Neutral Citation Number: [2010] IEHC 81

THE HIGH COURT

JUDICIAL REVIEW

2009 563 JR

BETWEEN/

JEANETTE FAMPUMU

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 25th day of March, 2010.

1. By order of Clark J. of 28th May, 2009 the applicant was granted leave to bring the present application to seek, *inter alia*, an order of *certiorari* quashing a decision of the respondent made on 19th May, 2009, (the "Contested Decision"). That decision is described as having made or upheld a transfer order in respect of the applicant made by the respondent. The decision might also be described, however, as one which refused a request made by the applicant under Article 15.2 of Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation") that the applicant be permitted to remain in the State with her sister because she, the applicant, is dependent upon the assistance of her sister on account of a serial serious illness from which she suffers.

2. The circumstances out of which the proceeding arises can be summarised as follows. The applicant is a native of the Democratic Republic of Congo who arrived in the State on 14th October, 2005 and claimed asylum. She initially stated that she had not claimed asylum elsewhere but upon investigation it transpired that she had done so in Belgium. The Refugee Applications Commissioner determined that she should be transferred to Belgium under the Dublin II Regulation. Submissions were made to the Minister that effect should not be given to that decision because the applicant was seriously ill and receiving treatment in St. Vincent's Hospital in Dublin.

3. A medical report dated 2/2/06 from a Dr. Victory, consultant pain physician and a report dated 10/2/06 from Dr. Darby, a consultant psychiatrist, were put before the Minister as evidence of the applicant's physical and mental condition and as demonstrating that the effect of a transfer to Belgium would be detrimental to her and even "highly dangerous from a medical point of view".

4. These submissions were rejected by the Minister effectively upon the basis that he had no discretion in the matter; that his function was to give effect to the determination of the RAC and that any necessary medical treatment would be available from the Belgian authorities who would be fully apprised of the situation and of the applicant's condition when the transfer took place.

5. Judicial review was sought of that decision (2006, No. 425 J.R.) which resulted in an order of Birmingham J. of 5th December, 2008 quashing the transfer order that had been made on 11th January, 2006 and as a result of the order the Minister became obliged to reconsider the submissions as to why the transfer order ought not to be implemented.

6. By letter of 30th April, 2009, the Refugee Legal Service on the applicant's behalf made fresh submissions. These invoked once again the contents of the two medical reports from Doctors Victory and Darby of 2006 and added what was described as an "updated medical report just received from Dr. Victory dated 27th April, 2009" together with a copy of a report "from our client's general practitioner, Dr. P. Harris confirming that our client continues to suffer from an electrocution injury she suffered in 2005 in the course of a severe sexual assault and rape in the Congo in 2005".

7. The letter dated 30/4/09 made a submission based upon Article 15.2 of the Dublin II Regulation in the following terms:

> "We are instructed that Mrs. Fampumu's sister, Marthe is a nurse and is lawfully resident in the State. Ms. Fampumu resides with her sister and is very dependent on her. We would on our client's behalf reiterate our request that the Minister consider the humanitarian and the provisions of Article 15 (2) Dublin Regulation that "in cases in which the person concerned is dependent on the assistance of the other on account of … serious illness … the Member State shall normally keep or bring together the asylum seeker with the relative present provided that family ties exist in the country of origin."

8. The letter went on to make a further submission based on Article 16.3 of the Dublin II Regulation to the effect that the transfer order had now lapsed and could not be implemented because the applicant claimed to have left Belgium in June, 2005 and to have remained out of the Member States for over three months. She claimed that she had returned to the DRC from 22nd June to 13th October, 2005 when she again left to come to Ireland.

9. The transfer order dated 19th May, 2009 was accompanied, when sent to the applicant, by a memorandum dated 18/5/09 compiled by the Dublin II Transfer Unit in the Department which effectively constitutes a statement of the reasons for the decision to make the order. After setting out the background to the case and disposing of the question of refoulement, the memorandum records the reason for the decision which is now contested under the heading "medical concerns" as follows:

> "The Refugee Legal Service have submitted medical reasons in their representations for non-enforcement of Ms. Fampumu's transfer order. They have also stated that Ms. Fampumu relies on her sister Marthe Kazeka's care both psychologically and emotionally and because of these reasons she should have her asylum application processed in this State under Article 15.2 of the Dublin II Regulation. Whilst the medical reports of Dr. Raymond Victory that the RLS have submitted regarding the nerve pain in her left hand and her psychological condition are not disputed, they do not show that Ms. Fampumu suffers from a serious illness and therefore Article 15.2 does not apply in this case. Given Belgium's advanced welfare and social protection systems, the authorities there will be quite capable of providing appropriately for her care and protection."

10. As mentioned, leave was granted by order of Clark J. and the grounds in respect of which it was granted were two as follows:

> (1) The respondent erred by failing to properly consider that the applicant was dependent upon her sister and was so in circumstances where the applicant suffered a serious illness pursuant to Article 15.2 of Council Regulation 343/2003; and
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> (2) The respondent failed to properly apply the provisions of Article 15.2 of Council Regulation 343/2003.

11. The regulatory context of those two grounds is this. As its title explains, the purpose of the Dublin II Regulation is that of "establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national". The legislative objective is to ensure that an application by a third country asylum seeker is examined thoroughly but expeditiously by the relevant authority of a single Member State. For this purpose the Dublin II Regulation defines a hierarchy of criteria for determining which Member State will be responsible in a variety of circumstances for the examination of such applications. It lays down common mechanisms and procedures for the application of those criteria and, where necessary, for the transfer of responsibility from one Member State to another including the transfer of the asylum seeker from one Member State to another. It was in application of these criteria that the applicant was to be transferred to Belgium as determined by the RAC because Belgium was the Member State in which asylum was first sought and which had accepted responsibility for the examination of the applicant's asylum application.

12. Article 15 of the Regulation – the only Article in its chapter V – is headed "Humanitarian Clause" and provides for a derogation from the hierarchy criteria that would otherwise determine which Member State will be responsible by, in effect, permitting two or even more Member States to agree that one of them will take responsibility for an application because, on humanitarian grounds based particularly on family or cultural considerations, it is desirable or appropriate to bring together or to keep together family members or dependent relatives. The substantive provisions are set out in the first four paragraphs of Article 15 as follows:

> (1) Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.
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> (2) In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.
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> (3) If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.
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> (4) Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.

13. It will be noted that the arrangements provided for in Article 15 are purely facultative and dependent upon the willingness of the Member States and of the persons concerned to implement such an arrangement in each case. It should also be noted that although Article 15.2 is invoked in the present case as a means of defeating the implementation of an existing transfer order, the Article is capable of application independently of the existence of any issue as to the application of the hierarchy of criteria in chapter III or the need to transfer an asylum seeker to another Member State. Thus, for example, Member State A might be approached by persons lawfully resident in it who are not asylum seekers with a request that it ask Member State B to permit an asylum seeker who is a family member or dependent relative of theirs in Member State B to be brought to Member State A and to have the asylum application examined in Member State A. Under Article 15.1 Member State A can take responsibility for the asylum application if requested to do so by Member State B and provided the persons concerned agree. If that request is made and Member State A accedes to it, the formal transfer of responsibility under the Dublin II Regulation then occurs in accordance with Article 15.4.

14. Article 15.2 deals with the particular situations of dependency of one person on another for assistance on account of "pregnancy or a new born child, serious illness, severe handicap or old age". It is to be noted that Commission Regulation (EC) 1560/2003 which lays down detailed rules for the application of the Dublin II Regulation provides in its Article 11.1 that this provision works both ways. Article 15.2 applies "whether the asylum seeker is dependent on the assistance of a relative present in another Member State or a relative present in another Member State is dependent on the assistance of the asylum seeker".

15. Before leaving Article 11, it is relevant to record that its second paragraph gives guidance on the question as to how the existence of "serious illness" in this context is to be established. It provides:

> "The situations of dependency referred to in Article 15 (2) of Regulation (EC) No. 343/2003 shall be assessed, as far as possible, on the basis of criteria such as medical certificates. Where such evidence is not available or cannot be supplied, humanitarian grounds shall be taken as proven only on the basis of convincing information supplied by the persons concerned."

16. In arguing the case, counsel for the applicant has emphasised that the single ground of challenge to the Contested Decision put before the Court is narrow and specific namely that the Minister was wrong in deciding that the applicant was not suffering from a "serious illness" in the sense of Article 15.2. This focussing of the issue is significant because it seeks to separate two factors which are clearly present in that paragraph namely, "serious illness" on the one hand and "dependence on assistance" resulting from the illness on the other.

17. Counsel submits that the only matter decided by the Minister under the heading "Medical Concerns" in the Contested Decision is that the applicant has not been shown to suffer from a serious illness. No negative finding, he says, has been made in respect of the submission that the applicant is dependent upon her sister in the manner set out in the submissions and in the medical reports from Dr. Victory of 25/1/06 and 2/2/06. Counsel for the respondent, on the other hand, argues that both factors have been addressed in the note and that the applicant's submission is based upon an artificial or unduly restrictive reading of it. He submits, in effect, that it is a composite finding that Article 15.2 does not apply and the closing reference to the ability of the Belgian systems to provide appropriate care and attention clearly shows that the Minister considered that the assistance provided by the applicant's sister could equally well be provided in Belgium.

18. If the issue is to be approached, therefore, on the precise basis contended for by the applicant, the Court is asked to determine whether the Minister was entitled on the basis of the information put before him in the submissions and medical reports, to decide that Article 15.2 was inapplicable because it had not been shown that the applicant was suffering from "serious illness".

19. Clearly, the onus of proof in that regard lay with the applicant. The term is not defined in the Regulation but it is clear from the context in which it is used that it is an illness of such seriousness as will render the sufferer dependent upon assistance from another person. It is, therefore, "serious" in the sense of "grave" but obviously not necessarily life threatening or of a permanent or long lasting nature because a similar dependency can arise out of pregnancy or the need to care for a new born child. It connotes, obviously, some degree of personal incapacity whether physical or mental. It is also apparent that it is something that will normally be proved by the production of medical evidence as envisaged by Article 11.2 of the Commission Regulation referred to above. It can, however, be proved otherwise but in the absence of medical evidence the information must be "convincing".

20. As already mentioned, the evidence relied upon for this purpose by the applicant consists of the medical reports of Dr. Victory and Dr. Darby in 2006 together with the further "update" from Dr. Victory dated 27/4/2009 and a handwritten note dated 10/3/09 from the applicant's general practitioner, Dr. P. Harris.

21. In the view of the Court, the significance of this medical evidence lies not so much in the contents of the medical reports dating from 2006 as in the contrast between that information and the content of the two notes from 2009 because it is on the basis of the condition of the applicant in the first part of the year 2009 that the Minister was required to make the decision.

22. There is little doubt but that the medical evidence from 2006 was convincingly supportive of the fact that the applicant was suffering from what might be termed "serious illness" at that point. In the first place, the applicant was then receiving treatment as an inpatient in St. Vincent's Hospital. On 25th January, 2006, Dr. Victory described her symptoms as "consistent with the diagnosis of complex regional pain syndrome previously known as reflex sympathetic dystrophy. This is a chronic nerve pain problem which has fixed flexion deformity of the left hand. She requires urgent treatment involving a spinal cord stimulator insertion which is due to be carried out in the next week or so. I want to be clear that if this lady is sent to another country it would have a detrimental effect on her medical condition. One part of the problem would be that this chronic pain syndrome would be more easily managed in a country where she has supportive care and her sister is a nurse working here".

23. He reiterated this opinion immediately afterwards in the report of 2/2/2006:

> "She … has a complex medical issue involving the physical pain problems associated with nerve injury and pain. Her psychological state is quite unstable and the patient needs psychiatric attention. She has been admitted to St. Vincent's University Hospital so that we can work on her pain management from a medical point of view and also assist her with her psychological support. Her sister has been very supportive, she speaks English and works as a nurse. The support from her is absolutely essential if Jeanette is to receive adequate treatment. Basically it would be impossible to provide any psychological support without the assistance of her sister. I understand that there is an intention to send this lady to Belgium, I think this would be highly dangerous from a medical point of view. Separation from her sister alone would make her extremely unstable from a psychiatric point of view. This would also impinge on the proper treatment of the complex regional pain syndrome in her hand….we plan to carry out an operation called a spinal cord stimulator implant".

24. This view of the applicant's psychological state at the time is corroborated by the report of 10th February, 2006 from Dr. Darby. Thus the medical evidence in February, 2006 was supportive both of the proposition that the applicant was then suffering from an illness which could be described as serious and that she was dependent for her prospects of recovery upon the availability of the immediate assistance of her sister who was not only a close relative but a qualified nurse.

25. The "update" of 27/4/2009 from Dr. Victory reads in its entirety as follows:

> "We have been looking after Jeanette Fampumu in the pain medicine service in St. Vincent's Hospital for over three years now. She has nerve pain in her left hand due to a torture injury in the Democratic Republic of Congo. She has

developed complex regional pain syndrome and has been undergoing treatment for this including nerve blocks, medications and occupational therapy. She has also been attending our pain psychologist, Dr. Rosemary Walsh as she has some difficulty in coping with pain and dysfunction from this problem. She is quite fragile psychologically and depends a lot on her sister. She is continuing to attend our pain service and will need continued support both psychologically and physically. I feel it would be detrimental to her medical and psychological progress were she to be deported from Ireland."

26. The handwritten note from Dr. P. Harris dated 10/3/09 reads as follows:

> "Above named suffers from complex regional pain syndrome which occurred following an electrocution injury in the Congo in 2005. She was apparently raped while also in the Congo and psychiatrists believe she is suffering from post-traumatic stress disorder. She is receiving medications and psychiatric treatment for these conditions. She had no use of her hand at the moment and may require surgery for the pain problem."

27. What is striking about these two documents when looked at from the point of view of convincing medical evidence of serious illness, is the absence of any detailed explanation or account of the success or otherwise of the treatment which the applicant had been receiving in the three intervening years. Dr. Victory merely mentions "treatment including nerve blocks, medications and occupational therapy". No reference is made to the operation proposed in 2006 to insert a spinal cord stimulator but in the absence of any reference to further surgery in the report of 27/4/2009 it must be assumed that this had been done as planned in 2006 and that it had been successful. In contrast with the situation of urgency described in February 2006, Dr. Victory now says that the applicant "has some difficulty in coping with pain and dysfunction".

28. The 2009 medical reports appear to indicate that the applicant was then still suffering from pain and loss of use in her left arm and that she was still psychologically fragile. Otherwise, however, the medical evidence is of a strikingly less urgent and serious character than that given in 2006 and implies a considerable improvement in the applicant's condition.

29. The second striking aspect of the information thus placed before the Minister is, in the Court's view, the almost total absence of any direct evidence from the applicant herself as to the practical effect which her medical condition is claimed to have on her day to day life. In her grounding affidavit she relies largely upon the medicals report and says "I remain seriously ill". She says she suffers from chronic pain and post traumatic stress disorder and that she is receiving medical and psychiatric treatment. She says "I say that I have found (my sister) to be of great comfort to me here in Ireland and her qualification as a nurse has been of great assistance to me also".

30. However, given that her illness is alleged to be so serious as to make her dependent upon the assistance of her sister, it is notable that no evidence is given as to the precise form which that assistance takes other than that of "great comfort". If a case of serious illness creating a form of incapacity and necessitating actual day to day assistance from the sister was being made, one would have expected some specific description of the actual incapacities experienced by the applicant. Is she unable to dress herself everyday? Is she unable to cook meals for herself? No such information was put before the Minister.

31. The High Court cannot quash a decision of this kind on the part of the Minister unless it is satisfied that there was no rational basis upon which the Minister was could to come to the conclusion that the applicant's condition did not amount to "serious illness". The Court is satisfied that on the basis of the contents of the medical reports from 2009, their obvious contrast with the situation described in 2006, and in view of the absence of any concrete information from the applicant herself as to the nature of the incapacity alleged in practical terms, that the Minister was entitled to come to the conclusion that the applicant was not, as of May, 2009, suffering from "serious illness" in the sense of Article 15.2.

32. On that basis, accordingly, the application for an order of *certiorari* to quash the Contested Decision must be refused upon the facts. However, for the sake of completeness and in view of the emphasis placed upon it in argument by counsel for the respondent, there is one further aspect to the case which must be mentioned although, in the result, it does not give rise to a distinct reason for refusing the application. In the light of information which has come to light since leave was granted by the order of 28th May, 2009, counsel for the respondent forcefully submitted that the Court ought in any event to refuse relief because of what was described as a "spectacular non-disclosure" of relevant information in relation to the applicant's position.

33. Following upon the grant of leave, a Statement of Grounds of Opposition was filed on behalf of the respondent on 27th November, 2009 together with an affidavit of Pat Carey on behalf of the respondent in which it was averred that at the end of May, 2009, the applicant had attended at the Garda National Immigration Bureau and informed it verbally that she had married a Mr. Blanchard Ndongola on 9th February, 2009. Mr. Carey deposed to the fact that this information had not been given to the respondent before the transfer order was made nor was any mention of the marriage made in letters addressed to the respondent by the Refugee Legal Service on 30th April and 12th May, 2009.

34. When questioned on this at the hearing of the present application, counsel for the applicant accepted that the statements were correct; that the marriage had taken place and he explained that this had not been brought to the attention of Clark J. on 28th May, 2009 because the R.L.S. was unaware of the fact at the time.

35. Furthermore, counsel for the applicant proceeded to inform the Court that on 11th November, 2009 the applicant had given birth to a son, Joshua, of whom Mr. Ndongola was the father. He further stated that on 10th November, 2009 the RLS had informed the Chief State Solicitor of the fact that the marriage had taken place but no mention was made of the pregnancy or the then imminent birth. It was not until 3rd December, 2009 that the Minister was informed of the birth of the child.

36. It is notable that although the fact of the marriage was put on the record in the case by the affidavit sworn by Mr. Carey on 26th November, 2009 at a point when the respondent was unaware of the birth of the child, the opportunity was not taken on behalf of the applicant to file any further affidavit putting on record the full picture of the applicant's position at the time when the transfer order was made and the application for leave was sought namely, the fact that the applicant was pregnant. The facts of the marriage and of the pregnancy were clearly matters that should have been disclosed to the Court and to the respondent because it was potentially relevant to the assessment that fell to be made in the application of Article 15.2. Clearly, if the applicant was claiming to be seriously ill and dependent upon the assistance of her sister with whom she was living, it was directly pertinent for the Minister to know on 19th May, 2009

and for the Court to be informed on 28th May, 2009 that the applicant was married and pregnant. Had she dispensed with the assistance of her sister on getting married? Was she no longer living with her sister? Was she now dependent on her husband?

37. Notwithstanding the service of the affidavit of Mr. Carey, no attempt was made prior to the hearing to provide evidence as to whether and how the marriage and pregnancy had altered the applicant's personal situation, nor was any explanation given as to how the marriage was possible when, in her asylum application, the applicant had stated that she had a husband and three children in the DRC. Instead, the single sentence is included in the written legal submissions dated 5th March, 2010:

> "The applicant resides with her sister in this State, notwithstanding her marriage."

38. When questioned on this aspect of the matter at the hearing, counsel for the applicant explained that it was considered unnecessary to file any additional affidavit by way of reply to the affidavit of Mr. Carey because the averment was not incorrect and because no issue had been raised in the statement of opposition in relation to the fact that the applicant had married in February 2009. He pointed out that the applicant was obliged to continue living with her sister notwithstanding the marriage by virtue of the conditions laid down by the GNIB governing her continued presence in the State. Furthermore, the existence of the marriage was unknown to the Minister as of the making of the transfer order and the only issue raised by way of challenge to that order was that in respect of the factual finding as to the non-existence of a serious illness.

39. The Court has already found above that, on that basis, the Minister's decision to make the transfer order was correct and valid. It is unnecessary, therefore, to make any additional findings as regards the submissions made as to non-disclosure and lack of good faith in invoking the jurisdiction of the Court advanced on behalf of the respondent. The Court will limit itself to the observation that the information available to the applicant as of 28th May, 2009 was clearly pertinent to the proceeding before the Court and ought to have been disclosed. Had it been disclosed a different view might well have been taken on the application for leave.

40. The application for judicial review is accordingly dismissed.