Neutral Citation: [2015] IEHC 145

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 62 J. R.]

BETWEEN

P. D. O.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND & THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 6th day of March 2015

1. The parties have agreed that the court should determine a preliminary issue in these proceedings as to whether the applicant's challenge to the decision of the Refugee Applications Commissioner has been rendered moot by the outcome of the applicant's appeal of that decision to the Refugee Appeals Tribunal.

2. The respondent contended that the proceedings are moot in the light of the decision of the Supreme Court in *M.A.R.A v. Refugee Applications Commissioner* [2014] IESC 71.

3. In *M.A.R.A* an infant applicant sought to challenge the decision of the Refugee Applications Commissioner who had rejected an asylum claim based on a fear of female circumcision if returned to Nigeria. Cooke J., on 19th December, 2011 acceded to a motion from the respondents to dismiss the infant applicant's claim because the proper remedy was an appeal to the Refugee Appeals Tribunal.

4. Prior to the determination of the appeal to the Supreme Court, the infant applicant appealed the decision of the Refugee Applications Commissioner to the Refugee Appeals Tribunal and later, sought subsidiary protection. The appeal to the Refugee Appeals Tribunal was rejected as was the application for subsidiary protection. The date of the RAT decision is 30th April, 2012. Charleton J. examined the legal capacity of the Refugee Appeals Tribunal to address errors in the decision of the Refugee Applications Commissioner and said:-

> *"14. It is clear from all of this that the form of appeal explicitly set out in the Act of 1996 is not merely a review as to whether any error had been previously made: rather, it is a full and thorough enquiry into the relevant documents and observations as previously furnished to the Refugee Applications Commissioner and the hearing of oral evidence and the reception of documentary evidence and submissions in respect of every point on which an appeal has been lodged. It is also apparent that the duty of the Refugee Appeals Tribunal is to make such rulings or finding of fact as are appropriate."*

5. He went on to say:-

> *"16. In essence, an appeal within this process is an active re-hearing. That is precisely what happened here. A full opportunity was given to the applicant/appellant to argue whatever points seemed to be germane to the contention made by her mother that she had a well founded fear of persecution in relation to the invasive practice of female circumcision or that she had a well founded fear of persecution by magic practitioners. An analysis of that contention took place in the context of a fair and thorough consideration of the credibility of the evidence and other materials put forward. Given that on these issues, findings of fact were made against the applicant/appellant, and given that the decision of the Refugee Applications Commissioner was affirmed under Section 16A of the Act of 1996 by the Refugee Appeals Tribunal, any consideration as to whether the learned trial judge was or was not correct in leaving the applicant/appellant to her appeal remedy under legislation, as opposed to not striking out her judicial review application in the High Court, is entirely moot."*

6. At paragraph 13 Charleton J. had noted:-

> *"…Hence, on appeal, there is a complete opportunity to present on behalf of the applicant in aid of this enquiry as to refugee status any new facts or arguments; to re-argue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full. The result of the appeal may be the affirmation of the Refugee Applications Commissioner in whole or in part or it may be that for a particular reason argued on appeal the applicant will be found to have established sufficient for a recommendation that the Minister grant him or her refugee status."*

Pleadings:

7. The applicant seeks an order of *certiorari* quashing the decision of the Commissioner that the applicant not be declared a refugee. In addition an order of *certiorari* is sought quashing the decision that section 13(6)(c) of the Refugee Act, 1996 should be applied to any appeal to the Refugee Appeals Tribunal.

8. With respect to the substantive decision refusing a positive recommendation, the applicant pleads, *inter alia*, a breach by the decision maker of Irish and European Law governing asylum assessments; failure to enquire into conditions for homosexuals in Nigeria;

failure to analyse the applicant's claim for asylum; and failure to carry out a correct assessment with respect to the possibility of internal relocation. With respect to the challenge to the Commissioner's decision pursuant to section 13(6)(c) of the Refugee Act it is said that no reason or rationale is provided for the decision to deny the applicant an oral hearing of his appeal.

9. That statutory provision in conjunction with s. 13(5) permits the Refugee Applications Commissioner to ordain a papers-only appeal where it is found that an asylum seeker failed to apply for asylum as soon as is reasonably possible without reasonable explanation and such a finding was made in respect of the applicant in this case.

10. These proceedings were instituted on the 25th January, 2011. On 18th January, 2011 the applicant lodged a notice of appeal against the recommendation of the Commissioner with the Refugee Appeals Tribunal. Accompanying the notice of appeal was a letter from the applicant's solicitors which sought to lodge the appeal and in addition to request copies of previous decisions of the RAT. The letter says that:

> *"In default of receipt of such confirmation [that the reports would be given] within 14 days…we shall have no alternative but to issue appropriate proceedings thereafter without further notification."*

11. I interpret that threat to relate to proceedings seeking an order directing the RAT to deliver reports to the applicant. The threat does not relate to the instant proceedings which, of course, constitute a challenge to the decision of the Refugee Applications Commissioner.

12. The final paragraph of the letter says:-

> *"Please note that until we have had access to such documentation we are unable to conclusively advise our client in relation to witnesses/further documentation/further grounds/further country of origin information he may wish to put forward in support of his case [sic] and we must therefore reserve our position and the right to call witnesses and/or whether to furnish further documentation.*
>
> *Lastly, we would ask you to note that this Appeal is lodged without prejudice to an application for judicial review of the decision of the RAC that may be sought by our client."*

13. The threatened proceedings in relation to the requested RAT decisions were never instituted notwithstanding the fact that the RAT did not deliver the reports as requested. Though the judicial review of the decision of the Refugee Applications Commissioner was instituted, the Refugee Appeals Tribunal was never informed that this had happened.

14. The notice of appeal was in general terms and stated:-

> *"The appellant reserves the right to furnish any other grounds of appeal or documentation which may arise or come to hand at or before the hearing under section 16(16) of the Refugee Act. This appeal is lodged without prejudice to judicial review proceedings to be instigated in relation to the applicant's claim.*
>
> *Prior to the appeal being listed for hearing the applicant requires production of records and reports of previous similar cases decided in the past by the Refugee Appeal Tribunal to enable her to obtain relevant legal advice (see covering letter)."*

15. The Refugee Appeals Tribunal issued its decision on 14th February, 2011 – barely four weeks after the appeal was lodged.

The Decision of the Refugee Appeals Tribunal:
16. The applicant's appeal was rejected on credibility grounds. In addition it was found that he was unlikely to face persecution upon return to his home country. Further it was found that internal relocation would be an option for the applicant. The decision of the Refugee Appeals Tribunal was not challenged by way of judicial review.

17. The question for the court is whether these proceedings challenging the decision of the Refugee Applications Commissioner are moot because of the existence of the decision of the Refugee Appeals Tribunal.

18. As to mootness in general Charleton J., in *M.A.R.A.*, said as follows:

> *"4. In general, it is not the function of the courts to grant advisory judgments. A court should not pronounce on questions which are not necessary for the adjudication of issues between the parties and should not issue a decision on points of law or fact that no longer affect the rights and liabilities of the parties. Where an issue has already impacted on the actual entitlements of a party, or may reasonably do so in the future if left unresolved, it is appropriate to adjudicate upon it. A course of conduct may have come to an end, but if it leaves in its wake consequences for litigants, issues as to the rights and wrongs of what has happened clearly require decision."*

19. In *M.A.R.A* the respondents successfully argued that every error they perceived in the decision of the Refugee Appeals Commissioner was capable of being remedied and addressed by the Refugee Appeals Tribunal. Charleton J. agreed with that proposition and found that the decision sought to be challenged was moot as it no longer affected the rights and liabilities of the parties.

20. In my view, all of the complaints sought to be raised in these proceedings relative to the substantive decision of the Commissioner refusing to recommend refugee status were capable of being addressed by the Refugee Appeals Tribunal. Nothing can be gained by challenging the decision of the Commissioner which cannot be achieved by appealing to the Refugee Appeals Tribunal. Once a decision on the appeal is issued, a challenge by way of judicial review to the substantive recommendation of the Refugee Applications Commissioner becomes moot. In accordance with the reasoning of Charleton J., the decision of ORAC on the substantive question as to whether the applicant might be declared a refugee no longer affects the rights of the applicant because the decision has been superseded by the decision of the RAT.

21. I accept that there is a significant factual difference between the quality of the appeal pursued by the applicant in *M.A.R.A* and the appeal which was lodged in the instant case. It is clear that there was full participation in the appellate process in *M.A.R.A.* As Charleton J. noted:-

> *"A full opportunity was given to the applicant/appellant to argue whatever points seemed to be germane to the*

contention made by her mother that she had a well founded fear of persecution in relation to the invasive practice of female circumcision or that she had a well founded fear of persecution by magic practitioners."

22. In this case a somewhat formulaic notice of appeal was lodged with the RAT. Little detail can be ascertained as to the basis of the appeal. It seeks to assert on its face that the appeal should not proceed until certain information is provided to the applicant and that the appeal is without prejudice to these proceedings.

23. In my opinion a person who appeals a decision of the Refugee Applications Commissioner to the Refugee Appeals Tribunal is not in a position to dictate the pace of the appeal. The Refugee Appeals Tribunal has a statutory duty to determine appeals. Indeed, section 16(18) of the Refugee Act 1996 expressly provides that a 'papers only' appeal against a recommendation of the Commissioner "shall be dealt with as soon as may be and, if necessary, before any other application for a declaration." In my view the Tribunal should seek to determine such appeals efficiently and timeously and that is what the RAT did in this case. It is not possible to fault such action. Needless to say the absence from these proceedings of the RAT would make any such criticism legally unfair.

24. I conclude that the decision of the Refugee Appeals Tribunal has rendered moot such part of the applicant's proceedings as relate to the challenge to the substantive decision of the Commissioner to refuse a recommendation of asylum status. The reason for this is that the decision of the RAT has replaced the decision of ORAC and granting the reliefs sought in respect of the substantive ORAC decision could not confer any right or benefit on the applicant. His legal status could not be affected in any way if the court granted the reliefs he seeks. The proceedings challenging the substance of the decision refusing refuge status is thus moot.

25. Different considerations apply to the decision of the Commissioner arising under section 13(6)(c) of the 1996 Act. Where a decision is taken that the applicant, without reasonable cause, failed to make an application [for asylum] as soon as is reasonably practicable after arrival in the State, then in accordance with section 13(5)(a) the notice informing an applicant of the right to appeal to the Tribunal states that such appeal will be determined without an oral hearing.

26. If an unlawful decision is taken by the Commissioner in this connection, it is incapable of being remedied by way of appeal to the Refugee Appeals Tribunal.

27. The authority for the proposition that no appeal lies to the Refugee Appeals Tribunal from a recommendation taken pursuant to section 13(6) of the Act is *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218 where Clarke J. said:-

"It would appear that where the RAT hears an appeal in a case to which s. 13(6) applies, the only options open to the Tribunal are to allow the appeal or affirm the decision of the RAC. It does not appear that the case can be referred back to the RAC."

28. In *B.N.N. v. Minister for Justice, Equality & Law Reform* [2008] IEHC 308, Hedigan J., discussing the limited circumstances in which an applicant might challenge the validity of a decision of the Refugee Applications Commissioner, stated:-

"46. By way of example, I would note that a clear and compelling case that an injustice at the Office of the Refugee Applications Commissioner is incapable of being remedied on appeal to the Refugee Appeals Tribunal might be demonstrated where the Office of the Refugee Applications Commissioner officer's findings include one or more of the findings specified in s. 13(6) of the Refugee Act, 1996…As noted by Clarke J. in Moyosola v. Refugee Applications Commissioner [2005] IEHC 218, (Unreported, High Court, Clarke J, 23rd June, 2005) at p.6, "[t]he combined effect of ss. 13(5) and 13(6) is to impose significant limitations on the extent of the appeal that will be available to an applicant to the Refugee Appeals Tribunal." For that reason, an injustice complained of may be incapable of being remedied on appeal and this may constitute one of the rare and limited circumstances where the applicant may be entitled to judicial review of an Office of the Refugee Applications Commissioner decision."

29. It is clear from these authorities that the only remedy available to an applicant in respect of whom a recommendation pursuant to ss.13(5) and 13(6) has been made is judicial review.

30. I cannot identify any mechanism whereby an applicant can avoid the time limits within which an appeal must be brought to the Refugee Appeals Tribunal. Instituting judicial review proceedings of the decision of the Refugee Applications Commissioner does not stop time running for the purposes of any appeal to the Refugee Appeals Tribunal. Therefore an applicant who seeks to challenge a decision of the Refugee Applications Commissioner pursuant to ss.13(5) and 13(6) as well as a negative decision on asylum must institute an appeal to the Refugee Appeals Tribunal within 10 days of the date of the letter notifying the applicant of the decision of ORAC and must institute judicial review proceedings of the ORAC decision within 14 days thereof.

31. An applicant who is dissatisfied with a section 13(5) finding by ORAC must therefore institute proceedings and appeal the decision. The applicant must inform the Refugee Appeals Tribunal that it is intended to seek judicial review of the decision of the Refugee Applications Commissioner and formally request that the appeal be stayed pending the outcome of the review of the decision of the Commissioner. The applicant must inform the Tribunal that in the event that it does not agree to stay the appeal, that the applicant will seek an injunction preventing the Tribunal from hearing the appeal until the determination of the judicial review of the Commissioner's decision.

32. In this case, although the applicant informed the Refugee Appeals Tribunal of the possibility of a judicial review, the Tribunal was never in fact informed that proceedings had been instituted. The applicant never sought an injunction to prevent the Tribunal from determining the appeal.

33. In my opinion, the Tribunal did not act unlawfully in determining the appeal without reverting to the applicant. It is a relevant consideration to bear in mind that the applicant in this case did not subsequently challenge the decision of the Refugee Appeals Tribunal. No complaint has been raised with the Tribunal saying that the Tribunal ought to have delayed its decision until the result of the proceedings against ORAC was known. No reasonable explanation has been advanced by the applicant as to why the decision of the RAT was never challenged. In my view, the applicant was obliged to enjoin the RAT from processing the appeal and, failing this, was obliged to challenge the decision of the RAT in order to protect the integrity of the proceedings challenging the decision of ORAC.

What effect would an order quashing the s. 13(5) and (6) finding have if made now?

34. If it could be said that an order of the court quashing the s. 13(6) determination would affect the applicant's rights then, in my view, these proceedings would not be moot. However, a validly constituted appeal has been lawfully determined by the Refugee Appeals Tribunal and the Minister has received notification of the recommendation of the Tribunal. An order quashing the decision of the Commissioner pursuant to s. 13(6) of the 1996 Act would not have the effect of quashing the decision of the Refugee Appeals

Tribunal.

35. In the absence of any procedural step having been taken by the applicant with respect to the decision of the Refugee Appeals Tribunal, it stands as a valid recommendation made by the Tribunal pursuant to section 16 of the 1996 Act. The jurisdiction of the Refugee Appeals Tribunal to decide the appeal in this case has never been questioned and in my view the principle of legal certainty of administrative decisions (see decision of the CJEU *Kuhne and Heitz N.V v Productschap und Pluimivee en Eieren*, C-453/00, 13 January 2004) and the presumption of validity of public law decisions (see *Lancefort v. An Bord Pleanala* [1998] IEHC 199) require that a decision of the Refugee Appeals Tribunal be protected from collateral attack mounted in proceedings in which the Tribunal is not a party. Further, s. 5 of the Illegal Immigrants (Trafficking) Act 2000 provides that the validity of decisions of the RAT maybe only be questioned in proceedings instituted in accordance with that Act and, as I have said, no such proceedings are extant and thus the decision of the RAT is inviolable. It is in this sense that I hold that the proceedings are moot because a decision of this court quashing the recommendation of the Commissioner made pursuant to s.13(6) could not effect the rights of the applicant at this stage. I reject the notion that setting aside the s.13(6) findings of ORAC affects the decision of the RAT. As indicated above, protective steps ought to have been taken as soon as these proceedings issued to request or demand that the Tribunal not determine the applicant's appeal. The applicant instituted an appeal and took no steps to prevent that appeal from being determined.

36. Thus, in relation to the preliminary question raised, I find that these proceedings challenging the decision of the Refugee Applications Commissioner have become moot because of the determination of the applicant's claim for asylum by the Refugee Appeals Tribunal in circumstances where no step was taken to prevent the RAT from determining the appeal and no step was taken challenging that decision subsequently.