Neutral Citation Number [2006 IEHC 152]

THE HIGH COURT
JUDICIAL REVIEW

2004 No. 483 J.R.

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

BETWEEN

LEONID POPOVICI AND ANNA ANDREEVA

APPLICANTS

AND

JAMES NICHOLSON, THE REFUGEE APPEALS TRIBUNAL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice de Valera delivered on the 26th day of April 2006.

1. This is an application for the production of certain documents set out in detail at paragraphs (i)-(v) of the notice of motion herein relating to the decisions and procedures of the first and second named respondents in the course of conducting appeal hearings concerning the applicants pursuant to the provisions of the above mentioned Acts of the Oireachtas. The description "discovery" does not appear in the notice of motion but is used in the affidavit of Mr. Durkan, the applicants' solicitor, supporting the application.

2. It should be noted that in the case of paragraph (ii) and paragraph (iii) of the notice of motion paragraphs are further subdivided into (viii) and (ii) divisions respectively.

3. This application is made subsequent to an order for leave to proceed by way of judicial review which was made on the 9th day of February 2005.

4. The application for leave was accompanied by a statement of grounds, supported by an affidavit from Leonid Popovici and subsequently a statement of opposition was filed supported by an affidavit sworn by John English.

5. The applicants' case can be summarised as claiming a general bias on behalf of the first and second named respondents evidenced by the alleged pattern of findings by the first named respondent and the procedures in assigning cases adopted by the second named respondent and a specific complaint concerning the manner in which the first named respondent conducted the appeal hearing in question.

6. The application for leave was not contested by the respondents and the hearing of the substantive judicial review is pending. This application is made in the course of these proceedings.

7. It should be noted that the affidavit of John English, sworn on the 21st April, 2005, pre-dates the letter seeking voluntary discovery dated the 5th May, 2005, and the notice of motion herein which is dated the 18th July, 2005, and anticipates the application for discovery (at paragraph (xv) of John English's affidavit).

8. There is a fourth affidavit sworn on behalf of the respondents on the 18th July, 2005, resisting the application for discovery.

9. In conceding the application for leave to seek judicial review the respondents must be taken to have conceded that there were "substantial grounds" on which to base the applicants' claim. This being so the dictum of Finlay C.J. in *AIB Bank Plc. v. Ernst and Whinney* [1993] 1 I.R. 375 is relevant:

> "The basis purpose and reason for the procedure of discovery… is to ensure as far as possible that the full facts concerning any matter in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than a partial or limited revelation of the facts arising in a particular action, may be done."

10. At paragraph 10-03 of *Civil Procedures in the Superior Courts*, 2nd ed., (Delany and McGrath) the learned authors state:

> "…the discovery process is designed to narrow the issues which must be resolved between the parties and to facilitate the resolution of the case in as speedy and cost efficient manner as possible."

11. And I adopt this as being an apt and appropriate statement of the law.

12. In this respect it must be borne in mind, as already stated, that the respondents have accepted there is a case to be tried, that is the application for judicial review, between the parties.

13. I am satisfied, therefore, that there should be discovery of documents by the respondents to ensure that the full facts of this matter come before the court hearing the judicial review application but the scope of the documentation sought by the applicant is too extensive and it should be restricted to such documents as are necessary for the purpose of ensuring a proper and comprehensive hearing of the facts and arguments.

14. In her affidavit, which has not been contradicted by any subsequent affidavit, Ms. NicCanna on behalf of the respondents points out, at paragraph (iv), that the information sought at (ii)(ii) of the applicants notice of motion has not been compiled by the Tribunal and is, therefore, not discoverable.

15. Ms. NicCanna at paragraph (v) of her affidavit and the numbers in relation to Ms. NicCanna's affidavit and to continue at paragraph (v) of her affidavit states that the information sought at (ii)(ii), (iv) and (v) of the notice of motion is already available to the applicant and, therefore, need not be discovered.

16. At paragraph (vi) of her affidavit Ms. NicCanna states that, as already stated in respect of paragraphs (ii)(ii) of the notice of motion paragraph (ii) (viii) seeks information not compiled by the respondents and therefore not available for discovery.

17. I accept that the information sought at paragraph (iv) and paragraph (ii)(v), (ii)(vi) and (ii)(vii) is in the public domain and therefore need not be discovered.

18. This leaves the information sought at:

Paragraph (i)

Paragraph (ii)(i)

Paragraph (ii)(iii)

Paragraph (iii)(i)

Paragraph (iii)(ii)

Paragraph (v)

to be considered.

19. I have been referred to Finlay Geoghegan J.'s decision in *K.A. v. The Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 93 in which she states, *inter alia*:

> "The limitation on discovery… it is that it must not be considered to be a fishing exercise… it is not sufficient for an applicant simply to make an assertion not based on any substantial fact and then seek discovery in the hope that there will exist documents which support the contention."

20. In respect of paragraph (i) I cannot see the relevance of this information to the application for judicial review and it must be considered, in the circumstances, to be a "fishing expedition" as envisaged by Finlay Geoghegan J. as set out above.

21. The information sought at paragraph (ii)(i) appears to me to be relevant to the judicial review proceedings and discoverable, if available. It seems appropriate to point out at this point that only statistics already compiled and available are discoverable – the discovery procedure is not appropriate to seek to force the respondents to compile statistics from information in their possession for the benefit of the applicant.

22. At paragraph (ii)(iii) if such records have been complied then it appears that they are relevant and discoverable but it is not the responsibility of the respondents to create such lists solely for the purpose of the applicants' discovery.

23. At paragraph (iii) the applicants seek documents relating to the assignment of cases to Tribunal members both generally and, specifically, in relation to the applicants and I am satisfied this is an appropriate heading pursuant to which discovery should be allowed under sub headings (i) and (ii).

24. Finally it is not clear that any audio visual recording or transcript in respect of the applicants hearing with the first named respondent exists but it seems to me that it is an appropriate matter for discovery but my comments in relation to discovery generally which follow are to be taken into consideration.

25. This matter came before me as a motion seeking discovery. As already pointed out, the notice of motion did not, in fact, specify this but merely sought, rather vaguely in places, documents and records and other general information. Matters which, for example in plenary proceedings, should more properly be sought by way of particulars are apparently included and this is not appropriate.

26. Order 31 of the Rules of the Superior Courts relates to discovery and discovery means, initially at any rate, the disclosure of the existence of documents (which as in this matter may include items such as video recordings). Discovery is made on affidavit and the standard form affidavit, in summary, provides for the disclosure of documents.

Firstly: in the possession of the deponent which it is agreed to produce.

Secondly: in the possession of the deponent, the production of which is objected to.

Thirdly: previously but not now in the deponent's possession and

Finally: an averment that there are no other relevant documents.

27. It is appropriate that the respondents make discovery, as set out above, in the manner provided for in the rules using the specimen form of affidavit as a template. I reiterate that the respondents need only disclose documents already in existence for the purpose of this discovery and do not need to create, or extrapolate, statistics or tables not already in existence as is apparently envisaged in the notice of motion particularly in paragraph (ii) thereof.

28. For the avoidance of doubt this means that it is still open to the respondents to object to the production of certain documents as envisaged in the specimen "Affidavit as to documents" (No. 10 appendix C Rules of the Superior Courts).