THE HIGH COURT

[2023] IEHC 629

[Record No. 2022/890 JR]

BETWEEN:-

S.F. AND S.M.F.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on 13th of November 2023.

Introduction.

1. This is an application for an order of *certiorari* quashing the decision of the respondent dated 12th September 2022, in which the respondent purported to refuse the applicants' application for an extension of time within which to appeal a refusal decision of the respondent in respect of the application by the first applicant for a join-family D visa for the second applicant, which had been initially refused on 29th April 2022.

2. The second applicant also seeks an order of *mandamus* directing the respondent to consider granting an extension of time to appeal the refusal of the 29th April 2022.

3. Although there is little dispute between the parties as to the background to the applicants' application, it is necessary to set out the background to the proceedings in brief terms, in order to properly understand the basis for the application herein.

Background.

4. The first applicant was born in 1995. He fled Afghanistan on 4th June 2011, as his family were concerned that he was at risk of indoctrination by the Taliban. Although the first applicant had planned to travel to France, where his aunt was living as a refugee, he was stopped and arrested by Irish authorities in Dublin Airport on 6th June 2011. He was taken into the care of the HSE, as an unaccompanied minor.

5. The first applicant initially applied for refugee status on 6th January 2012, which was refused. This refusal was quashed by Eagar J. in *S.F. (Afghanistan) (A Minor) v. Refugee Appeals Tribunal &*

Anor [2015] IEHC 48. The first applicant was ultimately granted refugee status by the respondent on 15th February 2016. The first applicant's family reunification application in respect of his parents and three younger siblings was granted by the respondent on 20th April 2017, with whom he now lives. The first applicant became a naturalised Irish citizen on 21st April 2017.

6. The first applicant married a woman from Afghanistan on 20th December 2017, with whom he has two children. His children are both Irish citizens.

7. The first applicant applied for a join-family D visa in respect of his wife; his older brother and his family; and his first cousin, the second applicant herein, on 20th October 2021. The first applicant stood as a sponsor for all of these individuals' applications. The first applicant's wife was granted a D-visa by the respondent on 24th January 2022.

8. The second applicant was born in Afghanistan in 1992. As mentioned above, he is the first cousin of the first applicant. It was submitted that the second applicant was at serious risk of harm from the Taliban in Afghanistan, owing to his profession as a doctor and on account of aid he provides to perceived enemies of the Taliban.

9. By letter dated 29th April 2022, communicated to the solicitors for the applicants via email on 4th May 2022, the respondent refused the visa application made in respect of the second applicant, on the grounds that the second applicant had submitted insufficient documentation; had failed to show a clear link to the first applicant; and the first applicant's finances were deemed insufficient to sponsor the second applicant. That letter stated that:

> "*This decision can be appealed within 2 months of the date of this letter. An appeal must be submitted in writing, fully addressing all the reasons for refusal […]*
>
> *Appeals received by email or fax will not be processed. All additional supporting documents should be submitted with your appeal.*"

10. In his grounding affidavit, sworn on 19th October 2022, the first applicant outlined at para. 7 that instructions were given to his solicitors roughly one week after the visa refusal, to lodge an appeal. It further outlined that owing to a heavy workload in the applicant's solicitor's firm and the personal circumstances of the particular solicitor dealing with his file, the appeal was not submitted on time. The parties are agreed that the time would have run out for the lodging of an appeal on 4th July 2022.

11. There is some dispute between the parties as to the exact date on which the appeal was lodged, that is to say that they do not agree as to the extent of the applicant's delay in lodging the appeal. At this juncture, it is sufficient to state that an email was sent by solicitors on behalf of the

applicant on 5th July 2022, in very brief terms. It stated: "*Please treat the attached letter as an appeal letter on behalf of our above-named client. We will update the appeal shortly and send the documentation by DHL.*" The letter attached to the email stated, in equally brief terms;

> "*We confirm we have been instructed by our above-named clients to appeal the refusal of a long-stay/D-type visa to* [the second applicant], *which was communicated to us by email dated 04 May 2022. We hope to send you the supporting documentation by DHL before the end of this week.*"

12. The appeal and supporting original documents were sent by the applicants to the respondent in hard copy, via courier on 15th August 2022. Further documents were also sent to the respondent via courier on 16th August 2022.

13. By email dated 16th August 2022, the respondent wrote to the applicant stating:

> "*Please note that we did not receive the hard copy for the appeal of your clients, as you are already aware the visa office does not accept any appeals received by e-mail.*
>
> *The appeal will only be accepted and considered once a hard copy is received within the given period allowed to submit it and acknowledged by our office.*"

14. A further email was sent by the respondent to the applicant on 18th August 2022, stating:

> "*We confirm receipt of appeal dated 15/08/2022 and 16/08/2022 for your client* [the second applicant], *whilst we are aware that a copy has been sent as an attachment by email on 5/7/2022, as you have already been informed in the past appeals received via email are not accepted.*
>
> *The appeal was only received today 18/08/2023 at the Embassy, the time to submit the appeal has elapsed and therefore the appeal is not accepted.*"

15. On 9th September 2022, solicitors for the applicant sent an email to the respondent with attached correspondence, seeking to have the respondent accept the appeal as being lodged in time via the email on 5th July 2022, or in the alternative, to extend the time limit within which to lodge an appeal to the visa refusal. The application for an extension of time was made on the grounds that the applicants had instructed their solicitors of their indication to appeal the visa decision quite promptly, but that appeal was lodged late, owing to an unusually heavy workload and the personal circumstances of the solicitor acting on behalf of the applicants. The letter also stated that: "*We submit that it would be disproportionate not to accept the visa appeals in light of the gravity of the consequences for the family involved.*"

16. In that letter, the applicants also made reference to the discretion of the respondent to accept the appeal, notwithstanding that it was lodged outside the time limits provided for in the 'Policy Document on Non-EEA Family Reunification' (hereafter referred to as "the Policy Document"). The third paragraph read as follows:

> "*The Minister clearly has a discretion to make an exception to any time limit in ministerial policy and, where called on to make an exception, the Minister clearly has an obligation to consider waiving the rule that only receipt of hard copy visa appeal will stop the time limit running and/or to consider extending the time for submitting a visa appeal*."

17. On 12th September 2022, the respondent wrote to the applicant via email and stated:

> "*We acknowledge the receipt of your email and attachment, however it remains that as per our email of 18/8/2022, we are not in a position to accept the appeal. Your client may make a new application if they wish to do so once the passport and original documents are returned.*"

18. It is the refusal to extend time that is challenged in these proceedings. There is some dispute between the parties as to the exact point at which that extension was sought by the applicant and/or refused by the respondent, but that will be outlined in more detail in the parties' submissions below.

19. The applicants were given leave to proceed by way of judicial review challenging the respondent's refusal to accept the appeal, on 14th November 2022.

Submissions on behalf of the Parties.

20. It was submitted on behalf of the applicant by Mr Power SC that the second applicant was one day late in submitting his appeal, in that the court should treat the appeal has having been lodged on 5th July 2022, via the email sent by solicitors on behalf of the applicants to the respondent. It was submitted that the email sent on that date indicated a clear intention to appeal the refusal decision.

21. It was submitted that the appeal documentation was then lodged in hard copy on 15th and 16th August 2022. Mr Power SC referred to the letter of 16th August 2022, sent by the respondent to the second applicant, which he stated was in line with the tenor of the impugned decision, in that it indicated an inflexible approach to the extension of the time limit within which to appeal the refusal decision. It was submitted that the provisions of para. 1.12 of the Policy Document provided the respondent with a discretion to extend the time for the lodging of an appeal.

22. In relation to the discretion of the respondent to extend time, counsel relied on the decision of *A & B v. Minister for Justice* [2022] IESC 35, wherein Charleton J. had rejected the proposition

that because the International Appeals Protection Act 2015 did not expressly provide the Minister with the power to extend time for the lodging of an appeal, such a discretion did not exist. Counsel submitted that this position was analogous to the provisions of the Policy Document, and that this court should find such a discretion to exist within the terms of the Policy Document.

23. The first impugned decision is that of 18th August 2022. It was submitted that the decisionmaker had not considered extending the time in relation to the lodging of an appeal at all, as she should have done. It was submitted that the decision simply noted that the time limit had passed, and therefore the second applicant could not lodge his appeal. It was submitted that there was no indication from the decision, that the respondent knew that she had a discretion to extend the time for the lodging of an appeal; nor was there an indication that she had exercised that discretion in a meaningful way.

24. It was submitted that this non-engagement with the discretion of the respondent to extend the time was an erroneous fettering of the discretion of the respondent to consider an extension of time. In that regard counsel relied on the cases of *Ling and Yip Ltd v. The Minister for Business, Enterprise and Innovation* [2018] IHEC 546 and *Yeasin v. Minister for Business, Enterprise and Innovation* [2021] IEHC 821.

25. The second impugned decision is the email of 12th September 2022. It was submitted that the language used in that decision was indicative of the fact that the respondent had not considered the application for an extension of time, but had merely referred back to her original position as of 18th August 2022. It was submitted that there was no indication that the circumstances of the case had been considered, in light of the exceptional humanitarian nature of the application. The exceptional humanitarian circumstances relied upon by the applicants in this case, were the rise of the Taliban in Afghanistan in 2021, upon the departure of the American army from that State.

26. It was submitted on behalf of the applicants that it must be clear from the decision that there had been full consideration of the jurisdiction of the respondent to consider extending the time limit to allow the lodging of an appeal, and failing that, the decisions should be quashed. In relation to this case, it was submitted that there were merely bald assertions made by the respondent in the impugned decisions, which did not comply with the standard required in order for the decisions to be valid. In that regard, counsel relied upon the decisions of *Pfakacha v. Minister for Justice and Equality* [2017] IEHC 620 and *S.R. v. Minister for Justice* [2023] IECA 227.

27. It was submitted by the applicants that the respondent could not apply the Policy Document in an inflexible manner, and consideration should always be made for exceptions to her policies, in

light of the particular circumstances of the case. It was submitted that the decisions in this case clearly conveyed a rigid and inflexible policy, which was an error of law. In that regard, counsel relied on the decisions of *Ezenwaka v. Minister for Justice* [2011] IEHC 328.

28. It was submitted that in circumstances where the respondent's had failed to adequately engage with the with the reasons offered for the delay, or the exceptional circumstances of the applicants' case, both decisions should be quashed and an order directing the respondent to consider the applicants' application for an extension of time should be given.

29. Mr O'Connor BL, on behalf of the respondent, submitted that the respondent had not considered an extension of time on 18th August 2022, because the applicants had not applied for one, at that point in time. Relying on the correspondence sent by the applicants on 5th July 2022; 15th August 2022; and 16th August 2022, counsel submitted that none of those emails or letters asked the respondent to consider extending the time within which the applicants might appeal the refusal decisions, and therefore the respondent was not under any obligation to consider that question.

30. Insofar as counsel for the applicant may have argued that the respondent should have known that the applicants were, in reality, seeking an extension of time to lodge their appeal, counsel for the respondent submitted that it was not an obligation of the respondent to search for implicit arguments which may have been canvassed to her. It was submitted that the decision of 18th August 2022 should not be quashed, for the simple reason that the respondent was not obliged to consider an extension of time on that date, and had not done so, where an extension of time had not been requested of her at that time.

31. In relation to the decision of 12th September 2022, counsel accepted that at that time, the applicants had sought an extension of time for the lodging of their appeal, by email dated 9th September 2022. However, counsel submitted that use of the term "it remains" in the letter of 12th September 2022, did not necessarily infer that the respondent had not considered her discretion in relation to the extension of time, and had exercised it. It was submitted that the refusal to allow an appeal was not a failure to exercise the discretion conferred on the respondent, but rather, the respondent had exercised her discretion and had found against the applicants, having considered the circumstances of the case.

32. Counsel also submitted that there was a presumption of validity in favour of decisions made by the respondent, and with regard to that presumption, the court should find that the respondent

correctly exercised her discretion, albeit not in favour of the applicants. In that regard, counsel relied upon *Campus Oil v Minister for Industry and Energy No. 2* [1983] I.R. 88.

33. In regard to the cases of *Ling and Yip Ltd v. The Minister for Business, Enterprise and Innovation* [2018] IHEC 546 and *Yeasin v. Minister for Business, Enterprise and Innovation* [2021] IEHC 821, counsel for the respondent submitted that those cases did not set out a hard and fast rule in relation to the exact wording the respondent should use, when refusing to extend time to lodge an appeal. Following from that, counsel submitted that the wording used by the respondent in this case was consistent with the valid exercise of her discretion.

34. Further, counsel submitted that the above caselaw referred to a statutory discretion conferred upon the Minister, which was not an element of the applicants' case herein, which referred to a discretion conferred upon the Minister by the Policy Document.

35. Counsel laid emphasis on the necessity for time limits in administrative proceedings, and highlighted the extent of the delay in this case, in circumstances where an extension of time was not sought until 9th September 2022, at which point the applicants were 2 months out of time.

Conclusions.

36. The most relevant provision of the Policy Document is para. 1.12. It states as follows:

> "*1.12 While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive*."

37. In *A & B v. Minister for Justice* [2022] IESC 35, Charleton J. considered the question of whether the Minister had discretion to extend the time for the lodging of an appeal under the International Appeals Protection Act 2015, wherein such discretion was not expressly provided for in the Statute. In his judgment for the majority of the court, he stated as follows at para. 16:

> **"***In the absence of a clear restriction by the legislature of the Minister's actions in relation to the suspension of a s 47 order, it cannot be said that such a decision lies outside of the scope of the executive power, and such an interpretation would be an excessive restriction of a fundamental State power by this Court. The inherent nature of this power has been "used to uphold a variety of executive actions taken without legislative authorisation in the immigration context", see Kelly: The Irish Constitution (5th edition, Hogan, Whyte, Kenny*

and Walsh, Dublin 2018) at p 169. The Minister's discretion in this area is significant, and undoubtedly encompasses the possibility of suspending an order made under s 47 for the purposes of allowing the appellants in this case, or any other persons subject to such an order, to seek an extension of time and appeal the recommendation of the IPO through IPAT, thereby ensuring the continued protection of their rights to fair procedures and a just remedy."

38. I am satisfied that the position as set out by Charleton J. in relation to statutory discretion, is also reflective of the approach to be taken by the Minister in relation to the discretion outlined in the Policy Document. The Minister must retain a discretion to extend the time for the lodging of an appeal, as an essential element of her unfettered discretion in relation to visa applications made in the State. I am satisfied that this discretion is found in para. 1.12 of the Policy Document. Counsel for the respondent accepted that the Minister had a discretion to extend the time for lodging an appeal in appropriate cases.

39. Where such a discretion exists, it should not be exercised in a rigid manner by the Minister. This was set out by Hogan J. in his judgment in *Ezenwaka v. Minister for Justice* [2011] IEHC 328. Referring to an earlier decision of Fennelly J. in *McCarron v. Kearney*, in the Supreme Court, Hogan J. stated that the Minister had exercised his discretion in an unlawfully rigid manner, such that the applicants were unable to effectively argue their case. He stated as follows at paras. 20-22:

"*20. This is a classic example of where a legitimate policy has been operated in an unduly rigid or inflexible manner. The application of this principle is well illustrated by the Supreme Court's decision in McCarron v. Kearney [2010] IESC 28. Here one of the applicants had been refused permission to import a heavy calibre rifle in the State on the basis that this was contrary to established policy. Fennelly J. held that the decision was unlawful for a number of reasons, one which was that it represented the application of a fixed policy position:-*

> *"The second problem with the Minister's decision is that it clearly does communicate a rigid inflexible policy. The Minister offered the applicant no opportunity to address the possibility of any exception to the policy or the merits of the particular firearm."*

21. The same can essentially be said of the present case. A legitimate policy - that an IBC family reunification visa would be issued only where the other spouse was also the other parent of the Irish born child - was rigidly applied and the Ezenwakas were given no real

opportunity to argue that an exception should have been made for them given that this mistake was not of their making.

22. It follows that I would also hold that the decision to refuse entry was unlawful on this ground as well."

40. This approach was further expanded upon by Kelly J. in *Mishra v. Minister for Justice* [2015] IEHC 222, wherein he stated:

"In my view, there is nothing in law which forbids the Minister upon whom the discretionary power under s. 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant."

41. Based on these cases, it is clear that the Minister cannot apply her policies in a fixed manner. She must consider the circumstances of each case presented to her, on their own merits. This does not require an extensive decision from the Minister, akin to that of a judgment of the Superior Courts, but it must require some engagement with the material presented by the applicant. Faherty J. set out that approach in *S.R. v Minister for Justice* [2023] IECA 227, delivering the judgment of the majority of the court, she stated at para. 122:

"*[W]hat was required, on the face of the Review Decisions, was unambiguous evidence that the review decision-maker had engaged in any real way with the arguments and materials advanced by the applicants in their review applications, together with some indication that the review decision-maker had engaged on the requisite weighing exercise. That does not mean that there had to be an overly discursive analysis. Indeed, given the nature of the submissions made on behalf of each of the applicants in their respective review applications, I would venture to suggest that an overly discursive analysis was not required once there was clear and unambiguous evidence that the merits of their submissions and the material the applicants relied on were considered. In my view, however, no such sufficiently unambiguous indication of the requisite engagement with the merits appears on the face of the Review Decisions*."

42. The decision of Faherty J. in *Pfakacha v. Minister for Justice and Equality* [2017] IEHC 620, is also helpful in that regard. That decision involved a refusal of the respondent to change the applicants' immigration status, wherein Faherty J. stated at para. 54:

> *"Having appraised the contents of the respective decisions in the within proceedings, I am satisfied that what effectively occurred in this case was a bald application by the decision-maker of the policies set out at para. 22.2 of the Policy Document. This amounts to a fettering of the discretion vested in the respondent by s.4(7) of the 2004 Act. While the Policy Document itself acknowledges the concept of ministerial discretion, the potential exercise of that discretion was fettered, in my view, by the failure of the decision-maker to acknowledge that the guidelines expressed in the Policy Document were not set in stone, and by the failure to engage in any meaningful sense with the submissions made by the applicants as to why the respondent should see fit to upgrade their status to Stamp 4."*

43. Turning now to the facts of this case, I accept the submission of Mr O'Connor BL that the applicants did not in fact apply for an extension of time until the email of 9th September 2022. When the wording of the emails is closely analysed, it is clear that no extension of time to lodge an appeal was sought by the applicants until that date, which email offered detailed reasoning as to why the delay had occurred, and why the extension of time should be granted. I am satisfied that it was open to the Minister to insist upon the lodging of hard copy documents for the purposes of an appeal, and therefore the Minister was entitled to reject the email of 5th July 2022, as effectively 'stopping the clock' in relation to the lodging of an appeal.

44. However, the extent of the applicants' delay should not alter the fact that the Minister is required to exercise her discretion to consider extending time for the lodging of an appeal, once that was finally requested on 9th September 2022. I accept the submission made by Mr Power SC, that the decision of 12th September 2022, does not reflect the Minister having considered her discretion to extend the time, in light of the humanitarian circumstances proffered by the applicants, and a refusal on that basis.

45. I am supported in this view by the wording of that email. It states: "*it remains that as per our email of 18/8/2022, we are not in a position to accept the appeal"*. From this wording, it is clear that the Minister merely adopted her original approach as stated on 18th August 2022, on which date she did not consider the extension of time, as it had not been formally requested. I am not persuaded that the decision of 12th September 2022 could be read as indicating that, despite having considered

the exceptional humanitarian circumstances of the case, that the Minister had decided to remain with her original position and had decided to refuse an extension of time within which to lodge an appeal. The Minister did not set out that she had considered the material and had decided not to exercise her discretion. She merely stated "*we are not in a position to accept the appeal*." She did not even use the phrase "extension of time" in her decision of 12th September 2022. She did not refer to the exercise of her discretion in that regard.

46. It is clear in this case, that the respondent has failed to meaningfully engage with the applicants' request for an extension of time in her decision of 12th September 2022. She has stated, in very brief terms, that the position has not changed since her email of 18th August 2022, but as I have outlined, and as was accepted by counsel for the respondent, the position had very clearly changed in the interim. On 9th September 2022, the applicants had sought an extension of time. The Minister has failed to include an acknowledgement that an extension of time was being sought; much less was there any visible engagement with the reasons on which that extension was sought. In my view, that visible engagement is necessary to ensure that an applicant can know that the circumstances of their individual application have been considered.

47. The court holds that the respondent has failed to engage in any meaningful sense with the application made by the applicants for an extension of time within which to lodge their appeal, and the reasons contained therein, in her decision of 12th September 2022. For that reason, I hold that the Minister has exercised her discretion to extend the time within which an appeal may be lodged, in a rigid and inflexible manner, which is unlawful. On that basis, the decision of 12th September 2022 must be struck down.

48. I should state that I make no findings in relation to the merits of the applicants' application for an extension of time. That matter is entirely for the Minister to consider, once it comes back to her for fresh consideration.

49. Accordingly, it is proposed that the final order of the court will provide:

(a) An order of *certiorari* quashing the decision of the respondent dated 12th September 2022.

(b) An order remitting the application for an extension of time for the lodgement of an appeal, back to the respondent for reconsideration.

(c) Refusing all other reliefs sought by the applicant.

50. As this judgement is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

51. The matter will be re-listed for mention for the purpose of making final orders at 10.30 hours on 13th December 2023.