Neutral Citation Number: [2008] IEHC 388

THE HIGH COURT

2006 No. 133 JR

BETWEEN

L. I.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MR JUSTICE HEDIGAN, delivered on the 10th day of December, 2008.

1. This is an application for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated 6th January, 2006, to refuse consent to the re-admission of the applicant to the asylum process under s. 17(7) of the Refugee Act 1996, as amended. Leave to apply for judicial review was granted by de Valera J. on 13th June, 2007.

Background

2. The applicant is a national of Moldova and a Jehovah's Witness. She arrived in the State on 29th May, 2005. She did not apply for asylum at that point. Some six weeks later, on 11th July, 2005, her son arrived at Dublin airport. The applicant presented herself to receive her son and thereby came to the attention of the Garda National Immigration Bureau. She and her son thereafter applied for asylum.

3. The Office of the Refugee Applications Commissioner (ORAC) provided the applicant with a questionnaire, which she completed on 20th July, 2005, citing her religion as the basis of her fear of persecution if returned to Moldova. I do not propose to set out the details of the claim as they are not strictly relevant to the present challenge. The applicant gave an address at 25 Cherry Park, Swords.

4. The applicant was told that she would be invited for interview with ORAC within roughly three months. As advised, a letter dated 1st September, 2005 was sent to her address in Cherry Park, inviting her for interview on 13th September, 2005. She did not attend for interview and the letter was returned to ORAC on 22nd September, 2005, marked "not called for". It is agreed between the parties that this means that a note was left at the applicant's house indicating that she had received a letter by registered post and should attend at the nearest post office to collect it within a certain number of days, but that she did not call for the letter, as directed.

5. On 4th October, 2005, the applicant instructed her current solicitors to assist her in her asylum claim. On the same date, her solicitors wrote to ORAC, requesting her file. A reply from ORAC, dated 6th October, 2005, requested a signed authority from the applicant before furnishing the file. On 19th October, 2005, the applicant's solicitors wrote to her at her address at Cherry Park, requesting that she sign an enclosed consent form. The applicant's evidence is that she was experiencing difficulties receiving her post, and did not receive the letter from her solicitors until 10th November, 2005. She returned the signed consent form to her solicitors the following day and on 17th November, 2005, they forwarded the form to ORAC.

6. A report was compiled by an ORAC officer in compliance with s. 13(1) of the Refugee Act 1996, deeming the applicant's asylum application to be withdrawn; the report noted that the applicant had failed to attend for interview and had not furnished an explanation within three working days of the date of the interview as is required under s. 11(10) of the Refugee Act 1996, as amended. It was therefore recommended that the applicant should not be declared a refugee and it was noted that there would be no appeal against this recommendation.

7. The ORAC decision was notified to the applicant by letter dated 24th November, 2005. That letter, which was sent to her address in Cherry Park, was returned to ORAC on 8th December, 2005, marked "not called for". The Minister's decision to refuse the applicant's claim for asylum, dated 5th December, 2005, was also sent by registered post to that address by letter dated 6th December, 2005 and a copy thereof was sent to the applicant's solicitors. The applicant has been refused leave to challenge the ORAC decision or the Minister's decision in that regard.

8. The decision in respect of which leave has been granted emanated from an request made by the applicant's solicitors by letter dated 21st December, 2005, that the Minister exercise his discretion under s. 17(7) of the Act of 1996, as amended, to consent to the applicant making a further application for a declaration of refugee status. This request did not relate to the applicant's son. The basis for the request was that the applicant did not receive the letter notifying her of the date and time of her ORAC interview. It was not disputed the said letter was sent to her home address. Rather, it was suggested that the applicant had been experiencing difficulties with her post. The section 17(7) request did not address the substantive nature of the applicant's asylum claim and no information was appended in that respect.

9. The applicant's solicitors were informed by letter dated 6th January, 2006 that the applicant's section 17(7) request had been refused. That letter stated that in cases such as the applicant's, the deciding officer (i.e. an officer of the Minister's department) looks at the reasons given by the applicant for her failure to attend for interview, bearing in mind that the applicant is not a passive participant in the process and has a statutory obligation to notify ORAC of any change of address.

10. Although it is not strictly relevant, it is nevertheless noteworthy that on 10th January, 2006, the applicant's solicitors informed the Minister that she had been living at a new address since 24th December, 2005. It is common case, however,

that at all material times for the purpose of the within challenge, the applicant was resident at the address given to ORAC, i.e. Cherry Park, Swords.

The Relevant Law
11. Under s. 17(7) of the Refugee Act 1996, as amended, a person who is refused a declaration that they are a refugee may not make a further application for a declaration without the consent of the Minister.

12. Section 11(10) of the Act of 1996 regulates the situation where an applicant fails to attend for a scheduled interview with ORAC. Under that subsection, it is open to the applicant to furnish the ORAC officer with an explanation for non-attendance within three working days of the date fixed for the interview. If no such explanation is furnished within that time-frame, the application "shall be deemed to be withdrawn." Section 17(1A) further provides that where an application is deemed to be withdrawn, the Minister "shall" refuse to grant a declaration of refugee status.

The Submissions
13. Among other reliefs, the applicant is seeking an order of *certiorari* quashing the Minister's decision to refuse consent under s. 17(7), and an order of mandamus directing him to re-admit her to the asylum process. The application is grounded on the submission that the Minister's decision in respect of the section 17(7) application was reached in breach of natural and constitutional justice, and was irrational in all the circumstances. The applicant's primary complaints are that:-

a. The Minister unlawfully fettered his discretion under s. 17(7);

b. The Minister failed to take all relevant material into consideration; and

c. The Minister reached a disproportionate decision.

14. The respondent submits that the Minister fulfilled his duty under s. 17(7) properly and in accordance with fair procedures, took all relevant materials into account and weighed the appropriate matters appropriately.

(a) Fettering of Discretion under section 17(7)
15. The applicant submits that the Minister unlawfully fettered his discretion by confining his consideration of the applicant's request under s. 17(7) to the question of her non-attendance at the scheduled ORAC interview. It is contended that the Minister has set out a rule for everyone who fails to attend for interview at ORAC and subsequently makes an application under s. 17(7); in this regard, the Court has been referred to the words "in cases such as your client's" in the Minister's decision. It is argued that the Minister was not, in fact, constrained under s. 17(7) to consider only the applicant's failure to attend for interview, in the same way as the ORAC officer is constrained under s. 11(10), but, rather, should have taken other relevant information into consideration.

16. The Court has been referred to Article 20 of Council Directive 2005/85/EC on minimum standards on procedures of Member States for granting and withdrawing refugee status ("the Procedures Directive"), which sets out the procedure in the case of implicit withdrawal or abandonment of an application. Subsection (1) thereof sets out the procedure for deciding to discontinue the examination of an asylum application. Subsection (2) provides that if an applicant reports again to the competent authority after a decision to discontinue has been taken, Member States must ensure that applicants are entitled to request that their case is re-opened. The applicant accepts that the Procedures Directive has not been implemented in the State and the implementation date has passed. The applicant contends, however, that reliance can be placed upon it as the Directive is – it is argued – capable of direct effect. In the alternative, it is submitted that the Directive serves as a useful guide as to what procedure should be followed by the Minister.

17. The respondent rejects the applicant's contention that Council Directive 2005/85/EC is capable of direct effect. That notwithstanding, the respondent submits that Article 20 must be read in light of recital 15, which states as follows:-

> "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."

18. The respondent contends that recital 15 applies in the instant case as the applicant did not include any new evidence in her section 17(7) application.

19. The respondent further submits that the Minister's decision in the within case was based on the section 17(7) request made by the applicant, in which no extra reason was given other than the fact that she did not receive her letter. The respondent submits that the applicant is not a passive bystander in the process but, rather, an active participant. It is submitted that in order to be re-admitted to the asylum system, there was a strong burden upon her to convince the Minister to grant consent under s. 17(7), and to put the facts before the Minister as strongly and as soon as possible. It is argued that there is no obligation on the Minister to enter into correspondence with an applicant seeking further information, and it is contended that the applicant has failed to participate in any meaningful way in the asylum process.

(b) Failure to take account of all Relevant Materials
20. The applicant concedes that when considering a section 17(7) request, the Minister may consider the applicant's failure to attend but it is contended that this cannot be the sole matter to which consideration is given. It is argued that it was, at a minimum, incumbent on the Minister to give due consideration to the question of whether the applicant has a *prima facie* case that she is a "refugee" within the meaning of the Act of 1996 and it is contended that the Minister ought also have taken account of the fact that an asylum application was made by her son.

21. The respondent argues that the Minister's role under s. 17(7) is limited to the consideration of the reasons given by an applicant as the basis for their application for re-admission to the system. Reliance is placed in this regard on the judgment of Denham J. in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25.

22. It is further submitted that the Minister's role under s. 17(7) is to consider whether the reasons given by the applicant are different to those advanced in support of the original application for asylum, and it is submitted that no new circumstances came to light in the present case. Reliance is placed on the judgment of the English Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Onibiyo* [1996] 2 W.L.R. 490. The applicant in that case first sought asylum citing his father's political activities as the basis for his fear. When that application was refused, he sought to make a new application based on his own association with an opposition party. The Secretary of State rejected the second application on the basis that it did not amount to a "fresh claim". Considering what constitutes a "fresh claim", the Master of the Rolls held as follows at p. 502:-

> "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."

23. The respondent submits that this "acid test" was approved by McGovern J. in *C.O.I. v. The Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 208.

(c) Proportionality
24. The applicant contends that the Minister failed to appropriately balance the adverse effects that his section 17(7) decision would have on the applicant's rights and interests with the interests of the State in upholding the integrity of the asylum and immigration system. It is also submitted that it was disproportionate to base the decision only on the question of whether or not the applicant received the letter inviting her for interview, in the light of the fact that her asylum application was refused for procedural reasons and no substantive determination was reached.

25. The respondent contends that he was entitled to take steps to maintain and uphold the integrity of the asylum system. Reliance is placed in that regard on the decision of Peart J. in *Margine v. The Minister for Justice, Equality and Law Reform* [2004] IEHC 127. It is submitted that the Minister's decision was reasonable and rational, and proportionate to the legitimate aim of upholding the integrity of the immigration system. Reliance is placed on the judgment of Lord Bingham in *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368. It is also submitted that there was no obligation on the Minister to expressly refer to the impact on the applicant of the decision not to grant consent to her re-admittance to the system under s. 17(7). Reliance is placed in this regard on *Sanni v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 398, where Dunne J. held, citing the judgments of Costello J. *in Pok Sun Shum v. Minister for Justice* [1986] I.L.R.M. 593 and Ryan J. in *Fitzpatrick v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 9, that in circumstances where it was "abundantly clear" from the papers that the Minister was aware of the family circumstances of the applicants and aware that the proposed deportation would have an effect on the applicant's family, there was no obligation on the Minister to spell out specifically that he had considered the impact of the proposed deportation of the applicant on his parents and on his Irish citizen siblings.

The Court's Assessment
26. I think it appropriate to note, at the outset, that in my view, s. 17(7) is designed so as to enable the State to fulfil its obligations under s. 5 of the Refugee Act 1996, as amended, which gives effect in Irish law to the prohibition of refoulement established by Article 33(1) the Geneva Convention relating to the Status of Refugees 1951. Article 33(1) provides as follows:-

> "No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

27. This, in the words of the Master of the Rolls in the judgment of the English Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Onibiyo* [1996] 2 W.L.R. 490, at p. 497, is "an overriding obligation" which "remains binding until the moment of return." Section 17(7) of the Refugee Act 1996 ensures that the State can fulfil this obligation, so that where a person has been refused a declaration that she is a refugee but thereafter new or altered facts or circumstances come to light indicating that she may now have a well-founded fear of persecution if returned to her country of origin whereas she did not have a well-founded fear at the time of the original application, the Minister may consent to the applicant being re-admitted to the asylum process.

28. In the light of the foregoing, the role of the Minister in considering a request made for him to grant consent under s. 17(7) is, generally, to consider whether new or altered facts or circumstances have been brought to his attention which would indicate that there is a realistic prospect that the applicant may now be found to have a well-founded fear of persecution if returned to his country of origin, such that he should be permitted to make a fresh application for refugee status (see *R v. Secretary of State for the Home Department, ex parte Onibiyo* [1996] 2 W.L.R. 490; *C.O.I. v. The Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 208).

(a) Fettering of Discretion under section 17(7)
29. I reject the applicant's submission that the Minister has unlawfully fettered his discretion under s. 17(7) in the present case. I do not think that there is any evidence to support the contention that the Minister has construed his discretion so as to be limited to consideration of the matters which the ORAC officer is obliged to consider under s. 11(10) of the Refugee Act 1996 (i.e. the failure to attend for interview and the failure to provide an explanation within three working days). Rather, the wording of the decision reflects the view that the matters to which the Minister will have regard are those set out in the s. 17(7) request made by the applicant. This is, I think, a rational and logical approach, and does not admit of any unlawful fettering of the Minister's discretion.

30. In my view, it is appropriate for the Minister to consider only the reasons put forward by the applicant in support of her section 17(7) request. Persons making an application under s. 17(7) are active participants in the process. Such persons must bring to the Minister's attention all of the matters upon which they wish him to adjudicate in respect of their application. They cannot sit back and later complain that the Minister failed to consider matters which they did not properly bring to his attention. I am fortified in my view by the judgment of the Supreme Court in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25, where Denham J. held as follows (at para. 31) with respect to the

consideration of an applicant's file prior to the making of a deportation order:-

> "Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances."

31. Although that case involved the making of a decision to deport the parent of an Irish citizen child, I am of the view that the same rationale can be applied by analogy to the present case, such that there can be no obligation for the Minister to enquire outside of the information furnished by the applicant in her section 17(7) request. It is for the applicant to ensure that all relevant facts and circumstances that have arisen or come to light since the applicant was refused a declaration are brought to the Minister's attention in the section 17(7) application.

(b) Failure to take account of all Relevant Materials
32. The basis for section 17(7) application that was made by the applicant in the present case was that the applicant did not attend for interview at ORAC because she had not received the letter scheduling that interview, and not that any new or altered facts or circumstances have arisen. I have carefully considered the letter sent by the applicant's solicitors on her behalf on 21st December, 2005, and the Minister's decision in that regard, dated 6th January, 2006. There is no doubt in my mind that the Minister gave full consideration to the reasons advanced in support of the applicant's request under s. 17(7), and I do not consider that it was incumbent upon him to give consideration to any other matters. I reject the applicant's submission that the Minister should also have analysed whether or not there was a *prima facie* case that the applicant was a "refugee" within the meaning of the Refugee Act 1996. In the absence of any new or altered facts or circumstances since the applicant was refused a declaration – or, at the very least, in the light of the failure of the applicant to bring any such fresh facts or circumstances to the attention of the Minister – it did not become necessary to consider, in accordance with the *Oniyibo* test, whether there is a realistic prospect that the applicant may now be found to have a well-founded fear of persecution if returned to her country of origin.

33. It will be incumbent upon the Minister at the deportation order stage to analyse the applicant's file in the light of s. 3 of the Immigration Act 1999, s. 5 of the Refugee Act 1996 and s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000, as amended, among other provisions setting out the State's obligations (i.e. s. 3 of the European Convention on Human Rights Act 2003). In addition, if the applicant chooses to make an application for subsidiary protection, it will be incumbent on the Minister to assess whether there are substantial grounds for believing that she would face a real risk of suffering serious harm if returned to Moldova, within the meaning of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). In the circumstances, it was neither necessary nor appropriate, in the circumstances of the applicant's case, to consider the section 17(7) application in the light of those provisions and obligations.

34. I also reject the submission that the Minister should have taken into account the fact that an asylum application had been made by the applicant's son. This matter was not highlighted in the section 17(7) application, which related to the applicant alone and did not relate to her son. In the circumstances, there was no obligation on the Minister to have any regard to the applicant's son.

(c) Proportionality
35. It seems to me that the applicant's complaints in respect of proportionality are intrinsically linked to her contention that the Minister failed to consider all relevant materials. As I have already noted, I am of the view that the Minister took into account the relevant matters, and I find that he weighed the competing interests appropriately. It seems clear to me that there was nothing unreasonable or irrational about the decision reached, and I am satisfied that it was open to him to reach the decision that he did on the basis of the matters that were before him.

36. I would note that I am not basing this part of my decision on the often-cited statement of Lord Bingham in *R (Razgar) v. Secretary of State for the Home Department* [2004] 2 A.C. 368 with respect to proportionality, which has come to be referred to as "the exceptionality test". The authority of that test may require consideration in the light of Lord Bingham's subsequent comments in *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167. This question has not been fully argued before me in the present case, however, and I reserve my opinion on the authority of the exceptionality test for an appropriate case.

Conclusion
37. In the light of the foregoing, I am satisfied that the Minister has not acted in breach of natural and constitutional justice, or in breach of fair procedures, or that he has erred in reaching the decision that he did. I therefore refuse the reliefs sought.