Neutral Citation [2015] IEHC 508

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 333 J.R.]

IN THE MATTER OF THE CONSTITUTION, AND

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), AND

IN THE MATTER OF THE IMMIGRATON ACT, 1999 (AS AMENDED)

BETWEEN

S.M. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on the 28th day of July, 2015

1. This is a telescoped application for leave to apply for judicial review together with an application for an order for *certiorari* quashing the decision of the first named respondents to refuse the application to readmit the applicant to the refugee status determination process, pursuant to s.17(7) of the Refugee Act 1996 (as amended).

BACKGROUND

2. The applicant is a national of Pakistan and was born on the 22nd September, 1973, and states that she is a member of the Ahmadiyya community. She alleges that she has suffered persecution as a result of her Ahmadi status in Pakistan, as has her family. In May, 2007 she married a fellow Pakistani, an Ahmadi man living and working in Germany. The applicant left Pakistan on the 18th August, 2010, with a view to travelling to Germany. The route chosen by the smuggler was to fly to Bahrain, from there to Turkey, from there to Ireland, from there to Belgium and to cross over to Germany by land. The applicant transited through Dublin and arrived in Belgium on the 20th August, 2010, whereupon the false passport documents with which she was travelling were detected. The applicant explained that she was a refugee fleeing persecution in Pakistan and that her destination was Germany. She was taken to a centre for asylum seekers and detained there until the 18th November, 2010, when she was sent to Ireland. Upon arrival in Dublin airport she was taken to the Dóchas Centre and imprisoned there for six days. Following the procurement by her husband of legal representation in Dublin, she was accommodated by the Reception and Integration Agency (RIA) in a direct provision centre and submitted an application seeking a declaration of refugee status. On attendance at Offices of the Refugee Applications Commissioner (ORAC) she was informed that ORAC would inform the Belgian authorities and there would be a three-month wait before the Belgian authorities would inform her if they were to take her back to Belgium. The applicant alleges that she was scared of being returned to Belgium as she had been locked up there previously and had found the atmosphere very frightening, that there was a lot of fighting and attempted suicides on an ongoing basis. A roommate in her accommodation in Ireland advised her that it would be possible to organise a smuggler to take her to Germany; she travelled to Germany in early January, 2011. She, with the assistance of a lawyer, attempted to make an asylum application in Germany and said application was made on 10th March, 2011. She also sought and was granted permission to remain residing with her husband in Germany while the application was being determined. She was interviewed in respect of her asylum application in Germany in October, 2011 and on 5th September, 2012, she was returned to Ireland, it would appear, pursuant to the Dublin Regulations (Dublin II).

3. Upon her arrival at Dublin airport she was given a letter to present to ORAC, which she so did on Monday, 10th September, 2012, and asked that her application for a declaration of refugee status be re-opened. I should point out at this juncture that in her absence and given that she had failed to attend for her scheduled interview before ORAC for the purpose of her initial asylum application, the application had been determined on the basis of a recommendation to the minister to refuse refugee status. The next day, on 11th September, 2012, she returned to her solicitors for assistance. On 21st September, 2012, she received a letter from the ministerial decisions unit informing her that the application seeking permission to be readmitted to the asylum process pursuant to s.17(7) of the Refugee Act 1996 (as amended) was receiving attention. She subsequently approached the Refugee Legal Services for assistance and on 1st March, 2013, the RLS sought her file from the INIS (Irish Naturalisation and Immigration Service). She received no further information until letter dated 21st August, 2013, when she was informed that a deportation order had been made in respect of her. The applicant then engaged her current solicitors on 26th August, 2013. On procurement of her file from the INIS, the solicitor could not find any copy of the s.17(7) application which, she had been informed by letter of the 21st September, 2012, was under consideration. In the circumstances, where it was unclear what evidence, if any, had already been submitted or considered, her current solicitors asked if she could procure a letter from the Ahmadiyya community confirming her Ahmadi status. She procured the letter from the Ahmadiyya community and an application seeking readmission into the asylum process was made by letter of 19th September, 2013.

4. The applicant was informed by the Garda National Immigration Bureau on 9th October, 2013, that a deportation was arranged for 11th October, 2013. An undertaking not to proceed was refused and shortly before an injunction application was due to be heard on 10th October, 2013, before the High Court, the decision on the s.17(7) application was faxed to the applicant's solicitor which held: "No new convincing evidence has been supplied to indicate that a favourable view might be taken if S[…] M[…] was readmitted to the process" (p.57 of the booklet).

5. The proceedings were redrafted and the injunction application proceeded on notice to the minister and was opposed. An interim injunction was granted and the interlocutory injunction was made returnable for 14th October, 2013. On 11th October, 2013, an open offer was made by the minister stating that an undertaking was being given thereby disposing of the need to seek an interlocutory injunction and proposing a compromise of the proceedings on the basis that the s.17(7) decision would be reviewed, and that review submissions would be sent to the minister within 28 days of the agreement.

6. The first set of judicial review proceedings were struck out on the 3rd February, 2014. An extensive and detailed letter dated the 26th March, 2014, was furnished by the applicant's solicitor to the ministerial decisions unit at the INIS, requesting that the applicant be readmitted to the asylum process. The letter is very extensive. It goes into the background of the application to readmit the applicant to the asylum process in short detail and, in great detail, goes into the legal context of the application and quotes extensively from the relevant UNHCR Handbook, Procedures Directive and regulations. It further refers to ECHR case law and the Qualification Directive.

7. The penultimate paragraph of that letter, which is contained from pp.60-66 of the booklet of pleadings before the Court, states as follows:

> "Please note that whilst this application addresses the Minister in terms of issues of law, it is our intention to provide by the end of the week further representations addressing the Minister in terms of issues of fact, as they relate to our client's application."

8. It does not appear that any such follow up letter was sent which addressed, in detail, the factual matters relevant to the applicant's application for readmission to the asylum process.

IMPUGNED DECISION

9. By letter dated the 27th June, 2014, the applicant was advised that the application was refused and the applicant was furnished with the letter of refusal, a copy of the examination of application for readmissions to asylum process under s.17(7) of the Refugee Act 1996 (as amended) which is dated the 26th May, 2014, and was signed by the relevant official in the ministerial decisions unit.

10. The decision of the ministerial decisions unit, taken by and on behalf of the minister, the first named respondent, on 26th May, 2014, is the decision the applicant seeks to challenge in the within proceedings. The covering letter submitted and sent to the applicant with the decision referred to the applicant's entitlement to request a review of the decision and further advised: "to seek a review write to the Assistant Principal Officer, Ministerial Decisions Unit, INIS, Burgh Quay, Dublin 2 setting out the reasons why you consider the decision to be incorrect".

SUBMISSIONS

11. The applicant submitted that the persecution faced by the Ahmadiyya community is well documented and has been recognised by this Court, *inter alia*, in the decision of Hogan J. in *Aslam v. Minister for Justice and Equality & ors*. [2011] IEHC 512. The applicant further contended that the failure on the part of the minister to arrive at a decision without having specific regard to the letter from the Ahmadiyya Muslim Association of Ireland is irrational in light of the basic principles enunciated in *Wednesbury (Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] 1 KB 223). The applicant argued that the minister has a statutory duty to consider all relevant material in a protection decision.

12. The applicant submitted that it is the duty of the minister, pursuant to s.17(7) of the Refugee Act 1996 (as amended), to provide an effective remedy in respect of a first instance decision of the minister to refuse a s.17(7) application and this is outlined in Barr J.'s decision in *N.M. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 638 as follows:

> "I am of the view that the present case may be distinguished from the circumstances pertaining in H.I.D. In that case, having applied the relevant test, the CJEU found that the RAT was a court or tribunal for the purposes of Article 39 of the Procedures Directive and that its independence was safeguarded by the availability of judicial review. In other words, it was the combination of the right to an appeal to the RAT, and the availability of judicial review to quash the Tribunal's decision, that meant that the Tribunal was an effective remedy. In the present case, however, in the context of a s.17(7) refusal, whether at first instance or on internal review, neither the first instance decision maker nor the internal review decision maker is a court or tribunal. Accordingly, I am of the view that the combination of remedies, even taken as a whole in respect of s. 17(7), do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal."

13. The respondents filed extensive submissions, the main point being that this application for judicial review is premature and/or that the applicant has failed to exhaust an alternative remedy. The alternative remedy being proposed by the respondents is the internal review mechanism referred to in the letter of 27th June, 2014, at p.68 of the booklet. The system which the department applies is that an applicant may seek to have the decision of the original official reviewed by a more senior official within the department, who looks at the matter afresh. The respondents submitted that this remedy is available to the applicant and this ought to have been availed of by the applicant before embarking upon judicial review proceedings. The respondents argued that the applicant did not seek any review, i.e. internal departmental review, and instead instituted the within proceedings and further argued that in the circumstances where the review can bring about an entirely different result for the applicant, such as a decision to readmit to the asylum process, the respondents submitted, judicial review was entirely inappropriate and premature, as an alternative remedy existed for the applicant. The respondents relied in this regard on a line of case law commencing with *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381, 404; *B.N.N. v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 719, 732; *A.K. v. Refugee Applications Commissioner* (Supreme Court, 28th January 2009); *H.S.E. v. O'Neill* [2014] IEHC 297, paras. 27-28. The respondents, at all times throughout the hearing of this judicial review application, made it clear that the internal departmental review was still a mechanism open to the applicant and that no time delay arguments would be raised in opposition to such an application.

14. The applicant in reply to this line of argument stated that the line of authorities from *Abenglen* onwards is irrelevant to the issue to be decided by this Court. The applicant submitted that the case which is fully on point is the decision of Hogan J. in *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 where at p.2 thereof, at paras. 4 to 7, under the heading "The failure to exhaust the administrative asylum process" he stated as follows:

> "4. Following the promulgation of the European Communities (Asylum Procedures) Regulations 2011 (S.I. No. 51 of 2011) ("the 2011 Regulations") which came into force on 1st March, 2011, the Minister introduced new administrative guidelines providing for administrative review of any decision to refuse permission to re-enter the asylum process pursuant to s.17(7). It is important to stress that the application for re-admission pursuant to s.17(7) post-dated the entry into force of the 2011 Regulations, so I would reject the applicant's argument that these Regulations were in some way applied with retrospective effect.
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> 5. While s.17(7) was significantly amended by the insertion of a new s.17(7A) of the 1996 Act by article 8 of the 2011 Regulations, it is important to stress that the new guidelines have no strict legal basis. They are, of course, in themselves none the worse for that and it is probably true that in some instances and under some circumstances the guidelines might give rise to an enforceable legitimate expectation: cf. the judgment of O'Hanlon J. in *Fakih v. Minister for Justice* [1993] 2

I.R. 406.

6. That, however, is not the same thing as saying that an applicant is obliged to avail of the appeal process, particularly in light of the provisions of s.5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") which requires that any challenge to the Minister's (original) decision has to be made within a 14 day period. If an applicant were to avail of the appeal process, he or she might find themselves well outside the 14 day time period prescribed by s.5 of the 2000 Act. It is, of course, true that the courts can - and regularly do - extend the time limit on discretionary grounds. But what lawyer faced with advising a client on this matter would be willing to forsake the certainty of the 14 day time period for the uncertainty of relying on the courts' discretion in relation to an extension of time? That question really answers itself. The guidelines are not in themselves law: they are at most elusive wisps hovering around at the outer extremities of the legal system. As such, guidelines of this sort cannot vary or alter or affect legal rights and obligations.

7. In this regard, the Minister cannot have it everyway. If it is desired to encourage applicants to avail of the administrative review regime, then legal certainty requires that the Oireachtas must be prepared to amend the provisions of s.5(2) in order to provide that time does not run against an applicant during the currency of an administrative appeal. Absent such an amendment, then an applicant such as Ms. NK cannot be faulted for failing to avail of the administrative review procedure, even if that procedure might well have dealt with the substance of her complaints."

15. A further hurdle which the respondents must overcome in order to persuade this Court that the applicant's application is premature and/or the applicant has failed to exhaust an alternative remedy arises from the decision of Barr J. in the case of *N.M. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 638 where at p. 27, para. 96 to 97 stated as follows:

"In the present case, however, in the context of a s. 17(7) refusal, whether at first instance or on internal review, neither the first instance decision maker nor the internal review decision maker is a court or tribunal. Accordingly, I am of the view that the combination of remedies, even taken as a whole in respect of s.17(7), do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal.

In the circumstances, the court is satisfied that the review procedure under the statutory instrument and the supervisory role of the High Court in exercising its judicial review jurisdiction does not constitute an "effective remedy" before a court or tribunal as required by Article 39 of the Directive."

16. It seems to me that in light of the two decisions cited above, it is open to the applicant to decline to avail of the internal administrative review procedure and to opt instead to litigate the matter by way of an application for judicial review before this Court. I would accordingly reject the respondents' argument that this application is premature and that there has been a failure on behalf of the applicant to exhaust an alternative remedy.

17. The applicant's complaint is that, at no stage, has there been a substantive adjudication and/or examination of her claim for refugee status. The applicant's application for refugee status was determined in her absence, her having failed to attend for the s.11 interview, as arranged. The Procedures Directive (2005/85/EC) (1st December, 2005) which was given recognition in the Asylum Procedures Regulation (S.I. No. 51 of 2011) is worth looking at. Article 10 provides certain guarantees for applicants for asylum. Article 32 specifically deals with the questions of subsequent applications and states as follows:

"1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum: (a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20; (b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.

3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.

4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II. 5. Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.

6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39."

18. Article 34 of the Procedures Directive then goes on to provide:

"Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1)."

19. Article 39 which comes under the rubric of chapter 5, under the subheading of 'Appeals Procedures' is headed 'The right to an effective remedy' and states as follows:

"Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum, including a decision:

(i) to consider an application inadmissible pursuant to Article 25(2),

(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),

(iii) not to conduct an examination pursuant to Article 36;

(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34"

It is article 39.1(c) which is at issue in these proceedings.

DECISION

20. The letter of the 26th March, 2014, written by the applicant's solicitors to the ministerial decisions unit, while a very erudite legal treatise on the applicable law in this area, was singularly lacking in relation to factual matters. I note at this juncture that a very extensive grounding affidavit was sworn by the applicant to ground these proceedings for judicial review and very fulsome explanations have been set out in relation to her conduct since her departure from Pakistan, subsequent arrival briefly in Ireland, transit onto Belgium, return to Ireland, transit to Germany and subsequent return to Ireland. I also note that the Court was advised during the course of the hearing, although it was submitted on behalf of the applicant, it was of no relevance to the matters which I have to determine in these proceedings, the applicant at this juncture is not in fact within the jurisdiction of these courts and is presently in Germany awaiting the outcome of these proceedings. In this regard I would highlight s.9 of the Refugee Act 1996 (as amended) provides:

"Leave to enter or remain in State.

(4) An applicant shall not—

a) leave or attempt to leave the State without the consent of the Minister, or

b) seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration […]

(7) A person who contravenes subsection (4), (4A) or (5) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 1 month or to both."

21. It is not for this Court on judicial review to adjudicate on the accuracy or otherwise of the applicant's evidence before this Court. These are matters that would need to be tested in cross-examination. However, it seems to me that the provisions of article 32 in relation to subsequent applications and in particular article 32.6 is relevant, which states as follows:

"Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39."

Whilst on the face of the matters averred to in the applicant's grounding affidavit, there may be justification for asserting that the absence of the information in relation to her faith was not available to her at the time of her first and initial application for asylum; however, no explanation has been forthcoming as to why the factual matters, which are set out so clearly in the grounding affidavit were not submitted to the ministerial decision unit, within the week following the applicant's letter of 26th March, 2014, as it was clearly stated that it was intended to so do.

22. In a decision in a similar type of matter in *M.K. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 658, Hanna J. reviewed the provisions of s.17(7) and in particular s.17(7)(d), which is similar to article 32.4 as quoted above, and at paras. 43 to 44 thereof stated as follows:

"The relevant statutory test is set out in s. 17(7D). For convenience, I set it out it here:

(7D) Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that-

(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and

(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16).

Accordingly, in order to satisfy this test two conditions must be met: (i) there must be new elements or findings which would make a successful application for asylum significantly more likely; and (ii) the non-presentation of those new elements in the previous application must not be attributable to any fault on the part of the applicant."

23. At. para. 51 Hanna J. continues:

"Even if the court had taken the view that the doctor's amplification of his earlier report does constitute "new elements or findings" which make it significantly more likely that the applicant's asylum claim would succeed, the applicant would not, it seems to me, be able to satisfy the second limb of the test, set out in s. 17(7D)(b). This is because the information provided in Dr O'Donovan's second report is not information that the applicant, through no fault of her own, was incapable of presenting for the purposes of her original asylum application. In this regard, the court observes that the second report

was prepared on the basis of the same physical examination of the applicant as the original report, and any findings on foot thereof were thus available to the applicant at the time of her original asylum application."

24. It seems that it was open to the applicant at any stage and particularly when she lodged her initial asylum application to provide proof of her Ahmadi faith to the asylum authorities. For reasons unknown, she failed and/or declined to provide such information. I note that she avers in her affidavit that she was not asked to provide this information until she was represented by her current solicitors. However, it remains the case that it was at all times within her procurement and powers to obtain such information and she did not do so.

25. Finally, even if I was disposed to accede to the applicant's application, which I am not, the grant of judicial review is a discretionary relief. It does not seem to me in all the circumstances that have been outlined to the Court in relation to the applicant's actions that she has upheld her duties and responsibilities in respect of an asylum applicant. For the reasons set out above I therefore refuse leave.