Neutral Citation Number: [2008] IEHC 126

THE HIGH COURT

Record Number: 2006 No. 651 JR

BETWEEN

B. F.

APPLICANT

AND

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

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgement of Mr Justice Michael Peart Delivered on the 2nd day of May 2008

1. By Notice of Motion issued on the 1st June 2006 the applicant seeks leave to seek certain reliefs by way of judicial review following the making of a deportation order by the first named respondent on the 2nd May 2006, and communicated to her no later than the 22nd May 2006.

2. In the present application she seeks to quash that deportation order, and the decision of the Refugee Appeals Tribunal made on the 17th May 2004 whereby her appeal against the decision of the Refugee Applications Commissioner was refused.

3. It will be immediately apparent that while her application seeking to challenge the Deportation Order has been issued within the permitted time, her application to quash the decision of the Refugee Appeals Tribunal is out of time by approximately 23 months. In that regard she seeks an extension of time.

Brief factual background

4. When the applicant was aged fifteen she arrived in this State from Nigeria as an unaccompanied minor, although it would appear from her account that her journey here was arranged for her by a pastor from her village in Nigeria who accompanied her as far as Dublin Airport, but who, according to her, then abandoned her, taking away with him any travel documents which were used for the purpose of her gaining entry.

5. Some days after her arrival she made an application for refugee status, and this was processed in the usual way. She completed a Questionnaire, and was interviewed. In June 2004 the Refugee Applications Commissioner recommended that she be refused refugee status, and this decision was communicated to her on the 9th June 2004. She was represented by the Refugee Legal Service at this time and an appeal was lodged against this decision to the Refugee Appeals Tribunal, and she was afforded an oral hearing of that appeal, which was unsuccessful. The decision of the Tribunal was made on the 17th May 2004, and this was notified to the applicant by letter dated 21st June 2004. By this time, the applicant was aged sixteen and a half years.

6. By letter dated 12th November 2004, she was informed that the Minister had decided to refuse to give her a declaration of refugee status, and her options were explained to her in the usual way, including that which she adopted, namely that representations could be made to the Minister for leave to remain in the State. When informing the applicant of this option, he informed her that such representations should be made on the Form 3 attached to that letter, and that any other documents which she wished to attach should be attached to that form. In addition, she was informed that "*should facts referred to in the form change following its completion and submission to the Minister, these should be brought to the notice of the Minister immediately*". This assumes some relevance in relation to one of the submissions being made in relation to the challenge to the Deportation Order.

7. It would appear from the affidavit sworn by the applicant on this application that the Refugee Legal Service wrote to the applicant on the 13th July 2004 following the negative result of her appeal, in which they set out the three options which were contained in the Minister's letter, and offered to prepare representations on her behalf for leave to remain should she wish that this be done. That letter contained no reference to the possibility that the applicant might commence an application to seek reliefs by way of judicial review of the Tribunal's decision. The applicant says that she simply followed the advice of the Refugee Legal Service, and it is implicit in that, and it was stated before me in submissions, that she is stating that the Refugee Legal Service never discussed or advised her in relation to judicial review. However, Ground 16 of the Statement of Grounds states:

> *"16. …….. the applicant was informed by the Refugee legal Service that the RLS would not be taking judicial review proceedings. No reason for this decision was afforded. The applicant relied on the legal advice proferred by the Refugee Legal Service and did not have the financial resources required to procure alternative advice."*

8. Unless that submission is simply wrong, it would appear that the question of judicial review application was canvassed with the applicant since she is relying on the fact that they stated that such an application would not be made.

9. At any rate, the Refugee Legal Service made representations for leave to remain by letter dated 25th November 2004. No decision was made by the Minister's office in relation to these representations until after they had been examined on the 13th March 2006 by a first and second supervisor, and until a recommendation was made by an Assistant Principal dated 26th April 2006 that a deportation order be signed by the Minister. The passage of time between the making of these submissions and the date on which a decision was made to sign the deportation order, namely *about sixteen months*, is something upon which the applicant relies for challenging the deportation order, since she states that her circumstances altered during that period of time, and the Minister did not communicate with her prior to making his decision in order to see whether there were any other circumstances which she wished him to take into account when reaching his decision to deport her. I will return to that again.

10. The Deportation Order was then signed by the Minister on the 2nd May 2006, and this, as I stated at the outset, was communicated to her on the 22nd May 2006.. By this time the applicant was aged eighteen and a half years.

11. The applicant states in her grounding affidavit that after she received the deportation order she contacted her present solicitor, Seán Mulvihill & Co. That seems to have happened on the 24th May 2006 since that is the date on which she signed a letter authorising her solicitor to take up her file from the Refugee Legal Service. In her affidavit she states that by the date of swearing thereof, namely 31st May 2006, this file had not yet been received.

Application for extension of time re: Refugee Appeals Tribunal decision

12. The important factors to be taken into account in deciding whether in all the circumstances of this case the time for challenging

this decision are, in my view, the prescribed period of fourteen days laid down by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000, the length of the delay which occurred, the reasons given for it having occurred, the age of the applicant at the time when she ought to have lodged an application, the availability of legal advice to her, and the potential merit of the grounds put forward for so challenging the decision. These are all matters to be taken account of by the Court when considering whether there is "good and sufficient" reason for extending the time for commencement of proceedings.

13. The period of delay is about 23 months, almost two years. That is an enormous delay especially when looked at in the context of the permitted period of fourteen days from the date on which she became aware of the decision. That period has been found to be constitutional in *Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. The respondent submits that there is no evidence that the applicant formed any intention to challenge the decision by way of judicial review within that fourteen day period, and that it was only after she became aware that a deportation order had been signed by the Minister that she decided to seek legal advice from her present solicitor. Against that submission is her own averment that she simply followed the advice from the Refugee Legal Service contained in the letter referred to already dated 13th June 2004 stating that she had three options as set forth in the Minister's letter, namely to leave the State before the Minister makes the deportation order, consent to the making of a deportation order, or make representations to remain temporarily in the State. She says that she followed this advice as she had no alternative to do so. However, she has not averred that the question of challenging the decision of the Refugee Appeals Tribunal was not discussed with her then advisers, and, as I have already referred to, one of the grounds contained in her Statement of Grounds (Ground 16) states that the applicant was informed that the Refugee Legal Service would not be taking judicial review proceedings, and that no reason was given to her for that decision. Given that there is no averment in her affidavit to that effect, there is no evidence to support that ground. The onus is on the applicant to put forward such evidence as exists to support her case, and in so far as there has been none, this Court is entitled to presume that the issue of whether there were grounds upon which to challenge this decision was considered resulting in the decision not to bring any such proceedings. It is reasonable to conclude that this applicant simply sat back, having legal advice available to her, and awaited events to occur, and that it was only when her application for leave to remain was refused and the deportation order was made and communicated to her that she became active again in seeking to address that situation by consulting her present solicitor.

14. It is of course the case that the applicant was a minor aged about sixteen and a half at that time, and some allowance must be made for that fact, but it is also the case that she had legal advice to her which she was available to avail of at that time, and did avail of. In that way she was not disadvantaged in relation to the availability of legal advice. The Illegal Immigrants (Trafficking) Act, 2000 makes no distinction between the time permitted to appeal in the case of an adult applicant, and a minor applicant. Nevertheless there can be particular circumstances which the Court would be entitled to take into account in order to be more flexible in the exercise of the discretion to extend time in the case of a minor, if such circumstances are shown to exist and which put the minor at a particular disadvantage. No such circumstances have been put forward in this case, other than the mere fact that she was a minor.

15. The Court should also consider the merits of the case sought to be made. For that purpose the Court ought not at the point when it is considering an extension of time confine its scrutiny of the grounds put forward by reference to the requirement to show "substantial grounds". That threshold is relevant only at the later stage of considering whether leave should be granted. But the Court should at least have to be satisfied that the grounds put forward are arguable, or have some chance of success. However, it must be stated also that it is clearly the case that even where the grounds can be seen as substantial grounds, the Court may refuse in the circumstances of the delay in question to refuse to extend the time. Otherwise in such cases the prescribed time limit would serve no purpose. By prescribing such a strict and limited period for the commencement of proceedings, the Oireachtas has placed an onus on applicants to move with great urgency. To ignore that imperative, the legislative intent would be frustrated and set at nought.

16. I have considered the grounds sought to be put forward in this case. The Tribunal in its decision made very clear credibility findings against the applicant. It is no exaggeration to say that it simply did not believe the account given by the applicant of her reasons for leaving Nigeria when she did and for coming to this State. Neither did it believe the applicant's account of the means by which she came here. The various matters in respect of which the applicant was found not to be credible are clearly set forth in the decision. The Tribunal member states in his decision that the Tribunal "is in no doubt that the applicant has not told the truth about her reasons for leaving Nigeria". It was also satisfied that the applicant had not sought assistance or protection from the authorities in Nigeria and that it was not therefore possible to assess their willingness or ability to afford the applicant protection.

17. It is submitted on behalf of the applicant that in reaching these adverse credibility findings the Tribunal has indulged in conjecture, acted in breach of fair procedures in making findings on matters "not put to the applicant" and by failing to invite explanations for perceived inconsistencies related to matters regarded by the Tribunal as being of central importance. It is also said that the Tribunal failed to determine the appeal by reference to country of origin information, and relied upon factual errors.

18. A feature of the applicant's grounding affidavit on this application is the absence of any particularity in relation to complaints made by her in relation to how the appeal hearing was conducted. There is much generalisation, and little of substance. For example, it is stated at paragraph 8 that "the said decision of the Appeals Tribunal contains many contradictions and contains opinions without any factual basis". None of these contradictions or opinions are identified. In paragraph 9 she states, inter alia, that the member ignored her "explanations" yet she has not stated what explanations she is referring to. This averment sits uncomfortably beside a submission to which I have referred, namely that the Tribunal acted in breach of fair procedures by making findings on matters "not put to the applicant". Clearly, if she is stating that she gave explanations, these must have been given in relation to matters for which explanations were sought. In the absence of any particularity as to what findings she is referring to where they were not put to her, this Court has no way of identifying which explanations were ignored.

19. In my view it is not even arguable on the facts as disclosed in the grounding affidavit, and in the light of the very detailed reasons which based the credibility finding, that the Tribunal erred in the manner in which it concluded that the applicant could not be believed in her story. Once such a fundamental lack of credibility is found, the Tribunal is not obliged to refer to country of origin information to see whether her story could be true. The first and essential matter for determination is whether the story can be believed. It is only when that hurdle has been successfully overcome that country of origin information can assist in the assessment of whether the alleged fear of persecution is subjectively and objectively justified.

20. I had reason to consider a similar type of credibility finding in *Imafu v. Minister for Justice, Equality and Law Reform*, unreported, 9th December 2005. Much of what I concluded in relation to the credibility finding in that case is apt in the present case also. No amount of country of origin information would assist in assessing credibility in this case since the facts asserted by the applicant are personal to her and family-related. In so far as the applicant relies on an absence in the decision of reliance on country of origin information, I find no basis for arguing that as a ground of objection in this case.

21. In my view, there is no possible basis for extending the time for commencement of these proceedings in relation to the decision of the Refugee Appeals Tribunal.

Substantial grounds re: Deportation Order
22. The applicant has referred in particular to the fact that it took the first named respondent from the 12th November 2004 when representations were made to him for leave to remain, until the 19th May 2006 when the decision to make the deportation order was notified to the applicant. The applicant submits that given the length of this delay, the representations and the information contained therein was out of date by the time the Minister considered them and made his decision, and that fair procedures require that at a minimum the Minister should have made contact with the applicant in order to inform her that he was about to make a decision on her application for leave to remain, and asked her to submit any further representations she might wish to make in order to update that information. By not so contacting the applicant, it is submitted that there has been a breach of fair procedures. The applicant has averred in her grounding affidavit sworn on the 31st May 2006, that by not so giving the applicant an opportunity to update her representations, the Minister has thereby failed to have regard to what she describes as "significant changes" in her circumstances, namely that "*my sister and her family reside lawfully in Ireland, and I now reside with her*." Nothing more is said. There is no detail as to when her sister and family arrived in this State or on what basis they are here.

23. In support of her submission in this regard the applicant has referred, inter alia, to my judgment in *Botusha v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 29th October 2003 where on very different facts, I held that there had been a breach of fair procedures where, immediately prior to the making of the decision to deport, that applicant's solicitor wrote to the Minister's office to inform him that a medical report on the applicant's state of health was at that time awaited and would be sent as soon as possible. Despite being on notice of this, the decision was made. But in this case there is no suggestion that anybody made any contact with the Minister's office. It is further clear that the applicant never availed of the opportunity which exists at all times and in all cases to submit further information from time to time as necessary in order to update the Minister in relation to matters which are thought to be of relevance and significance for the Minister to take into account when reaching his decision.

24. In that regard, it is important to have regard to the fact that the Minister in his letter dated 12th November 2004 to the applicant in which she was notified of the decision to refuse her refugee status and in which she was informed of the three options available to her, including that of making an application for leave to remain on the attached Form 3, she was told, *inter alia*, that "*Should facts referred to in the form change following its completion and submission to the Minister, these should be brought to the attention of the Minister immediately*". That was not done in this case. There is certainly no evidence from the applicant that her sister and family arrived in this State only at the time the decision was being made, and that there was no opportunity to provide that information sooner. The complaint of the applicant in this regard is simply that the Minister was obliged, in the light of the delay in making his decision, to make contact with the applicant and seek out any further information which may exist, and did not do so.

25. In my view, the facts of this case are fundamentally different to those in *Botusha* to which I have referred. In the present case, it was the applicant alone who failed to comply with the obligation upon her to keep in touch with the Minister's office if her circumstances here changed at any time and in any material respect following the representations made for leave to remain. She cannot simply sit back and presume that the Minister will write to her and seek out any further information before making the decision. A person in the position of the applicant is not a mere passive participant in the process, albeit that she was very young. There is an onus upon her, and not upon the Minister, to ensure that anything which she wished the Minister to take account of was furnished to him. She had at all times legal advice available to her and could at any time have sought to have her circumstances updated through them if she had wished, or directly by communicating herself with the Minister's office.

26. The Minister's obligation is to consider such representations as are made to him, and it was made perfectly clear in the letter to which I have referred that the applicant was free to keep her information updated as required ahead of the decision being made, and that she should do so immediately there was any relevant change in her circumstances which she wished to have taken into account. In my view the Minister was entitled to, and did, make his decision on foot of representations made to him by the applicant and he was entitled to presume that if there were any other matters which needed to be taken into account, these would have been communicated to him by or on behalf of the applicant. In my view there are no substantial grounds made out for contending that the decision made was one which breached fair procedures.

27. It is also submitted in this case that the making of the deportation order in this case breaches the principle of proportionality, in as much as the Minister has failed to justify his decision in this respect other than by stating that he is satisfied that "*the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems, outweigh such features of your case as might tend to support your being granted leave to remain in this State*".

28. The only averment in the applicant's grounding affidavit which touches upon the issue of proportionality is that contained in paragraph 13 thereof where she states "*I am advised and believe that the first named respondent failed to set out any or any proper reasons or reasoning for his said decision. Further there is no evidence that the first named respondent considered there to be any grave or sufficient reason for my deportation*".

29. It is to be borne in mind that the representations made on her behalf for leave to remain by the Refugee Legal Service addressed the issue of proportionality at paragraph 10 thereof, wherein it was submitted that the common good does not require the deportation of the applicant, that she is a vulnerable girl who has a lot to offer the State, and much to lose should she be returned to Nigeria. It was submitted that the State should adopt a humanitarian approach to persons such as the applicant who have been refused refugee status and are in need of protection from the undue hardships and risks of violation of human rights which they would encounter if returned to their country of origin, and it was submitted that the applicant deserves such humanitarian assistance and protection. The fact that she was a minor at that time should also be borne in mind by the Minister, reference being made to Article 3 of the Convention on the Rights of the Child, and that all considerations of their immigration status must be secondary, and that the best interests of the child required that she be permitted to remain in this State. It was urged that since the applicant was a minor, her application should be prioritised and dealt with in an expeditious manner.

30. While I have little doubt that an application for leave to remain by a minor should be dealt with more expeditiously than occurred in this case, nevertheless it is a fact that no further submissions were made during the period of delay to which I have already referred. The mere fact that the delay occurred does not in my view breach the principle of proportionality, but there could be a case where circumstances did change, and where those changes are communicated to the Minister prior to his decision, it would be incumbent upon the Minister to consider them especially in the light of the fact that such changes were permitted to occur by an unreasonable delay in dealing with a minor's application. A failure to do so could potentially speak to the issue of proportionality. However, that is not the position in the instant case.

31. In the present case the Minister made the deportation order following a consideration of the submissions made on behalf of the

minor applicant. The Minister has a wide discretion in the matter, and in the absence of some unusual or special circumstances, it must be presumed that the submissions which were made were those which the Minister considered. It must also be borne in mind that at the point in time at which the Minister is considering the application for leave to remain, she is already a person who has had the benefit of the procedures which led to the decision to refuse her refugee status.

32. I refer in a general way to the judgment of Clarke J. in *Kouaype v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 9th November 2005 where he concluded that, absent very special circumstances, a deportation order could be challenged on a number of grounds as set out therein. I respectfully adopt his reasoning and conclusions in that judgment, and conclude in this case that there is no reason shown on this application why the Minister may have failed to reach his decision to refuse leave to remain in accordance with law. In particular, as far as the present issue of proportionality is concerned it is evident that the issue of proportionality was addressed in the representations made on the applicant's behalf, and that the Minister considered them and reached his decision that in spite of such representations, he was of the view that such issues as were raised did not outweigh the public interest in upholding the integrity of the asylum and immigration system and the common good.

33. In my view no substantial grounds have been shown to exist for challenging the deportation made in this case.

34. For all the above reasons I refuse the application for leave to seek the reliefs set forth in the applicant's Notice of Motion.