

## THE HIGH COURT

## JUDICIAL REVIEW

[2011 No. 982 J.R.]

BETWEEN

Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

**JUDGMENT of Ms. Justice O'Regan delivered on the 5th day of April, 2017****Issues**

1. The applicant herein secured leave in 2011 to maintain the within judicial review proceedings for the purposes of seeking the relief of *certiorari* to quash the decision of the respondent advised to the applicant of 11th August 2011 when the respondent refused to allow the applicant to make a further application for refugee status pursuant to s. 17 (7) of the 1996 Act. This impugned decision followed an application on 30th June 2011 on behalf of the applicant to be re-admitted to the asylum process under s. 17 (7) of the 1996 Act on the basis of:

1. A personality disorder.
2. The applicant is an atheist.
3. The applicant had a recent history of alcohol abuse and/or substance abuse.

2. The application was refused on 29th July 2011 and the applicant sought a review of this refusal on 4th August 2011 which culminated in the ultimate refusal order of the 11th August 2011 now under review.

3. The grounds seeking the relief are to the effect that the respondent acted outside power vested in him under s. 17 (7) and misunderstood or incorrectly applied the test for determining such applications. In this regard the applicant asserted that the test would as per the decision of Clark J. in *A.A. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 436. In addition the applicant complained that the provisions of the within process did not amount to an effective remedy as provided for by Article 39 of Procedures Directive 2005/85/EC. This aforementioned ground was subsequently abandoned following the judgment of Hogan J. delivered on 14th July 2016 in *N.M. v. Minister for Justice, Equality and Law Reform* [2016] IECA 217.

4. In the circumstances the issue arising is whether or not the correct test and/or procedure was undertaken by the Minister in the assessment of the s. 17 (7) application of the applicant.

**Brief Background**

5. The applicant was born in 1988 and is a Palestinian national. Both his parents were killed in a bomb blast and he does not have any siblings. At the age of twelve he was detained by Arabic soldiers and subsequently tortured and degraded. Such detention lasted until on or about December 2000 when he travelled to Algeria for a six year period. From there he went to Morocco for appropriately a one year period and ultimately arrived in Ireland on 2nd November 2007. He applied for refugee status on 6th November 2007 on the basis of imputed political opinion. At that time he disclosed that he was an atheist. He was interviewed on 30th January 2008 and ultimately an ORAC decision recommending that he be refused refugee status issued on 14th February 2008. With the assistance of the Refugee Legal Services the applicant submitted an appeal bearing the date 6th March 2008 which was supplemented by additional information including country of origin information in a letter of 13th March 2008. Thereafter it appears that the applicant changed addresses without advising the respondent so that his whereabouts were unknown to the respondent and ultimately his appeal was deemed withdrawn on 17th December 2009. However the applicant did attend a medical examination on 11th June 2008 which culminated in a medical report of 1st October 2008 which was tendered to the appeal Tribunal.

6. In the application for review of the initial refusal under s. 17 (7), by way of letter of 4th August 2011 his complaint is that in the earlier decision (29th July 2011) the deciding officer did not take into account the applicant's personality disorder which it was submitted was established by reason of a second medical report dated 17th June 2011. The earlier decision included a statement to the effect that the medical report did not explain what personality disorder the applicant had and objective evidence was not available to show that the applicant has a personality disorder.

7. In the letter of seeking review it was also claimed that the new claim was sufficiently different from the earlier claim to admit a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached in the earlier claim. The appeal document complained that the applicant did not have the benefit of legal advice when he completed his questionnaire. Further insofar as the initial decision is concerned it is complained that it states that the applicant should have put forward his fear of being persecuted as a result of being an atheist at an earlier time however the appeal documents suggested that the applicant's inability to express his fear of persecution because of his atheism must be viewed in the context of his personality disorder.

**Submissions**

8. Insofar as the letter seeking review of 4th August 2011 is concerned the respondent points out that the applicant did in fact have the benefit of legal advice when appealing the ORAC decision of 14th February 2008 and the respondent also points to the fact that it is asserted that the applicant was unable to express his fears because of his personality disorder in 2008 is indicative of the fact that asserted new evidence amounts to new proofs of the initial claim of persecution as opposed to a new claim. The respondent also complains that the second medical report of 13th June 2011 does not support the fact that the applicant definitely had a personality disorder or that the asserted personality disorder, if he did have same, rendered him incapable of venting his fear of persecution

based upon him being an atheist at an earlier time.

9. In my view the fact that the applicant can now attend to maintaining a claim based upon his atheism notwithstanding that apparently he has a personality disorder belies the suggestion that he could not have made this claim at an earlier time.

10. In the medical report of Dr. Leonard of the 13th June 2011 the reader is not advised as to the qualification of Dr. Leonard or the date of examination. The medical report opens with an identification of its purpose namely to provide medical orientated argument as to why the asylum seeker should be granted humanitarian leave to remain. Significantly there is a finding that the applicant did not have any issue with a bearing on insight and judgment though he did show evidence of Axis II problems which apparently deal with personality difficulties and mental handicap such that it is suggested that he is more likely to expose himself dangers inherent in middle eastern society than the average person. The report goes on to say that in order to substantiate such statement with objective evidence it would be necessary to conduct something like M.M.P.I. test which in the events was not conducted. The report of Dr. Leonard states that Dr. Leonard strongly suspects that a test would reveal a vulnerable personality which would then render him more at risk if he was to be forcefully repatriated to Palestine. This appears to be based upon the assertion that the applicant admitted to above average use of mood altering substances (it appears that the applicant did indicate that since arriving in Ireland he has been involved in substance abuse although there is nothing in the report to indicate that same was above or below average user and what average user might amount to), his declaration of atheism, his identity as a Palestinian, and his rootlessness.

11. The respondent argues that save for the substance abuse the other items identified namely atheism, Palestinian national and rootlessness were known at the earlier application for refugee status and therefore did not amount to anything new. Insofar as substance abuse was concerned the applicant submissions are to the effect that by January 2011 his situation and mental health has improved.

12. The respondent argues that there is no evidence whatsoever available to the effect that abuse of mood altering substances or alcohol renders an individual more susceptible to being persecuted in Palestine than would prevail otherwise. The respondent makes a similar comment in relation to the applicant's rootlessness, the fact that he is a Palestinian national and/or the fact that he might have the asserted personality disorder. The applicant has not sought to counter these submissions.

### **Jurisprudence**

13. As aforesaid the applicant relies on the judgment of Clark J. in *A.A. aforesaid*. The difficulty in this regard however is that that judgment related to the effect of s. 17 (7) of 1996 Act as it then was. In the events there has been a substantial amendment to the provisions which came into force in early 2011 and which apply in the instant circumstances. At the date of the judgment in *A.A.* the relevant provision was to the effect that a person to whom the Minister had refused to give a declaration may not make a further application for a declaration under the Act without the consent of the Minister. By virtue of the 2011 amendments it is provided that the relevant consent of the Minister may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or being presented by that person and the Minister shall afford such consent if following such examination such new elements or findings significantly add to the likelihood of the applicant qualifying as a refugee.

14. In a judgment of Cooke J. in *L.H. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 406 an application was made under s. 17(7). That application concerned the law prior to the amendments in 2011.

15. In the case before Cooke J., as in the present case, a complaint was made that there was inadequate insufficient or no consideration of the asylum claim and that applicant also complained of his medical status. Cooke J. indicated that it was important to distinguish between a claim made for refugee status and the proofs put forward for same. At paragraph 21 of his judgment he indicated that s. 17 (7) was available for further applications as opposed to re-opening earlier applications and paragraph 35 indicated that a deemed withdrawal of an application or an appeal is a determination. Cooke J. was satisfied that the test to be applied was as per the judgment of Clarke J. in the matter of *E.M.S. v. the Minister for Justice, Equality and Law Reform* [2004] IEHC 398 and in the matter of *R. v. Secretary of State for the Home Department, Ex parte Onibiyo* [1996] QB 768. In the latter mentioned judgment Bingham MR stated that the test is:

“The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.”

16. Clarke J. in *A.M.S. v. Minister for Justice and Equality* [2014] IESC 65 accepted that this test applied.

17. In the event Clark J. in *A.A.* found the test to be of assistance but appeared to modify same.

18. Cooke J. in *L.H.* aforesaid went on to assess the implications of the amendments to s. 17 (7) to the effect that if anything the threshold was raised for re-admission.

19. In a further case *J.K. v. the Minister for Justice, Equality and Law Reform* [2011] IEHC 473 Hogan J. indicated that the amended provisions of s. 17 (7) is such that the *E.M.S.* test applied.

### **Decision**

20. I am satisfied that the views expressed by Cooke J. in *L.H.* aforesaid (including the threshold observation in paragraph 32) as to the test to be applied in an assessment by the Minister under s. 17 (7) of the 1996 Act, as amended in 2011, represents the correct current position. In the application for review of the 4th August 2011 no complaint is made as to the test which was applied but rather the review is sought essentially on the basis that the asserted new claim based upon the asserted personality disorder is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken. This is of course is a qualitative decision for the Minister and not for the applicant's legal personnel.

21. I am not satisfied that there is anything unreasonable or irrational about the decision of the 11th August 2011 such that it should be quashed.

22. Clearly the issue of the applicant being an atheist was within the initial application of the applicant and demonstrated by the content of the letter on behalf of the applicant of 4th August 2011 and therefore this aspect of the matter cannot be considered to be new.

23. There is in fact no evidence put forward to the effect that having a personality disorder gives rise to persecution and similarly there is no evidence that having a history of alcohol abuse or substance abuse might give rise to a persecution.

24. In the circumstances therefore I am satisfied that there was no error in the assessment and conclusion reached in the review decision of the 11th August 2011 and therefore the application for *certiorari* is refused.