Neutral Citation: [2013] IEHC 356

THE HIGH COURT

JUDICIAL REVIEW

[No. 2013/236/J.R.]

BETWEEN

A. A.

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 19th day of July 2013

1. The applicant in this case seeks *certiorari* of a decision of the Minister for Justice and Equality dated 18th January 2013 refusing an application for family reunification with his father, mother and two sisters. Leave to apply for judicial review was granted *ex parte* by Ms. Justice Clark on 8th April 2013 in this matter.

Background:
2. The applicant is an Iraqi national who was granted refugee status on the 6th August 2008. He is employed as a software engineer. He made a family reunification application to the Minister relative to his parents and two sisters on the 24th October 2011. That application was referred to the Office of the Refugee Applications Commissioner ("ORAC") pursuant to s. 18(2) of the Refugee Act 1996 and a report of the investigation conducted by ORAC was received by the Family Reunification Unit of the Irish Naturalisation and Immigration Service on the 16th March 2012. In correspondence following the delivery of the report, the Minister sought clarification from the applicant in relation to certain matters including whether the applicant's parents were in receipt of pension payments or had amassed any savings and in respect of the employment status of his elder sister. The reply from the applicant's solicitors is dated 13th December 2012. The decision of the Minister refusing family reunification issued on the 18th January 2013 and it is that decision which is sought to be impugned by the applicant in these proceedings.

Decision of the Minister:
3. In considering an application for family reunification the Minister is guided by s. 18(4) of the Refugee Act 1996, which provides:

> "(4)(a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
>
> (b) In paragraph (a), "dependent member of the family", in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully."

4. Thus, various requirements must be satisfied in order to obtain family reunification. In this regard, the Minister was prepared to accept, on the basis of the documentation submitted, that the applicant had established that the subjects of the application were his parents and sisters and that they came within the required "degree of relationship" provided ins. 18(4)(b) of the Act. The Minister then examined the question as to whether the subjects were dependent on the applicant. In the first instance, the respondent sets out an extract from the report compiled by ORAC in respect of the medical condition of the subjects of the application for reunification. The Minister then states:

> "While medical reports submitted suggest that the above named subjects may be suffering from certain medical conditions, the documents submitted fail to sufficiently establish that they are suffering from a mental or physical disability to such an extent that it is not reasonable for the subjects to maintain themselves fully."

5. Counsel for the applicant, Mr Simons S.C., suggests that the applicant's narrative of the medical condition of the respective family members, including the diabetes and duodonitis suffered by the applicant's father and the myocardial hypertrophy of his mother, appears to have been accepted by both ORAC and the Minister. The complaint pursued is that the above finding does not flow from the evidence and gives no reason, or no adequate reason, as to why the uncontroverted evidence before the Minister does not establish 'disability to such an extent that it is not reasonable for the subjects to maintain themselves fully'.

6. It is my view that the finding of the Minister in this regard falls some way short of the requirements for the giving of reasons in modern administrative law as expressed in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, by Cooke J. in *J.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 and as to the adequacy of such reasons distilled by this court in *R.O. v. Minister for Justice* [2012] IEHC 573. The finding of the Minister is not patent in character, which might excuse non expression of reasons, and is contrary to the dicta of Murray C.J. in *Meadows* that: "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context."

7. The Minister next considers the domestic situation and the financial support received by the foreign family from the applicant in Ireland. In completing this task he sets out at length an extract from the report completed by ORAC which refers to the evidence submitted by the applicant regarding the following: his transfer of funds to the family by Western Union; that his eldest sister gave up her job to look after their parents; that his father is not entitled to a pension; that his parents own their own home; his sisters' entitlements as a lecturer; and whether his sister is entitled to any benefits for looking after her parents or owned any property in her own right. This extract also refers to certain matters queried by ORAC in a letter to the applicant on the 17th February 2012 and the

responses received. Further, the decision refers to the matters on which the Minister sought clarification and to which the applicant responded via his solicitors on 13th December 2012. The Minister sets out the response of the applicant's solicitors reiterating certain matters with regard to the applicant's father's lack of savings, his ineligibility for a pension and confirming his eldest sister's unemployment and her acceptance into a PhD programme.

8. It is at this juncture that the Minister sets out his findings in light of the above reproduced extracts from the ORAC report and the correspondence received from the applicant. He states:

> "It appears that [the applicant's eldest sister] was earning the equivalent of €1020 (approximately) per month as a university lecturer in Iraq. The subject states that she wishes to pursue further study in Ireland and that she has taken study leave from her position in Iraq. Therefore it appears that the subject is still employed as a university lecturer in Iraq and that she could potentially remain working in the university, which would assist in supporting [the applicant's youngest sister] and her parents.
>
> The applicant may be in a position to provide financial assistance to the subjects in Iraq by sending money transfers from Ireland given that the cost of living in Iraq would be lower than that in Ireland.
>
> The applicant has failed to establish that the subjects of this application are dependent upon him as required by Section 18...[quotes s. 18(4)(b)]"

9. It is submitted by counsel for the applicant that the approach taken by the Minister to the question of dependency is unlawful, that the Minister did not attach any or any proper weight to the regular money transfers made by the applicant or to the family ties and duties which are deemed to rest on the eldest son in Iraqi culture. In this respect it is contended that there is no rational basis for the decision that the family are not financially dependent on the applicant. Instead counsel suggests that the Minister's decision is apparently predicated on the idea that the applicant's eldest sister should return to employment in the university. Further the applicant contends that the Minister's decision is internally inconsistent whereby on the one hand it is stated that the applicant may be in a position to provide financial assistance to his family in Iraq and yet it is then held that his family are not dependent on him.

10. I agree with the dicta of Cooke J. in *Hassan Sheekh Ali v. Minister for Justice, Equality and Law Reform* [2011] IEHC 115 that the issue of dependency"...is one of fact as to whether the subjects of the application are, in their circumstances in the country of origin "dependent" in the sense of reliant for subsistence on the means and support of the refugee." However, it is also clear that in making such an assessment of dependency that the Minister is obliged to give a decision which should be rational and adequately reasoned. In the words of Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1986] 1 I.R. 642:

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

11. In this regard I agree with counsel for the applicant that it appears in this instance that the Minister, in making the above findings, has reached his decision on an irrational basis. It is clear that there was evidence before the Minister regarding the regular transfer of funds to the family by the applicant and yet there is no mention made of such transfers in the reasoning of the Minister aside from a repetition of the report produced by ORAC. It is also clear that there was evidence before the Minister in relation to the current employment status of the applicant's eldest sister and indeed, subsequent correspondence was entered with the applicant in order to clarify this position. It is the view of this court that the finding of the Minister in respect of the potential ability of the applicant's sister to work is unreasonable because it is based on speculation that she "could potentially remain working in the university" .

12. As an aside, it is clear from the provisions of s. 18(2) of the Refugee Act that the function of ORAC in compiling the report which is reproduced at length in the Minister's decision is primarily investigative: in nature and that such report "shall set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person." The statutory function of ORAC in completing this role is essentially to conduct a fact finding mission and to produce a descriptive report for consideration by the Minister in making his findings, unlike, for example, the function of ORAC in the asylum process itself whereby it is required to make an express recommendation regarding refugee status.

13. On this basis it is evident that it is incumbent on the Minister not merely to consider the report of ORAC but also to make findings with regard to the application based, *inter alia*, on the findings of fact made in the report produced. In this case the Minister, in reproducing an extract from the ORAC report, has highlighted in bold the sentence "***It is difficult to establish how dependent they are, even taking into account the generous amount of the applicant's remittances***." It is not clear to the court if this is then to be considered as an express finding adopted by the Minister, taking into account the role of ORAC in simply producing an investigative report. However, what is clear to the court is that this sentence must be read in the context of the surrounding sentences and the paragraph in which it is situate. In that regard the paragraph begins by raising concerns that: "The applicant has not provided us with details of his parents' home or of any pensions that may be payable to them. It is stated in the questionnaire that the parents do not rent their home, but the section on ownership has not been completed." It is in that light that the above highlighted comment is then made. Then the ORAC report appears to set out the steps taken to clarify these issues: "This Office issued a query letter to the applicant on 17/02/2012 in relation to financial support to his family."

14. The ORAC report then proceeds to detail the various questions put by ORAC and the answers received from the applicant, specifically with regard to his parents' lack of a pension or state benefits and in respect of the ownership of their house. Thus, it is clear that the above highlighted sentence is not in the nature of a conclusion reached following the assessment of all of the evidence but rather appears to be the statement of an issue which arose midstream and but which was then overtaken by the investigations carried out by ORAC. It appears to this court that the decision reached by the Minister is irrational because he was not entitled to decontextualise a preliminary ORAC finding, subsequently overtaken, and use it as a basis for his decision.

Error of Fact:

15. Lest I am wrong about any of my conclusions reached above, it is clear that in reaching his decision the Minister placed a considerable degree of emphasis on the inaccurate salary of the applicant's eldest sister. The Minister appears to have predicated his decision rejecting the family's asserted dependency on the applicant on the basis that his eldest sister was "earning the equivalent of €1020 (approximately) per month as a university lecturer in Iraq." A translated copy of a letter from the Al-Mustansiriyah University dated 1st March 2012 submitted in respect of the applicant's eldest sister, which translation was procured by the respondent, clearly

states that the sister "receives a monthly salary of 549,000 Iraqi Dinar [approx. €360]...and that her salary total is 1,466,000 [Iraqi Dinar] [approx. €970] only". Putting aside any potential question as to whether the applicant's eldest sister may or may not be working or, indeed, may be working part time etc., it is clear to the court that the Minister has effectively based his decision on a fundamental error of fact as to what her earnings are and therefore what the foreign family's monthly income is.

16. This court was most recently called upon to examine the issue of "error of fact" in the decision *of S.N. v. Refugee Appeals Tribunal* [2013] IEHC 282. In that case I examined a series of authorities on the point which were in support of the proposition that an error of this nature is sufficient to quash an administrative decision. In that case I considered the manner in which the issue was addressed in the United Kingdom in the case of *E. v. Secretary of State for the Home Department* [2004] Q.B. 1044, where the Court of Appeal stated: "...First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not neeessarily decisive) part in the Tribunal's reasoning." I then turned to address the view taken by the Irish courts in relation to the issue and in particular referred to the cases of *V.C.B.L. v. Refugee Appeals Tribunal* [2010] IEHC 362 and *Richardson v. Mahon* [2013] IEHC 118, where Dunne J. addressed her views on the issue and in which she referred to the decision of Keams J. in *Ryanair v. Flynn* [2000] 3 I.R 240.

17. In *S.N*, having considered the above jurisprudence in the area I concluded that:

> "Having regard to the approach in these three cases some simple propositions are evident: firstly, an error of fact where the facts are not in dispute is susceptible to judicial review; secondly, error of fact in a judgment arising from disputed facts will rarely attract judicial review remedies, save if the error is one that no reasonable decision maker could have made; thirdly, an error of fat whether within or in excess of jurisdiction will not attract a remedy where the error had no material effect on the outcome."

18. In this case the error of fact in relation to the applicant's eldest sister salary is susceptible to judicial review as the amount was never in dispute between the parties. Indeed, the applicant volunteered the letter from the university when clarification on the issue was sought by the respondent. Thus, the court must decide whether this error of fact had a material effect on the outcome. In my view, the error made by the Minister in this regard was a fundamental error which had a material and indeed decisive effect on the outcome of the matter and which is sufficient, in its own right, to vitiate the decision.

19. Taking into account all of the foregoing, I therefore grant an order of certiorari quashing the decision of the Minister of 18th January 2013 and remit the matter for reconsideration with a direction that this decision be available to the next officials and Minister, at the election of the applicant.