Neutral Citation Number: [2007] IEHC 290

THE HIGH COURT

Record Number: 2006 No. 184 JR

BETWEEN

F. A., AND B. A., A MINOR SUING BY HER MOTHER AND NEXT FRIEND F. A.

APPELLANTS

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 27th day of July 2007

1. The first named applicant is the mother of the second named applicant who was born here on the [ ] July 2005, some fifteen days after the arrival of the first named applicant into this country. On arrival she claimed asylum on the basis that if returned to Nigeria, her unborn child, who was by means of a scan already known to be a female child, would be subjected to circumcision by her husband's family.

2. Part of her history given to the RAC and to the Tribunal was that her first child, a female, had been subjected to circumcision by her husband's family and that this daughter had died very shortly thereafter despite having been brought to hospital after the circumcision had been carried out.

3. The Tribunal decided that there were reasons to doubt her credibility, and concluded that the fear that if the first named applicant refused to have her daughter circumcised she would be treated as an outcast was not 'persecution', and that it would in any event be possible for the first named applicant to relocate elsewhere in Nigeria where such practice is banned, and that she could avail of police protection.

4. The applicant seeks to impugn the process whereby credibility was assessed by the Tribunal Member and submits also that there was no basis upon which the Tribunal Member could have properly concluded that internal relocation and police protection were available options for the applicants.

5. This application is for leave to seek a number of reliefs, including one of Certiorari to quash the decision of the Refugee Appeals Tribunal which affirmed the recommendation of the Refugee Appeals Commissioner that the first named applicant should not be declared to be a refugee.

Application for extension of time

6. The decision of the Tribunal Member is dated the 9th December 2005 and was communicated to the applicant by letter dated 29th December 2005. The deemed date of receipt of that communication is therefore the 1st January 2006, after which the fourteen day time period within which to commence proceedings by way of judicial review started to run against the applicant. It follows that these proceedings ought to have commenced not later than the 15th January 2006 if they were not to be the subject of an application for an extension of time. In fact the Notice of Motion by which this application was commenced was issued on the 17th February 2006, more than one month later.

7. The first matter arising therefore is whether the Court should exercise its discretion to extend the time for commencement of this application on the basis that good and sufficient reason has been shown as to why it was not commenced within the period of fourteen days prescribed by the Oireachtas for doing so.

8. The first named applicant states in her grounding affidavit that the decision of the Tribunal was notified to her by letter dated the 29th December 2005, and then that by letter dated 30th January 2006 she was informed that the Minister proposed to make a deportation order. It would seem to be the case that she then immediately contacted her then solicitor for advice, since he wrote a letter to the Refugee Legal Service dated the 31st January 2006 telling them that he had advised the first named applicant to contact that service "with regard to you preparing a humanitarian appeal on her behalf" and her file was enclosed with that letter. By this time of course the fourteen day period for commencing proceedings for judicial review had already passed some two weeks previously. There is no suggestion in that letter that such proceedings were even being contemplated.

9. The next averment by the first named applicant is that in paragraph 15 of her said affidavit in which she states:

> "I was very concerned about what would happen to me and my daughter and spoke with friends who are also asylum seekers. I was told to contact solicitor Seán Mulvihill. I made an appointment at his offices on 6th February 2006 and signed an authority enabling him to procure my file….".

10. That written and signed authority is one which authorises that solicitor "*to act as my solicitors and pick up all files regarding my humanitarian leave to remain application*" (my emphasis).

11. She goes on to state that Mr Mulvihill received her file on the 8th February 2006, and that advice from Counsel was sought. It appears then that at a consultation with counsel she was upset when she understood what the Tribunal Member had found regarding her asylum claim. She avers then at paragraph 20 of her affidavit that as soon as Counsel's opinion was received, instructions were given to initiate these proceedings immediately, and that as soon as she was informed of the meaning of the Tribunal Member's findings she wished to challenge them in whatever manner she could. It is of some relevance to indicate that the applicant's application for asylum states that her language is English, and her profession is given as "business lady". Her questionnaire also indicates that she speaks English as well as her native language of Igbo, and her interview on the 19th August 2005 was conducted through English. I mention these matters since the letter dated 29th December 2005 notifying her of the Tribunal's decision refers to the reasons for that decision being those contained in an appendix to the letter, and that a copy of the decision itself has been sent to her then solicitor.

12. There is no further affidavit filed by the applicant or on her behalf.

13. Anthony Moore BL on behalf of the respondents submits that no good and sufficient reason has been shown by the applicant for the passage of time from the date on which she received the notification of the decision, namely 1st January 2006, and the expiry of the fourteen day period thereafter for commencing the present proceedings. He correctly, in my view, submits that the explanation

given relates only to a period after the expiry of that time, namely after she received the further letter dated 30th January 2006 informing her of the proposal to deport her. Only then did she take any step whatsoever to address what was happening, and even then it was a further seventeen days before she commenced these proceedings.

14. Mr Moore has referred to the judgment of Finnegan J. in *GK v. Minister for Justice, Equality and Law Reform* [2001] 1 ILRM 401 in which he set out a number of factors which ought to be considered when deciding whether or not to exercise a discretion to extend time. These were the period of the delay, the reason for the delay, the prima facie strength of the applicant's case, and any other personal circumstances affecting the applicant. Although he was considering an extension of time under planning legislation, Clarke J. in *Kelly v. Leitrim County Council*, unreported, High Court, 27th January 2005, set forth a number of matters which he felt might be considered in applications for an extension of time. These were the time prescribed in the relevant statute, whether any third party rights were affected, the legislative policy, blameworthiness of the applicant, the nature of the rights involved, and the merits of the applicant's case.

15. To these in my view could be added the question of whether during the permitted time the applicant had either made a decision to commence proceedings, or could reasonably be expected to have been able to decide to commence such proceedings. This question reasonably arises by reference to one of the criteria set forth in *Eire Continental Trading Co. Ltd v. Clonmel Foods Ltd* [1955] IR 170 for considering whether or not the 10 day period for appealing to the High Court against a decision of the Circuit Court should be granted, and there is no reason not to consider this question in the context of the present case.

16. Finally, it may be necessary to consider whether the applicant had legal advice available to her during the 14 day period, should she have wished to seek it.

17. Mr Moore has submitted that the onus is upon the applicant to show grounds for extending time, and in this regard has referred to the judgment of McGuinness J. in the Supreme Court in C*.S. v. Minister for Justice, Equality and Law Reform* [2005] 1 IR 343 when she stated:

> "This court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself."

18. Before considering the matters which ought to be considered in relation to extending time, it seems to be clear that the blameworthiness or tardiness of the applicant is not the only matter which must be considered. Therefore, even where the applicant is entirely to blame for the fact that she has not commenced proceedings within time, there may be other circumstances which the Court should take into account and which would require the court to exercise its discretion to extend time.

19. From the cases referred to it seems to me that in the present case the Court should consider the question of extending time for commencement of these proceedings by reference to the following issues:

The length of the time limit in question
20. The period of fourteen days is a very short time and this must be taken as indicating an intention on the part of the Oireachtas that applicant's must act with great dispatch when considering whether or not to challenge a decision by way of judicial review, this being part of the legitimate objective for a democratic state to effectively control and regulate entry to the State by nationals of other countries.

The period of delay
21. While in another context a delay of thirty three days beyond the final date permitted for the commencement of proceedings may be seen as not being unduly excessive, the same period in the context of a 14 day period assumes a much greater significance. But if particular circumstances are shown to exist where it would be just in all the circumstances to extend the time then the court may do so. It cannot be simply benignly overlooked by the court, and to do so would be to have scant regard to the intention of the Oireachtas in legislating as it did in s. 5 of the Illegal Immigrants (Trafficking) Act, 2000. That section came under scrutiny by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR. 360, and was found to be permissible.

The legislative policy evident from the legislative provisions in question
22. This policy is clear, namely that matters of this kind should be dealt with speedily, so that an effective and efficient process might exist so that such challenges to administrative decisions as may be attempted should be commenced very promptly.

Third party rights affected
23. Potentially, and on the basis that what the first named applicant has stated as the basis of her fear of persecution in relation to her daughter, that daughter may be affected by the refusal of an extension of time. That potential is presumably counter-balanced by the possibility that an entirely separate application for asylum has been lodged on behalf of the second named applicant since her birth. The Court has no information in that regard.

The blameworthiness of the applicant and/or her lawyers
24. In the present case it is clear that the solicitors involved at any relevant time have not been responsible for delay during the 14 day period, or even to any great extent thereafter. If the applicant had not delayed as she did during the 14 day period, it seems clear that the present application would have been capable of being lodged within the prescribed time period. Accordingly it is unnecessary that there should be any affidavit from any solicitor in this case. The Court is entitled to infer from the fact that no attempt has been made to excuse the delay from the beginning of January 2005 to the 15th January 2005, or indeed from that date to the receipt of the letter from the Minister's Department dated 30th January 2006, that there is no such excuse, and that it can reasonably be inferred therefore that it was only upon the receipt of that letter that the applicant decided that she should address the unfolding events. Even at that point her intention, based presumably also on advice received from her solicitor, was clearly confined to seeking leave to remain on humanitarian grounds. This much is clear from the letter dated 31st January 2006 written by her then solicitor to the Refugee Legal Service. The same intention remained when she first signed an authorisation for her present solicitor to act. It can be seen therefore that even at the 8th February 2006 this applicant had no formed intention to commence proceedings by way of judicial review.

25. It would appear that at some point the applicant decided to seek the services of another solicitor. I should add therefore that simply because an applicant is dissatisfied with the advice of one solicitor and decides to shop around in order to get advice with which she agrees cannot of itself entitle him or her to an extension of time. To so permit would set at nought the 14 day time limit.

The *prima facie* strength of the applicant's case

26. This is just one of the factors which the court should consider. But it must be said that even if this Court was to be satisfied that the applicant's case on a prima facie consideration passed the substantial grounds test, this alone is not sufficient to warrant an extension of time, since if that were so the 14 day period would become meaningless. It is within the clear intention of the Oireachtas that where the time limit of 14 days has been exceeded, an extension of time may be refused even where such an application, if commenced in time, would have succeeded. There must be some other factor in addition to *prima facie* substantial grounds in order to make it just that time should be extended. Clearly if the delay incurred was of a slight, and was at least explained, and the case was one appearing to be arguable, then such a feature would weigh heavily in favour of not refusing to permit the application to be brought. It might be unjust to do otherwise. But each case will have to be considered on its own facts and circumstances. The Court must engage upon a balancing exercise in which a number of factors are weighed in the balance so that a just decision can be arrived at.

27. In the present case I have carefully considered the grounds upon which the applicant has eventually sought to challenge the decision of the Tribunal. The first ground mentioned in written submissions and by Counsel on this application is that the Tribunal relied upon a report entitled "Immigration and Refugee Board of Canada dated 10th March 2000 which dealt with the availability of police protection in Nigeria. The applicant now submits that it was a breach of fair procedures that such a report should have been relied upon by the Tribunal in circumstances where it had not been disclosed to the applicant at the hearing. In fact this matter is not referred to in any way in the grounds set forth in the Statement of Grounds. Neither is it referred to in her grounding affidavit. The court is entitled to have regard to that fact for the purpose of considering an extension of time.

28. The applicant also submits that the Tribunal made credibility findings which are both inconsistent with the findings of the RAC, and in circumstances where no such credibility findings had been made by the RAC. It is also submitted that matters which the Tribunal stated had given cause for concern had not been put to the applicant in order to give her an opportunity to respond to those concerns. In my view based on the evidence the argument in this regard is weak. The Tribunal is perfectly entitled to reach its own conclusions on credibility, even where no such finding has been made by the RAC. The Tribunal was entitled to consider aspects of the application to indicate a lack of credibility. It is clear having regard to the whole of the decision that for reasons set forth the Tribunal had concerns relating to the credibility of the applicant's story and her fears. It is clear also in my view that credibility was not the only basis on which the Tribunal reached its decision. This argument would therefore not be strong.

29. Another ground is that the Tribunal member erred in concluding that internal location was an option for the applicant without having regard to the UNHCR document entitled "Relocating Internally as a reasonable alternative to seeking asylum", or to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status". I would just remark that simply because the Decision may not mention these documents specifically does not mean that one must conclude that their contents were not in any way considered. It can be presumed at this stage that in an expert body such as the Refugee Appeals Tribunal the personnel who hear these appeals are familiar with these documents.

30. It is submitted also that the Tribunal failed to consider what was in the best interests of the second named applicant. But in this regard it must be remembered that the decision of the Tribunal relates to the application by the first named applicant for asylum, albeit on the basis of a fear related to what might befall the second named applicant if she is believed. The whole basis of the application is the second named applicant, and it is quite clear that in considering the application at all the Tribunal was considering the position of the child if mother should be sent back. In my view this submission is very weak.

31. In conclusion on this part of the consideration of an extension of time, I would say that while, as in most cases, there are points to be made arising out of a careful parsing and analysing of the Tribunal's decision, the case being made at this stage is not strong. I do not want to conclude as to whether or not the threshold of substantial grounds would be surpassed, because that is not necessary at this point, but I would go so far as to say that the case is not so strong as should of itself outweigh any other factors which might point to refusing an extension. As I have stated already, even if it was considered to be a very substantively arguable case, that of itself would be insufficient of itself to mandate an extension of time being granted.

Whether a decision to commence proceedings was made or could reasonably have been made during the time permitted
32. In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [supra], the Court stated that a party who in all the circumstances of the case could be shown to have used *reasonable diligence* might well be in a position to persuade the court to extend the 14 day period provided for in the section. This means in my view that such diligence must be shown to have been exercised during the permitted period rather than only after the time has expired, unless there is some reason established as to why no such diligence was possible during the period - illness being but one very obvious and simple example. In my view it is clear that no decision was made by the first named applicant to do anything until after she received the letter dated 30th January 2006. Only at that point did she consider what else should be done, and at that point even the decision was not to contest the decision of the Tribunal but to make an application for leave to remain on humanitarian grounds.

The availability of legal advice
33. The first named applicant clearly had the services of a solicitor available to her from the moment that she was notified of the making of the decision by the Tribunal. He was the solicitor who had represented her up to that point, and in fact she went to see him in early February 2006. She could have sought his advice at the very beginning of January 2006 but appears not to have done so, and she has provided no explanation for her failure in this regard. She has not sought to excuse this in any way. In my view it is reasonable to expect in this case that the first named applicant should have and could have made the decision to challenge the Tribunal's decision within the time permitted for doing so under the legislation.

Any other relevant circumstances
34. The first named applicant has not brought any other particular circumstances to the attention of the court and there are none therefore to be considered.

35. In my view, and having carefully weighed all the factors to which I have referred, I can see no justification for extending the time for seeking these reliefs. While at best there may be some arguability in some of the grounds relied upon, the case is a weak one. There are several features of the case and which I have dealt with above which militate strongly against an extension of time and there is little in favour.

36. I therefore refuse the application for leave to seek the reliefs sought in this case.