Neutral Citation: [2017] IEHC 127

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 62 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED)

BETWEEN

D.F. S. (ALSO KNOWN AS D. M.)

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 6th day of March, 2017

1. By *ex parte* docket bearing the date 13th February, 2017 the applicant is seeking an order extending time within which to bring the within application together with leave to apply by way of judicial review to quash the recommendation of the respondent that the applicant should not be declared a refugee, which recommendation was notified to the applicant on the 26th July, 2016. A declaration that the recommendation was in breach of the applicant's Constitutional rights and fair procedure is also claimed together with an injunction and/or stay.

2. The essence of the complaint on the part of the applicant is to the effect that after the s. 11 interview with the applicant on the 27th February, 2016 the UNHCR by a letter of the 7th April, 2016 advised the respondent that biometric data was not held at the refugee camp in Malawi in relation to the applicant – it is complained that this response was not put to the applicant prior to the decision being made and therefore breached fair procedures. Since the impugned decision, by email of the 25th of October, 2016 the applicant has been advised by the UNHCR that they have biometric data although it does not appear that same was tendered to the applicant and consequentially the applicant has not tendered same to the Court.

3. A further complaint is that the respondent erroneously recorded that the UNHCR letter of the 7th April 2016 was a document submitted by the applicant as opposed to a document which was secured directly by the respondent. The applicant argues that the respondent relied upon the content of the UNHCR letter to support a finding that the applicant had not provided evidence to establish on the balance of probabilities that he is DFS.

4. The application for leave was ultimately heard on notice to the respondent.

5. The applicant initially arrived in Ireland on the 10th January, 2015 apparently to study and he subsequently secured permission on the passport that he tendered from the authorities on the 3rd March, 2015. The documents which the applicant used in arriving in Ireland were documents which were considered valid, in the applicant's passage through Germany to Ireland and also when he arrived in Ireland. The documents established that he was in fact DM. On the 29th July, 2015 the applicant applied for asylum status and he did so without the assistance of a solicitor notwithstanding that he was furnished with documentation from the respondent advising him of legal contacts. Prior to this he had contacted the UNHCR, and secured ORAC contact details, who queried if the applicant had a lawyer. The applicant appealed the decision of ORAC by appeal of 5th August, 2016. In this communication the applicant was again advised of contact detail of the Refugee Legal Services.

6. At para. 10 of his grounding affidavit on the 23rd January, 2017 he states that he sought legal advice for the first time on the 26th October, 2016. No attempt is made to explain why he did not seek legal advice before that date.

7. When the matter came before the Court on an *ex parte* basis, there was no affidavit from the applicant's solicitor and therefore no explanation as to the delay between the 26th October, 2016 and the 23rd January, 2017. However, following the direction to make the application on notice to the respondent the applicant's solicitor, Finbar Phelan, swore an affidavit on the 14th February, 2017 in which Mr. Phelan states that the applicant was referred to him by the Refugee Legal Services and he arranged a consultation for the 26th October, 2016 at which time the applicant furnished Mr. Phelan with the relevant documentation save for the applicant's notice of appeal, a copy of which was not retained by the applicant. Accordingly, Mr. Phelan wrote to the Refugee Appeals Tribunal on the 27th October, 2016 seeking a copy thereof which was duly furnished on the 10th November, 2016. It is noteworthy that the applicant does not argue that the notice of appeal was a critical document in or about moving a judicial review application. At para. 3 of his affidavit Mr. Phelan said because three months had elapsed since the applicant had received notification of the negative decision he did not see judicial review as a pressing issue particular as he deals with asylum cases and was well aware of the twenty-eight day time limit. Mr. Phelan also indicated that he was aware of the hurdle in challenging a decision of the Commissioner as a result of the "BNN test". Mr. Phelan also refers to the fact that the applicant had already lodged a notice of appeal. At para. 5 of this affidavit he suggests that this appeal presented the natural next step in the case. At para. 6 he said it was not immediately apparent to him that the letter of the 7th April, 2016 from the UNHCR had not been disclosed to the applicant however a reference to the document having been submitted by the applicant himself. On the 16th January, 2017 Mr. Phelan instructed counsel seeking proof and general advices on the merits of the within proceedings. This apparently arose because of the judgment of Humphreys J. in *B.A. v. RAC* [2016] IEHC 672 which was delivered on the 21st November, 2016 and suggested that the BNN test might be surmounted. Mr. Phelan does not however deal with the delay between the 21st November, 2016 when this judgment was available to him and the 16th January, 2017 when he instructed counsel.

8. Insofar as the merits of the argument as to the unfair procedures incorporating the UNHCR letter of the 7th April, 2016 into the decision without furnishing same to the applicant for his comment or explanation the applicant argues that this was highly prejudicial and averse to the applicant and therefore under relevant jurisprudence it was obligatory for the respondent to afford an opportunity to the applicant in advance of the decision to comment. On the other hand, the respondent argues that the letter of the 7th April, 2016 was only a minor aspect of the decision maker's consideration as to whether or not the applicant was a national of Burundi or Malawi and also points to the fact that the applicant himself at no time sought to secure this information considering how relevant he believed it was to the establishment of his correct identity. The respondent argued that the decision maker proceeded to assess the core elements of the applicant's claim and assessed the creditability of all aspects of the claim. The respondent also relies on Humphreys J. decision in *B.A.* to the effect that the failure to put new information need not necessary be fatal to a decision:

substantial grounds must be made for the contention that the conclusion averse to the applicant drawn from the new information are so fundamental and significant that the information should be specifically put.

9. At para. 20 of Humphreys J. judgment in *B.W. v. RAT* [2015] IEHC 759 the Court indicated that where the new information needs to be put to the applicant depends upon whether it materially changes the picture before the decision maker – if the new information comes to light after the applicant has had an opportunity to comment, which does not alter the picture before the decision-maker, the decision is not invalid by reason only of a failure to put that information.

10. In the subsequent case *B.A. v. RAC* aforesaid Humphreys J. said that while not all failures to put information would be fatal, in the specific circumstances of the case before him, substantial grounds had been made out for the contention that the conclusions averse to the applicant drawn from the new information were so fundamental and significant that the information should have been specifically put to the applicant.

11. The relevant letter of the 7th April, 2016 in fact confirmed that a prior letter of the 13th November, 2000 furnished by the applicant to the respondent was authentic however, it also suggested that there was no biometric information for S or Mr. F and the decision maker found that the result of this correspondence and a s. 11 interview was that the authenticity of the letter of the 13th November, 2000 was confirmed. However, it appears to have granted asylum to a man who was dead for three years at that time therefore notwithstanding the providence of the letter itself according to the applicant's account it's content relate to a fraudulent application. In the next paragraph it is stated that despite the applicant's assertion that the UNHCR had retained biometric data same was not held by the UNHCR in fact. In the next paragraph it was held that because he traveled with a passport in the name of DM a national of Malawi the Commissioner found that he had not proved that he was anyone other than that person on the passport, on the balance of probabilities although thereafter for the purpose of the report he was assessed as a national of Burundi, his asserted country of origin.

12. In my view, notwithstanding the fact that it is an ORAC decision the applicant's complaint is arguable and, but for the time delay consideration, it would be appropriate to grant leave.

13. Insofar as an extension of time is concerned the applicant relies on the judgment of Mac Eochaidh J. in *M.B. v. RAT* [2013] IEHC 168 where having considered other cases and jurisprudence he identified the significant issues that follows:-

> "(1) The relevant statutory time limit and the extent of the delay.
>
> (2) Whether or not the applicant was in receipt of legal advice.
>
> (3) The reasons for the delay advanced.
>
> (4) The strength of the potential claim.
>
> (5) The extent of which an injustice might be perpetrated."

14. The respondent relies on the decision of Costello J. in *O'Donnell v. Corporation of Dun Laoghaire* [1991] ILRM 301 where the court indicated that an extension of time might be afforded if there are reasons which both explain the delay and afford a justifiable excuse for the delay. The respondent also refers to the Supreme Court decision in *S. v. Minister for Justice* [2002] 2 I.R. 163 where it was held that a further issue in a time when the intention to appeal was formed. In *SAFR v. Revenue Commissioners*, Supreme Court, the 16th March, 2016, the test of Costello J. in the *O'Donnell* case aforesaid was approved.

15. Having considered all of the foregoing appears:-

> (1) The applicant had twenty-eight days within which to make his judicial review application and therefore requires an extension of time of five times the statutory period;
>
> (2) The applicant was not in receipt of legal advice until the 26th October, 2016 although no evidence has been tendered as to why the applicant did not secure legal advice before that date given the availability of advice to the applicant from the Refugee Legal Services and the notification to him from the respondent of the availability of such advice;
>
> (3) In the events the applicant is relying on his own decision not to secure legal assistance as an excusable ground for delay, a proposition I cannot agree with;
>
> (4) Limited if any reason has been afforded for the delay from the 26th October, 2016 and in my view no prudent reason was advanced for the delay as between the 21st November, 2016 when Mr. Phelan was aware of the content of the judgment of *BA*, aforesaid and the 16th January 2017 when Mr. Phelan instructed counsel, save that Mr. Purcell saw the appeal as the next natural step (see para. 5 Mr. Phelan's affidavit) ;
>
> (5) The applicant's position is arguable;
>
> (6) I cannot see how injustice would be perpetrated on the applicant by a failure to grant an extension of time in particular as, to date, the biometric information is not yet available, and an appeal is being processed which is a full appeal (as per *M.A.R.A. v. Minister for Justice and Others* [2014] IESC 71).
>
> (6) I believe the applicant has sought to explain the delay however I am not satisfied that the explanation given excuses the delay.
>
> (7) The fact that grounds seeking relief are arguable does not trump all other considerations as to whether to extend time or not – if so this factor wouldn't be included in the mix of other matters to be taken into account (in considering an extension of time) but, rather, would in my view, be expressed as a stand alone deciding factor

16. Finally, and entirely independently of the foregoing the reality is that the affidavit of Mr. Phelan suggests that he took one view whereas counsel, when instructed, took a different view. As being held by Irvine J. in the High Court in *J.A. v. Refugee Applications Commissioner & Others* [2009] 2 I.R. 231 an extension of time would not be granted merely to allow new lawyers to take a different view as to the legality of a decision already considered by their predecessors. To do so would lead to an open ended right to maintain judicial review proceedings. This line of authority was recently followed in N.N. v. Minister for Justice and Others, judgment of Keane

J. delivered on the 15th February, 2017.

17. The applicant seeks to distinguish himself from the *J.A.* facts however I am satisfied the sentiment above applied to the within facts.

18. In the circumstances the application to extend time so as to pursue an application for leave is refused.