THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1110 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED) AND IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED) AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

K A

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM, ATTORNEY GENERAL, IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 21st day of December 2012

1. This is an application for judicial review of a deportation order. The notice of motion for leave to seek judicial review issued on 4th August 2010, seeking a variety of reliefs relative to the deportation order, a decision refusing subsidiary protection and a decision refusing the applicant refugee status. Leave was granted by Clark J. on 19th January 2012, in the following terms:

> "The decision of the first named respondent to make a deportation order against the applicant was unreasonable in that it was based on the mistaken recommendation to the Minister that the Refugee Appeals Tribunal had found that the applicant was not of the Ahmadi faith."

The reliefs relative to subsidiary protection and refugee status were not pursued. It would appear that leave was not granted to do so.

The first issue to be decided is whether the ground in respect of which leave to seek judicial review was granted is comprised in the grounds as originally formulated on 8th August 2010. The respondents argue that the 'leave ground' is a new ground and consequently the applicant will require an extension of time to seek relief because s. 5 of the Illegal Immigrants (Trafficking) Act 2000, requires challenges to deportation orders (*inter alia*) to be brought within fourteen days of the date of the notification of the order. Section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 provides:

> "(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall-
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> (a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and
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> (b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

2. The version of O. 84. r. 20(3) of the Rules of the Superior Courts applicable when leave was granted was as follows:

> "The Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit."

What happened at the Leave Stage?

3. The only formal record of the leave application is the perfected order of the court dated 6th March 2012. In written submissions to this Court, signed by counsel for the respondent the following account of the leave application is set out:

> "After a brief hearing, Clark J. indicated that leave would be granted on grounds to be formulated by the court. This was done on the explicit basis that the respondents were entitled to raise the issue of delay in raising the ground upon which leave was to be granted, at the hearing of the substantive action."

Counsel for the applicant did not question the accuracy of this account. On this version of events, it appears that the court, in accordance with O. 84, r. 20(3) (as then formulated), allowed an amendment of the applicant's proposed statement grounding application for judicial review, either by specifying a different ground or an additional ground or otherwise subject to the entitlement of the respondents to raise the question of delay at the hearing of the action.

4. It seems to me that the issue of delay in raising the ground in respect of which leave was granted only arises if it is a new ground, or in the words of O. 84, r. 20(3), an "additional ground".

5. In *S.M. v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 3rd May 2005), McCracken J. considered how far s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies in respect of an application to amend grounds in judicial review.

The learned Supreme Court judge referred to the decision of Kelly J. in *Ni Éilí v. The Environmental Protection Agency & Ors*. [1997] 2 ILRM 458, which involved an application to extend grounds beyond those identified in a grant of leave where the impugned decision was one protected by statutory provisions requiring any challenge to be brought within a fixed period. At p. 464, Kelly J. said the following:

> "It cannot be denied but that the amendments sought by the applicant amounts to an additional and entirely new case. The new grounds are very different to those already advanced. They raise, in effect, a new cause of action. Can the applicant be permitted to do this by way of an amendment to her existing proceedings? In my view, she cannot. To allow such a course would in my opinion, run counter to the will of Parliament as expressed in s. 85(8) of the Act. All statutory construction has as its object the discernment of the intention of the legislature. What is the object of s. 85(8)? It seems to me that it is (a) to require that proceedings which question the validity of a decision of the respondent be instituted at an early date to ensure that uncertainty about the decision may be disposed of one way or the other in a timeous fashion; and (b) to make the beneficiary of such decision and the respondent aware that the validity of such a decision is being questioned and the basis for such questioning so that they may prepare their response to such proceedings expeditiously. To permit of an amendment sought here would run counter to the legislature's intent in this regard."

6. McCracken J., having quoted from the judgment of Kelly J., then said:

"The next point to be considered is whether either the amendments to the reliefs sought or the amendments of the grounds amounted to the making of an additional and entirely new case..... The amendment sought at D2 and F1 and the amendments to the grounds, therefore, as they are in fact making a new case or new cases, they are prima facie out of time under s. 5 and the court will have to be satisfied that there is good and sufficient reason for extending the periods in which such claims may be made."

7. Following the approach of McCracken J. in *S.M. v. The Minister for Justice, Equality and Law Reform*, I now compare the case originally pleaded with the case in respect of which leave was granted to see if it is a new ground and if so whether time should be extended to permit the ground to be pursued.

The Original Statement of Grounds
8. The original statement of grounds sought "an order of *certiorari* . . . quashing the decision to make a deportation order in respect of the applicant ...".

9. In addition to seeking to challenge the deportation order, the applicant also sought to challenge a decision on subsidiary protection and a decision on refugee status, though leave was not granted to challenge these decisions. Section E of the original statement grounding application for judicial review is entitled *'Grounds upon which Relief is Sought'*. Four grounds are set out. The first ground asserts that the applicant's claim for refugee status was not determined by a procedure compliant with the requirements of Council Directive 2005/85/EC by reason of the absence of an effective remedy against the first instance determination of his application for asylum. This defect therefore deprived the respondent of jurisdiction to refuse the applicant a declaration of refugee status and/or to make a decision on subsidiary protection and/or to make a deportation order. The ground in respect of which leave was granted by Clark J. is not related in any way to this ground.

10. The second ground in the original pleading is as follows: "... the respondent erred in law in:

> (i) Failing to consider the interference with the private life of the Applicant in a reasonable manner;
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> (ii) Failing to make a proportionate decision;
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> (iii) Failing to make any reasoned and proportionate determination on refoulement. Undue reliance was placed on the previous unlawful asylum decisions made in respect of the applicant. In the alternative, any imputed refoulement findings were unreasoned and/or irrational."

11. In support of ground 2, paragraph 10 of the applicant's affidavit sworn on 3rd August 2010, says:

> "I say the decisions of the Minister were vitiated by the failure to provide me with a lawful and effective remedy in respect of my asylum application. I further say finding that refoulement is not an issue was unlawfully arrived at. Further, the Minister failed to consider the impact my deportation will have on my private life."

12. It seems to me that ground 2(iii) is broad enough to embrace the ground in respect of which leave was granted. Section 3(1) of the Immigration Act 1999, provides that the Minister may require a non-national to leave the State, provided the prohibition of refoulement contained in s. 5 of the Refugee Act 1996, is not violated. The deportation order, signed personally by the Minister for Justice and Law Reform on 13th July 2010, expressly provides that the provisions of the Refugee Act 1996, prohibiting refoulement were complied with in the case of the applicant. This finding by the Minister is based upon an examination of the applicant's file under s. 3 of the Immigration Act 1999. That examination is comprised in a document exhibited before the court and stamped with the words *"Approved by Minister"*. The text of the examination, at p. 4, states that "... the Refugee Appeals Tribunal found major credibility issues with the applicant's claim that he is an Ahmadi". At p. 22 of the same examination the author says:

> "Credibility issues were raised by the Tribunal Member regarding the applicant's claim that he is a member of the Ahmadi community and I have considered these matters above. Having considered all the facts of this case, I am of the opinion that repatriating Mr. Ahmad to Pakistan is not contrary to s. 5 of the Refugee Act 1996, as amended, in this instance."

Another official, in handwriting, on the opening page of the examination document says:

> "Having considered all the facts and the circumstances of the case, I agree with Ms. Ryan's recommendation."

Beneath this, another official at Assistant Principal level in the Department of Justice, says:

> "Having considered all the papers on file in this case, I recommend that the Minister makes a deportation order in respect of Mr. Ahmad. The Tribunal Member (RAT) raised credibility issues regarding the applicant's claim that he is member of the Ahmadi community and I have taken these into account in consideration under s. 5 of the Refugee Act 1996."

Thus, it was represented by three of the Minister's officials that the Refugee Appeals Tribunal had decided that the applicant was not a member of the Ahmadi community.

The original pleading at para. 2(iii) is to be read bearing in mind the strong assertion by the applicant that he is member of the Ahmadi community and the equally strong assertions by the Minster's officials that the Tribunal found that he was not a member of the Ahmadi community which latter assertions were made for the purpose of recommending to the Minster that he make a deportation order, something he could only do if the principle of non refoulement was respected.

14. The original pleading seeks to attack the deportation order because of the manner in which refoulement was addressed. The rule against refoulement could only be said to have been respected if the Minister had decided that the applicant was not a member of the Ahmadi community. If the applicant was of the Ahmadi faith, returning him to Pakistan would deliver him into the hands of his persecutors (assuming the rest of his story is credible) and thereby breach the non refoulement rule. Thus, the pleading may be interpreted as embracing a complaint that the finding of non-refoulement could only have been made if the Minister and his officials mistakenly found that the RAT had said that the applicant was not a member of the Ahmadi community. In this sense, the 'leave ground' is embraced by the original pleading.

15. The second element of the original pleading was the plea that the Minister and his officials placed undue reliance on previous unlawful asylum decisions made in respect of the applicant. The ground permitted by Clark J. is directed at the mischaracterisation by the Minister and his officials of the findings of the RAT on the question of whether the applicant was a member of the Ahmadi community. It does not strain language to say that the 'leave ground' is embraced by the original plea that the Minister and his officials placed undue reliance on the decision of the RAT. I understand the term "undue" to mean unwarranted or inappropriate. Where the applicant pleaded that the Minister and his officials placed undue reliance on the earlier asylum decisions, that is capable of meaning that the Minister and his officials placed an unwarranted reliance on those decisions in the sense that they misconstrued or mischaractarised them. In my view, this pleading is also comprised in the 'leave ground'.

16. I also find that the final alternative plea at para. 2(iii) of the original pleading (where it is said that any imputed refoulement findings were unreasoned and/or irrational), is also capable of being embraced by the ground fashioned by Clark J.

17. In view of my conclusion that the ground expressed in the order granting leave is not a new ground and is embraced by the matters originally pleaded, I refuse the respondents' application to set aside the grant of leave and conclude that the proceedings have been instituted timeously.

Was the Decision of the RAT misrepresented by the Minister and his officials?
18. Turning to the substantive issue in the case, the Order granting leave presents two questions for decision. 1) Was the deportation order made by the Minister based on a mistaken assertion by officials to the Minister that the Refugee Appeals Tribunal had found that the applicant was not of the Ahmadi faith? 2) If so, was the Minister's decision to deport the applicant unreasonable?

19. The first question presented is a simple question of fact. In the earlier part of this judgment, I set out quotations from the Minister's officials who said that the Refugee Appeals Tribunal found that the applicant was not a member of the Ahmadi faith or the Ahmadi community.

20. Section 3 of the Tribunal's decision is entitled *'Summary of the Applicant's Claim'* and records the applicant's assertion that he is an Ahmadi Muslim and that all of his family were similarly Ahmadi Muslims. The discrimination suffered by members of this community is described and the particular persecution suffered by the applicant because of his Ahmadi faith was also described.

21. At section 4 of the Tribunal's decision, the Tribunal notes that it was asked to consider a letter confirming that the applicant was a member of the Ahmadi community. The Refugee Applications Commissioner made a submission to the Refugee Appeals Tribunal which sought to cast doubt on the idea that the applicant was a member of the Ahmadi faith by saying that although the applicant said he was not only a member of the faith but also an active preacher of the Ahmadi faith, he did not know that there had been a split within the Ahmadi religion. In section 6 of the Tribunal's report, the author records that the applicant "claims to have been persecuted in Pakistan on account of the fact that he was a member of the Admadi (sic) faith. His main problem seemed to relate to the fact that he was an active preacher and there was the charge of blasphemy pending against him which would result in the death penalty. Therefore, it is central to this man's appeal to be able to show that he was a prominent member of the Ahmadi community". From this quoted text, one can discern that the concern of the Tribunal was not as to whether the applicant was a member of the Ahmadi faith, but whether he was a prominent member of that faith and a preacher of that faith.

22. The Tribunal refers to country of origin information which describes two sects within the Ahmadi faith. The differences between them are significant but do not need to be set out in this judgment. The applicant claimed that there was only one sect and the RAT says as follows:

> "[The applicant] is putting forward the case that he was a preacher since the year 2000 and was a member of the Ahmadiyya Movement since birth. Despite that, he claims that there is only one sect within the Ahmadiyya Movement. This appears to be incorrect. This contradiction is inconsistent with this man's claim that, in fact, he was a preacher on behalf of the Ahmadi faith. The core of his claim relates to his assertion that he was a preacher and would face persecution in Pakistan on account of his preaching activities."

I interpret this finding by the Refugee Appeals Tribunal as relating only to that part of the applicant's claim that he was a preacher. It is a finding that the Tribunal does not believe that he was a preacher. It is not a finding that the Tribunal does not believe that he was a member of the Ahmadi faith.

24. In the next part of the Tribunal's assessment, reference is made to detailed questions put to the applicant during interview [conducted by ORAC], the answers given by the applicant are recorded in the Refugee Appeal Tribunal's decision and the Tribunal comments on the answers given as follows:

> "In assessing the answers in question, I feel that they are, to say the least, vague and would not be consistent with the perceived knowledge of somebody who claims to be a preacher of the Ahmadi faith. I feel that he should have been more definite in his answers. Again, this man claims to have been a preacher since the year 2001. If, in fact, that was the case, then I think he would have been more definite in his answers that were put to him than that I have already quoted. I do not accept he was a preacher of the Ahmadi faith. This is a significant item of credibility because he claims that all of his problems in Pakistan related to his contention that he was a preacher and would face the death penalty if he was to return to Pakistan on account of his activities as a preacher."

25. In this passage, the Tribunal clearly disbelieved the applicant's claim that he is a preacher. No part of the decision I have just quoted suggests disbelief that the applicant is a member of the Ahmadi community or Ahmadi faith.

26. In view of the foregoing, I find that the Minister's officials erroneously concluded and so represented to the Minister that the Refugee Appeals Tribunal had disbelieved the applicant as to his membership of the Ahmadi community and faith.

Is the Minister's Deportation Decision unreasonable ?
As noted by the Refugee Appeals Tribunal, the applicant's fear of persecution or harm stems from both general and specific circumstances. The applicant says that members of the Ahmadi faith suffer disadvantages in Pakistan. Country of origin information in support of this claim was submitted. In addition, the applicant claimed that he was a preacher of the faith and that he converted two persons to the Ahmadi Muslim faith and that he was arrested and charged with blasphemy. The applicant says the death penalty is a potential outcome of a blasphemy charge.

The Minister was told by his officials that the Refugee Appeals Tribunal had decided that the applicant was not a member of the Ahmadi faith. Given that the Minister is prohibited from making a deportation order unless he is satisfied that he is not sending a person into harm's way, it may be said that the Minister was persuaded to make a deportation order because of the finding that the applicant was not a member of the Ahmadi community and therefore would not suffer any of the disadvantages members of that community apparently suffer in Pakistan. In circumstances where no such finding was ever made by the Refugee Appeals Tribunal, the rationality of the decision to make a deportation order disintegrates and I grant an order quashing the deportation order in suit.