Neutral Citation Number: [2008] IEHC 36

THE HIGH COURT
JUDICIAL REVIEW

[2006 No.66 J.R.]

BETWEEN

A.Z.

APPLICANT

AND
THE REFUGEE APPLICATIONS COMMISSIONER
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr Justice Brian McGovern delivered on the 6th. day of February, 2008

This is an application for leave to apply for judicial review for an order of *certiorari* quashing the recommendation of the 20th December, 2005, made by the first named respondent that the applicant not be declared a refugee and for other ancillary relief.

1. The applicant is an Iranian citizen and is of Kurdish ethnicity. He claims to have fled Iran owing to ethnic and political persecution as a result of his support of the "Komala" political party. He says that he was involved in an anti-government demonstration in a town called Piranshahir and that the security forces intervened in a robust manner to break up the demonstration. While fleeing, he claims to have fallen in a laneway and the next thing he remembers is waking up in hospital where he says he was being treated for a leg injury. He was in hospital for four days and while there claims that he spoke to a stranger and asked him to contact his family since he was apprehensive that the security forces were looking for him. He was aware that his photograph had been taken at the demonstration and that others had been arrested. His uncle managed to get him out of the hospital and he spent some time in hiding and eventually came to Ireland.

2. The applicant applied for asylum in the State on the 5th September, 2005 and completed a written questionnaire on the 12th September, 2005. He was interviewed by an authorised officer of the first named respondent on the 29th November, 2005. Following the interview, the Refugee Applications Commissioner prepared a report pursuant to section 13 (1) of the Refugee Act, 1996 (as amended). The Refugee Appeals Tribunal (RAT) made certain findings, calling into question the credibility of the applicant and held that the applicant had failed to establish a well founded fear of persecution, both on an objective and subjective level. Accordingly, the first named respondent refused the applicant's application for asylum. The applicant had lodged an appeal to the RAT around the same time as he commenced this application for judicial review. The respondents argued that there was an alternative remedy available to the applicant, namely, an appeal to the RAT and for that reason the court should exercise its discretion against granting leave to apply for judicial review. The Supreme Court has held that the presence of a pending appeal is not a bar to the court exercising its discretion to grant a judicial review. It is a factor to be considered. (See *Stefan v. Minister for Justice, Equality and Law Reform*, and Others [2001] 4 I.R. 203 and *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381. In the *Abenglen* case, Henchy J. held that where an inferior court or Tribunal makes an error within jurisdiction and without recording that error on the face of the record, *certiorari* does not lie. It is only when there is some extra flaw, such as the court or Tribunal acting in disregard of the requirements of natural justice, that *certiorari* will issue. If there is a statutory procedure for the correction of error in a court or a Tribunal and that procedure is adequate or more suitable to meet the complaints made by the applicant, then *certiorari* will not be granted. In *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at p.509 Barron J. stated "*the real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to shows that this is in effect the real consideration*". This view was adopted by Geoghegan J. in *Buckley v. Kirby* [2000] 3 I. R. 431.

3. In the statement of grounds, the applicant complains that the first named respondent based the rejection of his claim primarily on the grounds of his credibility and that in so doing the first named respondent was in error. He alleges that the first named respondent was in error in impugning the applicant's credibility on the basis of information given by him about the "Komala" party in Iran. The application for judicial review was made on the 19th January, 2006 and it is conceded by Mr Moore on behalf of the respondents that it was made within time. In the course of the hearing, counsel for the applicant complained of the fact that the first named respondent confused the "Komala" party with the "Komalah" party which meant that the basis of the RAC decision was flawed. Counsel argued that they are two separate and distinct parties.

4. The first time that this point was raised was in an affidavit of the applicant sworn on the 9th day of June, 2007. It did not form one of the grounds on which the application was made. I therefore hold that the applicant is out of time in making that claim. In any event, I have serious doubts as to the genuineness of that claim because in the applicant's statement of grounds he justifies his answers in relation to the "Komala" party and in paragraph 2 of his grounding affidavit sworn on the 18th January, 2006, he says "*I say that I fled Iran owning to ethnic and political persecution due to my support of the Komala political party, visited upon me by the Iranian state there . . .*". He does refer to the "Komalah" political party in para. 4 of the same affidavit but he does so in the context of saying that his information on the dates relating to the party was correct and that the RAC was wrong in the information it relied on. Nowhere in that affidavit does he say that the "Komala" party and the "Komalah" party are separate entities and distinct and that the RAC was confusing the two. At para.23 (a) of the questionnaire submitted in his application for refugee status, he states "*yes, I was a supporter of Komala*" and also stated that his brother was a member of the same organisation. In exhibit A to his affidavit of the 9th June, 2007, the applicant submits a document which purports to come from the official website of the "Komalah" party. The document is in what appears to be Arabic and is not translated but what is clear on the document is that at one point it states "Komalah" and another part of the same page has a heading "Komala tv." There is a photograph of a man who appears to be the same person under both headings, which would certainly call into question the assertion that the two organisations are separate and distinct. The burden of proving that he is a refugee lies on the applicant and he has to engage fully in the asylum process. The information which has been furnished is, in my view, too late to be raised now. But in any event, it is very unclear as to whether it supports the applicant's case in view of the matters I have set out above. If the applicant was at all times aware that there were two separate and distinct parties with a similar name, the onus was on him to ask the interviewer which party he was referring to; was it the "Komala" party or the "Komalah" party?

5. The applicant has to show substantial grounds for contending that the decision of the first named respondent on that point is invalid or ought to be quashed. It seems to me that on the information available, the first respondent was entitled to come to the conclusion reached and that even if the Commission member was in error, it was an error of fact and an error made within jurisdiction. As such, it would not be amenable to judicial review.

6. The applicant also criticises the first respondent for finding against him on a credibility issue relating to the location of Azadi Square. The applicant informed the first respondent that the demonstration in which he was involved took place in Piranshahir City and that it was in Azadi Square. The first respondent stated in her report that Azadi Square is in Tehran and not Piranshahir and that this must cast serious doubts on the credibility of the applicant. The applicant says that there are is an Azadi Square in Pirahshahir and that accordingly, the basis of the first named respondent's decision is flawed insofar as it reflects on the credibility of the applicant. That may well be so, but if the first respondent made an error in holding that there was no Azadi Square in Pirahshahir, it was an error of fact and an error made within jurisdiction. The applicant complains that the first respondent should not have made an adverse finding of credibility on this issue when it had not been raised with the applicant at the time.

7. It seems to me that it is important to remember that after the applicant has been questioned, the information is then checked by the RAC by reference to country of origin information or otherwise. If the RAC makes a mistake of fact and draws the wrong conclusion from that, then this is something which is most appropriately dealt with on appeal. In this case, the applicant may well be correct in stating that there is an Azadi Square in Pirahshahir in which case the RAC is incorrect. But it seems to me that this error is made within jurisdiction and can be cured on appeal. If, for example, the appeal to the RAT were to proceed and the applicant can establish that there was an error made on this point, then the error can be rectified. It may well be an error that is capable of rectification by judicial review but it is also capable of correction under the statutory procedure which has been provided for and it seems to me that that procedure is adequate and more suitable to meet the applicant's complaint on this issue. It is a simple and straightforward matter for the applicant to establish whether or not there is an Azadi Square in Piranshahir. If he establishes that on the appeal, then, clearly, no adverse credibility finding can be made against him on that account. Therefore, it seems to me that I should exercise my discretion against granting leave to apply for judicial review on this point.

8. The next matter complained of by the applicant is that the first respondent was in error in stating that the applicant was in hospital for four months when in fact he had stated he was only there for four days. On question 25 in the section 11 interview he was asked "how long were you in hospital?" and his reply was "4 nights".

9. The first respondent stated in the report that the applicant's description of how he escaped the demonstration lacked credibility. The report goes on to state: "*he maintains he fell down and fainted in one of the lanes of the area of the demonstration and woke up two days later in hospital. He claims he does not know how he got there. It is also difficult to lend credence to the applicant's account of how he left the hospital. He maintained that he asked a stranger to contact his mother who, in turn, contacted the applicant's uncle. He maintains that his uncle took the applicant out of hospital without any difficulty or adverse attention, despite the applicant being there for four months. It should be noted that the applicant was admitted to hospital following his participation in an anti-government demonstration. To suggest that he left hospital in the manner suggested it not credible*".

10. I have set out at some length the first respondent's finding on this point so as to put the applicant's complaint in context. It seems that the first respondent's scepticism as to the applicant's account of how he left hospital was based on the fact that the security forces would have been looking for him and it was therefore surprising that he was able to get out of hospital without any difficulty or adverse attention. The reference to the "four months" does not appear to me to be of particular significance. It may well be that the first respondent would have reached the same conclusion on the basis of the applicant having been in the hospital for four days. But, whatever may be the case, it seems to me that this is a matter which can be resolved adequately through the appeal process once the error is pointed out to the appeal Tribunal. On that basis, I exercise my discretion against granting leave to apply for judicial review on that ground.

11. Having considered all the arguments in this case, I adopt the position of Barron J. as expressed in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 where he said at page 509:

> "*the real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review . . . the true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and the principles of fairness . . .*". I am satisfied that in this case the complaints made by the applicant can adequately be dealt with in an appeal before the RAT and I note that he has lodged such an appeal.

The facts of this case can readily be distinguished from those in the Stefan case. There a portion of the evidence was missing and the decision maker was not in possession of all the facts. In this case the errors alleged to have been made were in the context of the evidence which had been given by the applicant.

The Oireachtas has put in place a statutory scheme for dealing witgh asylum applications which includes a right of appeal from decisions of the RAC. While there may be circumstances in which an error made by the RAC should properly be dealt with by an application for judicial review, the Courts should only grant leave to an applicant where the issues cannot adequately or conveniently be resolved before the RAT. In *Stefan .v. Minister for Justice* [2001] 4 I.R.203, Denham J. stated at p.217:

> *"Certiorari may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of certiorari may be granted, the court retains discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to attain a just result."*

In the circumstances of this case I take the view that it is appropriate to exercise my discretion against granting leave to apply for judicial review.