Authorised Officer of the Refugee Applications Commissioner to take into account the letter of the 1st March, 2006, in making the findings and reaching the conclusions which I have just indicated. However, in all the circumstances of this application, the court finds that there are substantial grounds for contending, particularly having regard to the provisions of Section 11A(3) and s. 16(A) of the Refugee Act 1996, (as amended), that it would be a denial of the applicant's entitlement to a primary decision in accordance with fair procedures to refuse judicial review and, no matter how fair the hearing might be before the Refugee Appeals Tribunal, it could not cure an unfair hearing before the Refugee Applications Commissioner and the applicant was entitled to both. (See *Stefan v The Minister for Justice, Equality and Law Reform and Others,* (above cited, per Denham J. p. 17).

27. Referring to the decision of Barron J. in *McGoldrick v An Bord Pleanála* [1997] 1 I.R. 497 at 509, where the learned High Court judge, (as he then was), held that:-

> "The true question is which is the more appropriate remedy in the context of common sense, the ability to deal with the questions raised and the principles of fairness, provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind."

28. Counsel for the respondents submitted that the applicant, in the instant case, had gone too far down the road in relation to the appeal to the Refugee Appeals Tribunal and should be considered to be estopped from changing his mind. I do not consider that the service of a notice of appeal to the Refugee Appeals Tribunal and the fixing of a date for the hearing of oral evidence before the Member of the Refugee Appeals Tribunal could reasonably or justly be considered as sufficient to estop the applicant from now seeking the alternative remedy of judicial review, while retaining the option of prosecuting his appeal before the Refugee Appeals Tribunal should his application to this Court prove unsuccessful. The situation might well be different had an oral hearing taken place before the Refugee Appeals Tribunal or, even if the appeal had been opened to the Member of the Refugee Appeals Tribunal. In the instant case, neither of these situations occurred by reason of the indisposition of the applicant, which in the evidence, I am satsifed was genuine. In *Stefan v The Minister for Justice, Equality and Law Reform and Others* (above cited), Denham J. at p. 15 held as follows:-

> "The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal has been lodged but had not been opened. It is therefore a situation to be distinguished from that in *The State (Roche) v. Delap* [1980] I.R. 170.

29. In this case the appeal is pending. It is for the court to determine in the circumstances whether judicial review is an appropriate remedy. The presence of the pending appeal is not a bar to the court exercising its discretion. It is a factor to be considered. It is a matter of considering the requirements of justice."

30. The court will therefore give leave to the applicant to seek judicial review on the foregoing grounds.