THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 299 J.R.]

BETWEEN

M. G. O. L. (SUING BY HER MOTHER AND NEXT FRIEND J. N.)

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 4th day of April, 2017

Issues

1. The applicant herein, who was born in 2009, in Ireland, acting through her mother and next friend, secured leave by order of 18th July, 2016 to bring the within proceedings seeking to quash the decision of the respondent of 7th April, 2016 deeming her appeal against the decision of ORAC refusing her refugee status to be withdrawn.

2. One of the complaints for which leave was afforded was to the effect that s. 16(2B) (a) of the Refugee Act 1996 is unconstitutional however this aspect of the matter did not proceed in the context of the within judicial review application, by consent of both parties.

3. The outstanding grounds upon which order of *certiorari* is sought are as follows:-

(i) the respondent failed to exercise any discretion and therefore breached the relevant section;

(ii) in concluding that no discretion existed the respondent unlawfully fettered her discretion;

(iii) where the applicant's failure to comply with the section was due to circumstances beyond her control the respondent acted irrationally and in breach of procedures Directive and/or the Constitution and fair procedure;

(iv) the respondent erred in law in concluding that no discretion existed.

Brief background

4. The applicant was born in 2009 in Ireland. An application was made on her behalf for refugee status on 16th March, 2010. There followed an interview with the applicant's mother on 16th April, 2010 and on 21st May, 2010 ORAC recommended that the application be refused.

5. By appeal of the 11th June, 2010 the applicant sought to appeal the recommendation aforesaid however the appeal document used was in the wrong form and did not include any grounds pertinent to the application in respect of the purported appeal. By letter of 2nd July, 2010 the respondent sought that the applicant would submit the correct form and include the grounds upon which the appeal was being processed. Thereafter it appears that the applicant maintained judicial review proceedings however these were subsequently withdrawn, apparently by consent, and apparently on the basis that the applicant could continue with her appeal.

6. On 24th July, 2014 the respondent wrote to the applicant seeking that the appeal would be set forth in the correct form and also include the substantial grounds upon which the appeal was to be processed.

7. It is common case that there was no response to this communication.

8. On 1st March, 2016 the respondent communicated with the applicant's solicitors seeking that the appeal would be maintained with the correct form, that grounds would be advised within five days and that submissions together with a list of documents would be furnished prior to any hearing.

9. The response to the communication aforesaid was a letter of 9th March, 2016 from the applicant's then solicitors to the effect that the solicitors were seeking updated instructions.

10. By letter of 10th March, 2016 the respondent wrote to the applicant's solicitors pursuant to the provisions of s. 16(2B) (a) (in fact the wrong provision was incorporated in the letter however no issue was taken with this at the hearing) wherein the applicant was advised that if the applicant did not indicate whether or not the appeal was continuing within fifteen working days then the appeal would be deemed withdrawn. The relevant fifteen working days expired on 5th April, 2016.

11. Prior to the expiry of the period by letter of the 22nd March, 2016 the respondent notified the applicant of the date and time of an oral hearing namely the 7th April, 2016. This notification was also addressed to the applicant's mother and solicitors.

12. According to the applicant's affidavit she was advised on 24th March, 2016 that her prior solicitors could no longer act for her and on 29th March, 2016 the plaintiff instructed her current solicitors. The applicant's mother was in possession of the file since the 24th March 2016.

13. It is common case that no response was in fact afforded to the letter of 10th March, 2016 either by the applicant (through her mother) or by solicitors on her behalf. In this regard at the hearing of the matter the explanation tendered as to why the new solicitors did not respond to the letter of 10th March, 2016 prior to 5th April, 2016 was to the effect that they only received the file a number of days prior to the expiry of the period and they could not have been required to peruse the file to ensure that they had dealt with any outstanding query from the respondent. It is noted they perused the file sufficiently to see the content of the letter of

22nd March, 2016.

14. The applicant accompanied by Counsel attended on 7th April, 2016 for the hearing, although for the purpose of seeking an adjournment, however were advised on that date that the appeal was deemed withdrawn and that the respondent had no discretion to consider the matter further.

15. On that day the applicant indicated that the reason why the respondent was not advised within the timeframe identified in the letter of 10th March, 2016 was not her fault – the applicants mother did not expand on why it was not her fault (see para. 17 of the grounding affidavit).

Submissions

16. Section 16(2B) provides:-

> "Where – (a) it appears to the Tribunal that an applicant is failing in his or her duty to co-operate with the Commissioner or to furnish information relevant to his or her appeal, or
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> (b) the Minister notifies the Tribunal that he or she is of opinion that the applicant is in breach of subsection (4)(a), (4A) or (5) of section 9,
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> the Tribunal shall send to the applicant a notice in writing inviting the applicant to indicate in writing (within 15 working days of the sending of the notice) whether he or she wishes to continue with his or her appeal and, if an applicant does not furnish an indication within the time specified in the notice, his or her appeal shall be deemed to be withdrawn."

17. The applicant's argument is that for the purposes of providing an effective remedy, in exceptional circumstances, it should be possible to extend the time within which the applicant might indicate whether or not the appeal is proceeding.

18. The applicant refers to Council Directive 2005/85/EC. Under Article 39(6) thereof it is provided:-

> "Member States may also lay down in national legislation
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> the conditions under which it can be assumed that an applicant
>
> has implicitly withdrawn or abandoned his/her remedy pursuant
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> to paragraph 1, together with the rules on the procedure to be
>
> followed."

19. The relief mentioned in para. 1 of Article 39 is that Member States are to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal *inter alia* against decisions taken in applications for asylum. The article is in fact headed "Appeal Procedure".

20. The applicant likens the matter to Article 20 of the Directive that deals with procedure in cases of implicit withdrawal or abandonment of an application (a first instance status) and in that regard it is possible for Member States to assume that the applicant has implicitly withdrawn or abandoned the application for asylum when it is ascertained that he or she has failed to respond to requests to provide information essential to the application or has not appeared for a personal interview:-

> "Unless the applicant demonstrates within a reasonable time that his or her failure was due to circumstances beyond his control".

21. The applicant's argument is to the effect that the rider contained in Article 20(1)(a) should effectively be applied equally to circumstances anticipated in Article 39(6) notwithstanding that the EU Directive does not contain any such rider in Article 39(6).

22. The applicant also refers to substantial European case law to the effect that an applicant must have an effective remedy and that domestic law must be guided by this principle. No argument in this regard is taken by the respondent.

23. The applicant refers to Case C2/06 *Kempter* [2008] All ER (D) 157, a judgment of the grand chamber of the court of the 12th February, 2008 to the effect that all the authorities of the member states have the task of ensuring observance of the rules of community law within the sphere of their competence. The applicant also refers to para. 57 of the judgment to the effect that in the absence of community rules in the field it is for the domestic legal system of each member state to designate the detailed procedural rules governing actions provided that rules should not be less favourable than those governing similar domestic actions and that they should not render practically impossible or excessively difficult the exercise of the rights conferred by community law. The applicant refers to the fact that refugee status is such a right.

24. In the events none of the foregoing is disputed by the respondent.

25. The applicant also refers to the judgment in Case C-429/15 *Danqua v. Minister for Justice & Equality & Ors* a judgment of the third chamber of the court delivered on 20th October, 2016, and in particular para. 44 thereof to the effect that as regards time limits it is for the member states to establish those limits in the light of the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration.

26. The applicant refers to Case C – 295 – 298/04 *Manfredi* [2007] All ER (EC) 27) a judgment of the court of third chamber of 13th July, 2016 and in particular para. 78 thereof to the effect that a national rule under which a limitation period begins to run from the date in which the practice was adopted could make it practically impossible to exercise the right particularly if that national rule also imposes a short limitation period which is not capable of not being suspended. At para. 79 of that judgment it was noted that it was possible that the limitation period might expire even before the infringement is brought to an end rendering it impossible for the individual who has suffered harm after the expiry of the limitation period to bring an action. The court went on at para. 81 to again indicate that any rule implemented by the member state must not breach the principles of equivalence and of effectiveness.

27. The applicant argues that the exceptional circumstances in her case which would require the relevant section to be read as

incorporating an entitlement to extend the relevant period or, in the alternative to suggest that the relevant section is in breach or defiance of Article 39 of the European Directive aforesaid are:-

(i) the applicant is an immigrant (this will always be so in an application for refugee status);

(ii) Article 42(a) of the Constitution provides that in all actions concerning children whether undertaken by a public or private institution courts of law administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration and in Sivsivadze v. The Minister for Justice [2015] 2 ILRM 73 the Supreme Court applied Article 42(a) of the Constitution as the Court was satisfied that the infant should be entitled to maintain the appeal notwithstanding the adverse behaviour on the part of the infant's parents;

(iii) the applicant attended with legal personnel on 7th April, 2016 and thereby demonstrated an intention to continue with the appeal;

(iv) the sequencing of letters has to be taken into account namely that notwithstanding the letter of 10th March a letter of 22nd March was dispatched by the respondent identifying an oral hearing date.

28. Insofar as the ability to read in a discretion to the provisions of the section the applicants relied on the judgment of O'Keeffe P. in *East Donegal Cooperative Livestock Mart Limited v. Attorney General & Ors*. [1970] I.R. 317 to the effect that legislation must be read in the light of the Constitution and if there are two possible interpretations then the constitutional interpretation must be preferred. That case did however incorporate in the Supreme Court decision at p. 341 of the report a statement to the effect that a statutory provision that is clear and unambiguous cannot be given an opposite meaning.

29. The applicant lays considerable emphasis on the judgment of Butler J. in *Duba v. RAT & Ors*. (Unreported, High Court, 22nd January, 2003; 2003 WJSC-HC 2753) in which case the Minister had indicated that the Minister did not have authority to extend a time limit. There were seven other applicants who with the consent of the Minister and the court had their time limits extended however this was not the case in *Duba*. Mr. Justice Butler held that an injustice had been done to the applicant and court was satisfied to quash the decision notwithstanding the arguments on behalf of the Minister.

30. It does appear to me significant that no case law was referred to by Butler J. in the report and the case has not subsequently been followed.

31. Furthermore in para. 27 of the legal submissions on behalf of the applicant bearing date 2nd February, 2017 it is suggested that principles of constitutional justice do not permit a lack of discretion where the relevant failure in question is beyond the control of the appellant herself and where it can be shown that the appellant took steps to comply with the time limit but appears to have been failed by her lawyers. In this matter the applicant suggest that it was the failure of the initial lawyers that created the difficulty herein.

32. The problem from the applicant's point of view is:-

(i) clearly in the *Duba* case the applicant had believed that a notice of appeal was filed where as in this matter no such assertion is made in the grounding affidavit of the applicant's mother;

(ii) under s. 11 of the Refugee Act 1996 the applicant is obliged to cooperate with the respondent the applicant does not deny in the mother's affidavit that she was aware of the letter of 10th March, 2016 which in the events merely requested a simple straight forward uncomplicated answer of yes or no;

(iii) no steps whatever have been advised as to what the applicant did to comply with the time limits as it is suggested that she instructed a new firm of lawyers, however, if she was alive and alert to the time limit in the letter of 10th March, 2016, it is apparent that she did not instruct her solicitors in any way to respond to same prior to the expiry of the deadline;

(iv) in the matter of *Re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 1 I.R. 360,395, the Supreme Court indicated that an applicant for asylum is not a passive participant in the process. On this basis, I cannot see how the applicant has demonstrated that the failure to respond to the letter of 10th March, 2016, was beyond the control of the applicant herself.

(v) nothing in the relevant section under review in Duba prevented a late filing of an appeal whereas under s.16(2B)(a) there is a statutory deemed withdrawal of appeal.

33. Insofar as Article 42A of the Constitution is concerned, following the decision of the Court of Appeal in *Dos Santos & Ors. v. Minister for Justice & Ors.* [2015] IECA 210, it is clear that the type of decisions of which laws must be enacted to provide for the best interest of the child as being the paramount consideration is not applied to a decision taken by the Minister in relation to the deportation of a child. Furthermore, in the more recent case of *K.R.A. v. Minister for Justice & Equality* [2016] IEHC 289, Humphreys J. held at para. 76 that Article 42A does not require in a prescriptive manner that immigration decisions must be conducted on the basis of a different weight to be attached to the rights already recognised and Humphreys J. noted that the decision in *Sivsivadze v. The Minister for Justice & Equality & Ors*. [2015] 2 ILRM 73 was, in the exercise of the court's discretion to dismiss an appeal as an abuse of process and it was not a substantive application of the Article as a mechanism to enhance the rights of children in the deportation context.

34. For the reasons above, I am satisfied that it is not possible to deploy Article 42A of the Constitution or interpret the Supreme Court judgment of *Sivsivadze* to rewrite s. 16(2B)(e) of the 1996 Act in a manner other than as stated within the parameters of that section.

35. The respondent argues that the procedures mentioned in the 2005 Council Directive as to a decision in relation to an appeal clearly demonstrate that, in fact, the Directive does apply different rules to a first instance decision than to the appeal. I am in agreement with the respondent that if it was intended by the EU to have a similar rider incorporated in Article 39(6) as that contained in Article 20, it was a simple matter to attend to and I believe the fact that the rider was not included was intended.

36. In the decision in *Danqua*, at para. 44 aforesaid it is clear that one of the issues in or about the time limits prescribed by Member States, consideration must be given to the complexities of the procedures and of the legislation to be applied. As previously

mentioned, the relevant section now under review merely required the applicant to indicate whether or not the appeal was continuing and in the circumstances, there was no procedural complexity in or about a response. Furthermore as aforesaid, there is no evidence that some effort to respond was made either by or on behalf of the applicant.

Conclusion

> (i) The requirement to review domestic law in dealing with EU rights must be reviewed in the context of the principle of effectiveness.
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> (ii) The fact that the only requirement raised in the letter of 10th March, 2016, was to indicate whether or not the appeal was to be continued was such a straightforward uncomplicated issue that it distinguishes itself considerably from the decision under review in the Danqua judgment.
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> (iii) Notwithstanding the judgment in Duba aforesaid and in particular having regard to the Supreme Court views expressed in East Donegal, I am not satisfied that this Court is empowered to read into s. 16(2B) (a) a proviso that the withdrawal can be withdrawn at some point and I am satisfied that the wording of the section is such that it is clear and unambiguous and must stand without the courts reading in additional provisions associated therewith.

37. Article 42A of the Constitution cannot be deployed to read into legislation an entirely additional provision to be applied in respect of children as that to be applied in respect of adults.

38. I do not accept that Article 39(6) of the EU Directive of 2005, should be interpreted in the manner contended for on behalf of the applicant namely with the rider as incorporated in Article 20 of the same Directive. Even if I am incorrect as to the possibility of incorporating a proviso to extend time, I am not satisfied that the applicant has demonstrated that the within applicant, notwithstanding her infant status, demonstrated a reasonable explanation or good excuse to form the basis to be considered an exceptional case requiring an exceptional measure of deeming the withdrawal of the appeal withdrawn.

39. I am satisfied in the light of the *Danqua* decision that in all of the circumstances of the matter, in particular the limited and simple response required to the letter of 10th March, 2016, that s. 16(2B)(a) of the Refugee Act 1996, as amended, does not breach the principle of effectiveness as it does not render practically impossible or excessively difficult the exercise of a right of appeal.

40. In answer to the grounds upon which *certiorari* is sought, therefore, I would response:-

> (a) the respondent did not breach the provisions of s. 16(2B)(a) of the 1996 Act, as amended;
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> (b) in concluding that no discretion existed, there was no unlawful fettering of a discretion which, I believe was not included within the terms of the section;
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> (c) I am not satisfied that the circumstances where no response was given to the letter of 10th March, 2006, arose beyond the control of the applicant; and
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> (d) the respondent did not err in concluding that no discretion existed as the withdrawal of the appeal was a direct consequence of the applicant's failure to respond to the letter of 10th March, 2016 and the withdrawal was the implementation of a statutory provision as opposed to the exercise of any discretion on the part of the respondent.

41. For the reasons above, I refuse the application for *certiorari*.