Neutral Citation [2015] IEHC 505

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 856 J.R.]

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BETWEEN

Q.H AND G.H. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND Q.H.) (PAKISTAN)

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 30th day of July, 2015

1. This is a joint judgment of a preliminary issue in the telescoped hearing of applications for orders of *certiorari* quashing the decisions of the first named Respondent both dated the 20th June 2012 and notified to the Applicants respectively on the 2nd July 2012 and 13th July 2012.

2. The grounds up which relief was sought in the statement of grounds in relation to Q.H.:

> 1) The Tribunal erred in law and in fact that the Applicant had not suffered persecution in the past. In the alternative the said finding is irrational.
>
> 2) The imposition of a requirement that one must have a high profile as an Ahmadi is irrational in the light of the country reports placed before the Tribunal.
>
> 3) Without prejudice to the aforesaid the Tribunal erred in finding that the Applicant's lacks a "profile" as an Ahmadi in circumstances where the Applicant comes from a high profile Ahmadi family.
>
> 4) The decision is internally inconsistent in that the Tribunal Member holds that the Applicant has never engaged in preaching of conversation while then acknowledging that the Applicant was "involved in religious education of Ahmadi children."
>
> 5) The findings that the internal relocation available to the Applicant was made without regard to the evidence including country reports placed before the Tribunal.
>
> 6) The Minister lacked the jurisdiction to make the decision to refuse the Applicant refugee status in circumstances where the Applicant was not afforded a lawful asylum process.
>
> 7) The Respondents failed to have any or any reasonable regard to the grant of leave to remain to the husband of the Applicant.
>
> 8) If necessary an order providing for an extension of time

3. In relation to G.H., the infant, the grounds upon which relief were sought were as follows:-

> 1) The Tribunal erred in law and in fact in finding that the there was no evidence that the infant Applicant would be at risk of persecution in Pakistan. In the alternative the said finding is irrational in the light of the law as directed towards Ahmadyya Muslims in Pakistan and country of origin information reports showing that the persecution of Ahmadyya Muslims is endemic in Pakistan.
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> 2) The Tribunal erred in law in placing a requirement that the Applicant should show she is "an exceptional" Ahmadi in circumstances where country reports placed before the Tribunal show that non "exceptional" Ahmadis are exposed to persecution in Pakistan.
>
> 3) An order providing for an extension of time herein.

4. This judgment is dealing with the issue of an extension of time prior to making any further findings

5. The Applicants applied for an extension of time and the Respondent objects to same.

6. In her affidavit, which included country of origin reports, she was notified by letter received on or about the 2nd July 2012 that the Tribunal affirmed the decision of the Commissioner.

7. She was subsequently notified that the Minister refused to grant her refugee status and proposed to make a deportation in respect of her. This letter was dated the 31st July 2012. She was also invited to apply for subsidiary protection. By way of explaining the delay in bringing of the proceedings she says that on receipt of the decision of the Tribunal she instructed her then solicitor to challenge the decision. She says that he sought the advice of counsel in this regard but a challenge was not advised. She then sought the assistance of her present solicitor and was advised her file was not received by her present solicitor until the 20th September 2012, primarily due to confusion as to where her file was located and even then there were documents of relevance missing form the file. She says that she also experienced difficulties in travelling to Dublin from Cork to provide instructions due to her

being in the advanced stages of pregnancy. She advises and believes that her brief was immediately prepared for counsel and counsel's opinion was sought. She further advised that due to pre-existing work commitments in preparation for the new legal term, counsel was unable to provide an opinion until the 2nd October 2012. On receipt of counsel's opinion, instructions to institute the within proceedings were given immediately and they were commenced on the 11th October 2012. In relation to her daughter's case, the adult Applicant QH swore an affidavit saying that her daughter was born in Pakistan on the 28th December 2005 into an Ahmadi family, that she had suffered persecution since birth on account of her Ahmadi status, her father had since been granted leave to remain in Ireland in circumstances where his representations were substantially directed to his faith and the treatment of the Ahmadis in Pakistan. Her daughter and herself arrived in Ireland on the 8th October 2011. She attended for interview at the Commissioner in respect of her daughter's application and was notified that the Commissioner had refused her daughter, and a notice of appeal was submitted to the Refugee Appeals Tribunal. She was notified by letter on or about the 13th July 2012 that the Tribunal affirmed the decision of the Commissioner. A copy of the decision of the Tribunal Member was enclosed. He was subsequently notified that the Minister received to grant her daughter refugee status and proposed the making of a deportation order and this letter was dated the 31st July 2012. By way of explaining the delay in bringing the proceedings, she said that on receipt of the decision of the Tribunal she instructed her then solicitor to challenge the decision as in her own situation and in each case she asked for a further order of extension of time.

8. Section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 provides as follows:-

> *"2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall—*
>
> *(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made".*

9. Ironically s. 5(4) indicates that The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this section. I propose to refer to that subsection in due course.

10. Section 5(1) states as follows:-

> *"A person shall not question the validity of—*
>
> *(i) A decision of the Refugee Appeals Tribunal under s. 16 as amended by s. 11(1)(k) of the Immigration Act 1999 of the Refugee Act 1996 otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts."*

11. The Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011) came into operation on the 1st January 2012. Section 4 amends the Rules of the Superior Courts (S.I. No. 15 of 1996) and provides that:-

> *"An application for an order of certiorari, mandamus, prohibition or quo warranto shall be made by way of an application for judicial review in accordance with the provisions of this Order."*

And it provides that an application shall be made for leave by motion ex parte.

12. In hearings pursuant to s. 5 Illegal Immigrants (Trafficking) Act 2000 with a view to dealing with substantial delay issues in hearing of judicial review cases, the High Court has sought to truncate the time by having telescoped hearings of judicial review of Refugee Applications Commissioner decisions or Refugee Appeals Tribunal decisions in complying with s. 5(4) of the Act. The High Court are giving priority as is reasonably possible by having pre-leave telescoped hearings.

Extension of time

13. Rule 21 of the amended Rules of the Superior Courts (Judicial Review) 2011 provides :-

> *"(3) Notwithstanding sub-rule (1), (the time allowed for taking of judicial review proceedings) the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—*
>
> *(a) there is good and sufficient reason for doing so, and*
>
> *(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—*
>
> *(i) were outside the control of, or*
>
> *(ii) could not reasonably have been anticipated by the Applicant for such extension."*
>
> *(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a Respondent or third party.*
>
> *(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the Applicant which shall set out the reasons for the Applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.*
>
> *(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the Applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a Respondent or third party."*

It appears that no application for a certificate for leave to appeal was applied for in that case.

14. Counsel on behalf of the Applicant, Mr Christle SC (with Mr O'Halloran) referred to judgments given by Barr J. and MacEochaidh J. In *S.A.B. v. Refugee Appeals Tribunal & Ors* [2014] IEHC 495 Barr J. gave an extension of time in circumstances where an Applicant

had received notification of the decision on the 18th and 19th December 2009. He said:-

> *"9. Due to the time of year, the Applicant has stated that he was not able to consult with his solicitor until 5th January, 2010. The solicitor then sought a copy of the Applicant's file, and it was not received until 14th January, 2010. The Applicant's solicitor sent a brief to counsel and the papers were returned by counsel with admirable speed. The notice of motion appears to have issued on 20th January, 2010.*
>
> *10. In the circumstances, where it has taken over four years for the application to come on for hearing and where no prejudice has been caused to the Respondent by the delay in instituting the proceedings, I am satisfied that there are substantial grounds for extending time for lodging the within proceedings up to and including 20th January, 2010, which appears to be the date on which the notice of motion issued."*

It appears that no application for a certificate for leave to appeal was applied for in that case.

15. In *K.B. v. Minister for Justice Equality and Law Reform* [2013] IEHC 169, MacEochaidh J. stated as follows:-

> *"17. The Applicant received the Respondents' decision on 5th February 2009, which indicates that proceedings ought to have issued by 19th February 2009. Proceedings issued on 11th March 2009, a delay of approximately 20 days. I accept that the Applicant is blameless in the delay and acted in a manner consistent with a keen interest in the institution of judicial review proceedings. He contacted the Refugee Legal Service in Cork within the 14-day period for the institution of proceedings. They were unable to assist him and he then contacted a private solicitor in Dublin who did not receive the Applicant's full file until 26th February 2009. Counsel was instructed and with admirable expedition, prepared an opinion within three days.*
>
> *18. I have no hesitation in finding, in accordance with the dicta of Irvine J. in A. & Anor v. Refugee Applications Commissioner [2008] IEHC 440 that good and sufficient reasons have been advanced to extend time and I do so without hesitation.*
>
> *19. To this, I wish merely to add that I would be extremely reluctant to entertain an application to dismiss proceedings four years after the institution of those proceedings where the first indication of a complaint about delay is to be found in the written submissions filed in the days before the hearing. If a State Respondent is keen to pursue a genuine delay point, this itself should not be delayed, and I say this having regard to the particular circumstances of failed refugee judicial review Applicants who live, generally, in very difficult circumstances on a mere €19 or so a week. It would be unconscionable to permit proceedings to fail on a time point where an Applicant might have endured significant hardship over many years waiting for such a simple point to be determined. There would be much merit in such time points being advanced expeditiously and by motions in limine."*

16. Counsel on behalf of the Respondents, Mr Donnelly BL quoted from a decision of Finlay Geoghegan J. in *Muresan v. Minister for Justice Equality and Law Reform & Ors* [2004] 2 ILRM 364. Finlay Geoghegan J. had to deal with a situation where an Applicant sought leave to amend an application for leave and to seek new grounds of leave to seek judicial review. She stated:-

> *"The only explanation given for the delay in the filing and serving of the motion seeking the proposed amendments to the 30th January, 2003 was that a new counsel was retained in the case shortly prior to the hearing date of the 31st January, 2003 and that the new counsel, Mr. Humphries, considered that these additional reliefs and grounds ought to be included as part of the Applicant's claim on the facts as presented by the documents then available. No additional documents had been made available over and above those which were made available with the affidavit of Sandra Smith on the 27th November, 2002.*
>
> *I have concluded that a change of counsel in the circumstances of this case is not good and sufficient reason to extend the period. Mr. Pendred, the solicitor for the Applicant is an experienced solicitor in refugee matters. He had available to him all the relevant information on the 27th November, 2002. He also had been given an opportunity by this Court of filing documents seeking to amend prior to the 20th December, 2002. It is inevitable that different counsel will take a different view of the same case. It appears to me that if the Courts were to permit an extension of the period provided for under sub-s. (2) of s. 5 of the Act of 2000 simply upon the grounds that a new counsel had come into a case and had taken a view that a differing and additional claim on new and distinct grounds should be made that this would defeat the legislative intent as expressed in s. 5(2) of the Act of 2000. It may be that on certain facts the clear oversight or errors by lawyers acting for an Applicant may amount to a good and sufficient reason for extending the period under s. 5(2). There was no such clear error in this case."*

In this case Finlay Geoghegan J. was dealing with the change of counsel and not a change of solicitor. The solicitor involved in the *Muresan* case was an experienced solicitor in refugee matters. The change of a solicitor as opposed to the change of a counsel is a much more difficult and sophisticated issue.

17. Mr Donnelly also opened *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 IR 418. In this case the Applicants arrived in Ireland having travelled by plan from Warsaw to Frankfurt, Germany and then changed for a direct flight from Frankfurt to Dublin. They do not appear to have sought refugee status in Germany. They had previously travelled to the United Kingdom from Poland in December 1997. They applied for refugee status in England but were refused and were unsuccessful on appeal and they were deported from the United Kingdom to Poland in January 1999. Hardiman J. looked at "criteria for extending the time". He stated:-

> *"The time for applying for judicial review in respect of either of these decisions can be extended only if the High Court, or this court on appeal, "considers that there is good and sufficient reason for extending the period". This is a special statutory jurisdiction and it is, in my view, sui generis. Elucidation of the principles governing its exercise may be drawn from the jurisprudence which has developed in relation to other powers of a cognate nature, but none are directly analogous. Examples include the jurisdiction to extend time for appealing, or for the taking of a particular step in litigation and the jurisdiction to strike out a claim in the exercise of the courts inherent jurisdiction. These various powers are not directly analogous to each other.*
>
> *On the hearing of this appeal, a very clear point of divergence between the Applicants and the Respondents arose in relation to the interpretation of s. 5(2)(a). The Applicants contended that the phrase "good and sufficient reason for extending the period" excluded any consideration of the merits of the substantive application for judicial review... The Respondents, on the other hand, contended that the phrase "good and sufficient reason for extending the period within*

which the application shall be made" included a consideration of the merits of the case for judicial review."

18. The learned judge continued:-

> *"I believe that the use of the phrase "good and sufficient reason for extending the period" still more clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in particular circumstances. The statute does not say that the time may be extended if there were "good and sufficient reason for the failure to make the application within the period of fourteen days". A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits.*

19. Mr Donnelly also opened the decision of Irvine J. in *J.A. & D.A. v. Refugee Applications Commissioner & Ors* [2009] 2 IR 231. In this case Irvine J. was faced with an application for an extension of time in one case for a period of 15 months and in another case for a period of 2 years. She considered the Supreme Court decision in *The Illegal Immigrants (Trafficking) Bill 1999* reported at [2000] 2 IR 360. She said:-

> *"The Supreme Court recognised in the course of its deliberations in The Illegal Immigrants (Trafficking) Bill, 1999 [2002] 2 I.R. 360 that there were likely to be cases where, for a range of reasons, persons through no fault of their own (this court's emphasis) might be unable to apply for leave to seek judicial review within the limitation period. Hence the court has a discretion to extend the time for such an application where "good and sufficient reason" are shown for doing so. This provision, the Supreme Court concluded, was wide enough to avoid any injustice that might arise. Accordingly, the court did not consider the limitation period so unreasonable as to justify declaring the section unconstitutional."*

In the circumstances of the case she refused to extend the time period in this case.

20. Mr Donnelly also indicated that if the decision of MacEochaidh J. in *K.B. v. Minister for Justice Equality and Law Reform* (supra) were to be followed by the Respondent by bringing delayed points before the court at an earlier stage, that the court would be overwhelmed by the list of cases where the Respondents were seeking to object to an extension of time. This court indicated to Mr Donnelly that with four asylum judges, and only one involved in a Monday List, that one of the other judges could take a complete list of applications for seeking to complain about delay.

21. This matter was listed on the Monday List on the 20th February 2015 and the case was listed for hearing on the 24th April 2015 and returned to the List for allocation of an early hearing date with priority. This matter came before the Call Over List of the 22nd June 2015 and was put in for hearing on the 1st July 2015. **The first indication** that there was an application to refuse to extend to seek to object to an extension of time was in the intended statement of opposition in April 2012 and the notice of motion was issued on the 7th October 2012, a period of nearly three years.

22. This court is satisfied that the circumstances outlined by the adult plaintiff in relation to changing not only counsel but solicitor and a period during the Long Vacation with the difficulty of her travelling from Cork to Dublin with a late pregnancy, constituted good and reasonable grounds and were outside the control of and could not reasonably have been anticipated by the applicant for the requirement of such an extension.

23. It is also noted that Rule 21(4) where the court has to consider whether good and sufficient reasons exist for the purpose of Rule 21(3) the court may have regard to the effect which an extension of the period referred to in the subsection might have on a Respondent or third party. This court is of the view that this has caused no prejudice to the Respondent in this case.

Mel Christle SC and Gary O'Halloran BL, instructed by Trayers solicitors, for the Applicant

Daniel Donnelly BL, instructed by the Chief State Solicitor, for the Respondents.