Neutral Citation [2015] IEHC 404

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 338 J.R.]

BETWEEN

T.C. [ZIMBABWE]

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

REFUGEE APPEALS TRIBUNAL

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 25th day of June, 2015

1. This is a telescoped application for leave to seek judicial review, seeking an order of *certiorari* to quash a decision of the Refugee Appeals Tribunal dated the 31st January, 2011, and remitting the appeal of the applicants for *de novo* consideration by a separate tribunal member.

BACKGROUND

2. The applicant was born on the 2nd August, 1992, in Mutare, Zimbabwe. She arrived in Ireland on the 6th March, 2002, together with her father and sister for the purpose of visiting their mother, who had arrived here in 2001 on a student visa. The student visa of the applicant's mother expired in May 2003. The applicant and her mother have remained in this jurisdiction illegally since that time. The applicant's father and sister subsequently returned to Zimbabwe but the applicant has remained in Ireland, commenced school and completed her leaving certificate examinations in June 2011. The applicant applied for asylum on the 24th August, 2010, i.e. 8 years and 5 months after her arrival in Ireland. The applicant completed an ASY1 form on the 24th August, 2010, together with the s.8 questionnaire. An interview pursuant to s.11 of the Refugee Act 1996 (as amended) was conducted on the 11th November, 2010. A report issued by the Refugee Applications Commissioner (RAC) in December 2010, in respect of the applicant's application for refugee status. The Commissioner was satisfied that the applicant had not established a well-founded fear of persecution as required by s.2 of the Refugee Act 1996 (as amended). The Commissioner made a recommendation pursuant to s.13(1) of the Refugee Act 1996 (as amended) that the applicant should not be declared a refugee and further recommended that s.13(6)(a) of the said Act should apply to the application. The consequence of the finding pursuant to s.13(6)(a) was that any appeal by the applicant to the Refugee Appeals Tribunal (RAT) would be conducted on a papers-only basis. Section 13(6)(a) states "that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee".

3. A form two notice of appeal against the recommendation of the RAC, pursuant to s.13(5) of the Refugee Act 1996 (as amended), was completed on behalf of the applicant by the Refugee Legal Service. The notice of appeal is dated the 14th January, 2011, and comprises a total of 15 pages. Paragraph 9 of the notice of appeal addresses purported errors in fact and law made by RAC as a result of the s.13(6)(a) finding. The tribunal member, by decision dated the 31st January, 2011, affirmed the recommendation of the RAC. It is against the decision of the RAT that the applicant seeks to bring these proceedings.

EXTENSION OF TIME

4. The decision was dated the 31st January, 2011; however, it appears to be accepted that the decision of the tribunal was received by the applicant on or about the 7th March, 2011. A notice of motion together with a statement of grounds issued on the 19th April, 2011, which was outside the statutory 14-day period applicable for the commencement of such proceedings, as provided by the statute. The applicant at para. 7 of the grounding affidavit says as follows:

> "I say and am advised by, Mr. Brian Burns, that an extension of time is not required for the initiation of the within proceedings but if the position is otherwise I pray this Honourable Court for liberty to file a further affidavit in due course explaining such delay as has occurred."

5. It should be pointed out at this stage that no further affidavit was filed by the applicant. However, the solicitor on record on behalf of the applicant, Mr. Brian Burns, swore and filed an affidavit on the 19th day of February, 2015, exhibiting the missing documents associated with the applicant's case, as the only document exhibited in the grounding affidavit was the decision of the RAT. Counsel on behalf of the applicant explained in oral submissions before the Court that at the time the affidavit was sworn, a decision of Hogan J. had held that the time limit provided by the statute, i.e. 14 days, was in breach of the principles of equivalence and effectiveness pursuant to the Procedures Directive (Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status) [*T.D. & ors. v. Minister for Justice, Equality and Law Reform & ors*. [2011] IEHC 37]. Subsequent to the proposed issuing of these proceedings, the decision of Hogan J. was appealed to the Supreme Court and the decision was overturned and so the 14-day time limit remained applicable at the time of the commencement of these proceedings [*T.D. & ors. v. Minister for Justice* [2014] IESC 29]. Counsel for the respondents pointed out that no further explanation had been offered to the Court by way of an affidavit from the applicant in respect of the delay as was intimated would be forthcoming in para.7 of the original grounding affidavit. However, given the unfortunate, lengthy time delays that are involved in the listing of proceedings of this nature before the Court to date, I would not be satisfied to dismiss the proceedings on a delay point at this juncture. However, that is not to be taken as excusing the applicants from putting good and sufficient reasons on affidavit before the Court in order to substantiate an extension of time. In the circumstances, I am satisfied to accept the explanation offered by counsel and the averment at para.7 of the grounding affidavit and, in the circumstances of this particular case, I am satisfied to extend time within which to bring the proceedings.

SUBMISSIONS
6. There are six grounds set out in the statement of grounds at para.(e) thereof but at the hearing before the Court only the first ground was being proceeded with, which states as follows:

> "The Applicant's claim for declaration of refugee status under s.17 (1) of the Refugee Act 1996 (as amended) has not been lawfully determined by means of a procedure which complies with the minimum standards required to be met by Council Directive 2005/85/EC of 1st December, 2005 in that the said procedure deprives the applicant of an effective remedy against the first instance determination of her application for asylum before a court or a tribunal in compliance with the requirements of Ch. V of the said Directive. Accordingly the decision of the second named Respondent was arrived at ultra vires and is unlawful and the first Respondent thereafter lacked the jurisdiction to refuse to grant refugee status to the Applicant in circumstances where no lawful first instance asylum decision was made in respect of the Applicant."

7. This is a very broad statement of grounds as indeed were the remainder of grounds pleaded but which were not pursued at the hearing before the Court. In written submissions, (undated) February 2015, the applicant advances the case being relied upon at the hearing. The applicant was relying on the decision of Cooke J. in *S.U.N. (South Africa) v. Refugee Applications Commissioner & ors.* [2010] IEHC 338. That decision arises out of a complaint following on from the recommendation of the RAC and the finding pursuant to s.13(6)(e) of the Refugee Act 1996 (as amended) which, it is alleged, deprived the applicant of an opportunity to engage in an oral hearing of her appeal despite the negative credibility findings made. The applicant herein asserted that the finding made by the commissioner pursuant to s.13(6)(a) resulted in the appeal to the second respondent being less than an effective remedy under article 39 of the Procedures Directive. Therefore the applicant's case, in summary, is that the applicant has been deprived of any effective remedy to challenge the first instance decision of the commissioner and the papers-only appeal to the second respondent is insufficient to vindicate that right where credibility issues arise. The applicant relied on the decision of Cooke J. in the S.U.N case and as a result of that, submitted to the Court, the decision of the RAT should be quashed on that basis alone. The applicant further indicated in the written submissions that she was also relying on grounds two and three in the appeal but accepted that those claims stood or fell depending on the Court's decision in respect of the first ground, i.e. that the s.13(6)(a) finding of the commissioner resulted in the denial of any effective remedy to the applicant to challenge the decision of the commissioner. In addition to the *S.U.N* decision (*supra*) the Court was also referred to the decision of Barr J. in *N.M. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 638 and a further decision of MacEochaidh J. in *K.B. v. Minister for Justice, Equality and Law Reform & anor.* [2013] IEHC 169. In the *N.M.* case the Court was referred to para. 95 and 96 of the judgment which dealt with whether or not the applicant in N.M. had had an effective remedy available to challenge the decision pursuant to s.17(2) of the Refugee Act 1996 (as amended). However, that case, in my view, is wholly distinguishable from this case, in that *N.M* dealt with an application to the Minister to review, i.e. to reopen decisions previously taken on foot of negative recommendations from the commissioner and the tribunal.

8. The respondents in written submissions to the Court, which were expanded upon in oral submissions, raised a number of objections to the applicant's claim. The respondents submitted that insofar as the applicant seeks to rely on the S.U.N. case, any assertion based on that case is misconceived in these proceedings in circumstances where the decision as to whether a particular application falls within the ambit of s.13(6)(a) of the Refugee Act 1996 (as amended), is a decision of the RAC. The RAC is not a party to the within proceedings and it is not a determination made by any of the named respondents to these proceedings. The finding pursuant to s.13(6)(a) by the RAC was made in December 2010, and was not challenged by the applicant at that time nor since. The applicant was legally represented by the Refugee Legal Services with respect to the extensive notice of appeal filed to the RAT and finally, the respondents pointed out the applicant is out of time in respect of any purported challenge to the decision of the RAC at this juncture.

9. Without prejudice to those submissions, the respondents, in any event, proceeded to submit to the Court that the decision of Cooke J. in the S.U.N. can be distinguished from the present case on the basis that those proceedings were premised on a designation of South Africa as a safe country of origin, i.e. nationality, and not upon the facts underlying the instant case which are that the applicant showed either no basis or a minimal basis for the contention that the applicant is a refugee. This finding arose from both the length of time during which the applicant was in the State before she made any application for asylum and an analysis by the RAC of the claim advanced by the applicant, including a comparison with the claim of her mother. The decision of the RAT is not premised upon an issue of personal credibility but rather having specifically addressed and rejected any potential prejudice by way of an absence of an oral hearing upon the basis that *inter alia*:

> 1. Contradictions between the accounts of the applicant and her mother call credibility into question, not personal credibility in the manner in which was referred to in the *S.U.N* decision.
>
> 2. Failure to apply for asylum at an earlier opportunity. It was 8 years and 5 months after her arrival in the State that the asylum application was lodged.
>
> 3. A forward-looking fear was not objectively well-founded
>
> 4. Fear as a returning failing asylum seeker was not well-founded.

10. The respondents pointed out that all of the above issues were known to the applicant in advance of the s.13 report of the RAC and they were addressed by the applicant by way of a detailed written submission made on behalf of the applicant by her solicitor in the notice of appeal.

FINDINGS
11. It seems to me that the fundamental difficulty that the applicant faces in this case is that at a very late stage in the day an attempt has been made to challenge the s.13(6)(a) finding made by the commissioner in circumstances where it is well out of time. It is not specifically pleaded in the statement of grounds nor has any application been made to amend the grounds to specify such a claim. It would appear that a general non-specific statement of grounds was prepared on behalf of the applicant in accordance with the live issues which were before the courts in general at that time, i.e. the availability of an effective remedy in accordance with the Procedures Directive by virtue of the statutory procedures applicable in this jurisdiction. Those matters have been comprehensively dealt with in the intervening period (*Dokie* and *Ajibola* points) and in those circumstances were not pursued by the applicant before this Court. This is in accordance with practice in other similar cases which come before the Court and where the applicants acknowledge that these issues have subsequently been disposed of and are not live issues in the case when it comes on for hearing.

12. It appears what has occurred in this case is that a complaint in relation to the s.13(6)(a) finding has been extracted from a non-specific pleaded ground and an argument put forward that the finding has resulted in a denial of an effective remedy to the applicant for the purposes of her appeal to the RAT.

13. This contention, it seems to me, flies in the face of the established authorities of both this Court and the Supreme Court. The absence of an oral hearing is not fatal to the process. Indeed, this was ultimately conceded by counsel on behalf of the applicant in the reply to the respondents' submissions at the oral hearing. The decision of the Supreme Court in *V.Z. v Minister for Justice Equality and Law Reform & Ors* [2002] 2 I.R. 135 at p. 161 McGuinness J., in delivering the judgment of the Court, set out as follows:

> "I now turn to the second appeal. Here I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The applicant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross-examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross-examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing. His appeal was drafted on his own instructions by his solicitor and did not challenge the factual matters set out in the papers provided to him.
>
> Hogan and Morgan in *Administrative Law in Ireland* (3rd ed.) at p.556 discuss the right to an oral hearing, the right to summon witnesses and the right to cross-examine. They state:-
>
> 'Plainly whilst these issues may need to be considered independently, there is often a substantial connection between them. In any case, with each of them, as with other aspects of the *audi alteram partem* rule it may be misleading to speak of a 'right' since in such an amorphous area, entitlement to the advantage sought will depend on all the circumstances of the case. On the question of whether they apply, de Smith states:
>
> > 'A fair 'hearing' does not necessarily mean that there must be an opportunity to be heard orally. In some situations it is sufficient if written representations are considered.'
>
> The authors draw attention to the comments of Keane J. in *The State (Williams) v. Army Pension Board* [1981] I.L.R.M. 379 at p.382:-
>
> > 'Whether [there must be an oral hearing] in any particular case must depend on the circumstances of that case … the application in the present case was capable of being dealt with fairly … in the manner actually adopted by [the Board]'."

14. McGuinness J. continues:

> "It should be noted that in these references the authors are dealing with situations where there is no oral hearing even at first instance. Here there has already been an oral hearing at first instance.
>
> The Hope Hanlan letter itself deals with the matter of appeals in the context of the accelerated procedure and provides for an appeal in writing. An oral appeal is, therefore, not considered necessary in the system set up by agreement between the U.N.H.C.R. and the first respondent.
>
> The High Court Judge held that the absence of provision for an oral hearing of the appeal from a decision that an application for refugee status is manifestly unfounded did not infringe the right of an applicant for refugee status to natural and constitutional justice. In this he was, in my view, correct."

15. The respondents also rely on the subsequent decisions of *A.D. v. Refugee Applications Commissioner & ors.* [2009] IEHC 77; *M.O.O.S. v. Refugee Applications Commissioner & anor*. [2008] IEHC 399; and *S. v. Minister for Justice Equality and Law Reform* (Unreported, High Court, Birmingham J. 8th December 2008) and *M.Y.G. v. Minister for Justice Equality and Law Reform* [2010] IEHC 127.

16. The decision of McGuiness J. dealt with the Hope Hanlan procedures, which were an arrangement which was agreed between this State and the UNHCR, and indeed other states, for the purposes of regulating asylum applications. These procedures were subsequently replaced by the Council directives. However Birmingham J. in the *M.O.O.S.* case at paras. 51-52 thereof state as follows:

> "I realise of course that McGuinness J. was speaking in the context of an earlier set of procedures, the Hope Hanlan Procedures, but the principles she sets out seem entirely unaltered. I am fortified in my view in that regard by the decision of McMahon J. in *P.S. (A Minor) v. Refugee Applications Commissioner* [2008] IEHC 238. His views on the issue emerge very clearly from the judgment, and that is so notwithstanding that leave was granted in a situation where various grounds were interconnected.
>
> It seems to me that it is a matter for the Oireachtas to determine the scope and form of an appeal. So far as s.13(6)(d) of the Act of 1996 is concerned the subsection is directed to a legitimate policy objective of discouraging forum shopping. In this case the country where the prior application was made is Britain, a signatory to the European Convention on Human Rights and a fellow member of the European Union…"

17. Birmingham J. continues at para. 53:

> "In summary then, I am of the view that the applicant has not established substantial grounds for contending that the procedure at the ORAC stage was so flawed as to require intervention by way of judicial review. I am of the view that insofar as the recommendation of the ORAC officer referred to the fact that there had been a prior application for asylum that this meant that by statute any appeal would be other than an oral one. I am not satisfied that any arguable grounds have been established for suggesting that the statute that so provides is unconstitutional, or incompatible with the European Convention on Human Rights, and in these circumstances I propose to refuse leave."

18. It should be noted that the *M.O.O.S.* case was in fact an application for leave to seek judicial review against the RAC and the Minister for Justice, Equality and Law Reform.

19. In the decision of Clark J. in *V.M. (Kenya)* [2013] IEHC 24 the complaint concerned the fairness of the hearing before the RAT in circumstances of the s.13(6) finding i.e. a papers-only appeal. At para. 21 Clark J. stated as follows:

> "One further aspect of this case of serious concern to the Court is that the appeal was conducted without an oral hearing. The Court is powerless at this remove to review or amend the Commissioner's finding that s.13(6) of the Refugee Act 1996 applied on the facts relied on in the applicant's claim. The Court therefore looks with heightened vigilance at the process of the documentary appeal in circumstances where an appellant has no opportunity to appear and explain or expand on any perceived inconsistencies or deficits in his / her claim."

20. Clark J. stated at para. 22:

> "It is by now very well established that when considering a documents-only appeal, the standard required is of necessity one of extreme care as the Tribunal Member has no opportunity to form a personal impression of the applicant as at an oral hearing."

21. In *B.Y. v. Refugee Appeals Tribunal & ors.* [2015] IEHC 60 and *S.H. & ors. v. Refugee Appeals Tribunal & ors.* [2015] IEHC 98, this Court cited with approval the comments of Clark J. in relation to the standard of vigilance applicable by the tribunal member when conducting a papers-only appeal. However, it seems abundantly clear to me that at this remove, and indeed it was accepted by the applicants in the *V.M., B.Y.* and *S.H.* (*supra*), all parties were bound by the s.13 (6) finding, it not having been challenged and/or overturned at an earlier stage.

22. In light of the foregoing, I find that the applicant, at this remove, cannot now seek to launch a rearguard attack on the s.13(6) finding in the guise of a challenge to the RAT decision, where the lawfulness of a papers-only appeal to the RAT has been firmly established in authorities cited above. I therefore refuse leave.