Neutral Citation Number: [2008] IEHC 361

THE HIGH COURT

2007 No. 1621 JR

BETWEEN

P. O. T.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 19th day of November, 2008

1. This is an application for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated 29th August, 2007, to refuse to grant permission to the applicant for members of his family to enter and reside in the State. The applicant is seeking an order of *certiorari* in respect of the Minister's decision and a declaration that the said decision is unlawful.

Background

2. The applicant, who is a national of Ghana, arrived in the State on 25th September, 2001 and was granted refugee status on 26th March, 2003. Throughout his asylum application, he stated that he was married to M.O. and had three children: H. (born in 1991), Ma. (born in 1987), and G. (born in 1985).

3. In June, 2003, the applicant made an application for visas for M., H., Ma., G. and for a fourth child, F. (born in 1988), stating that the intended purpose of the visas was family reunification. With a view to corroborating his relationship with his wife and children, he submitted a marriage certificate, birth certificates, passports and letters from the children's schools. The respondent points out that in the visa application, the applicant stated that H. was born in 1992, whereas he had previously stated that she was born in 1991, but I do not think that anything turns on this in the present case. Perhaps more noteworthy is that by the time the visa application was made, G. was no longer under 18 years of age.

4. By letter dated 7th July, 2003, the Minister caused the visa applications to be referred to the Refugee Applications Commissioner (RAC), in compliance with section 18(1) of the Refugee Act 1996. The RAC provided the applicant with a questionnaire on 9th July, 2003, which he duly completed, thereby officially applying for permission for his family members to enter and reside in the State (i.e. family reunification). On 10th November, 2003, the RAC submitted a report to the Minister, in compliance with s. 18(2) of the Act of 1996. The report noted that the applicant had submitted original documentation in respect of his marriage and his relationship with his children. It also noted that there was no evidence that G. was dependent upon the applicant or that he was suffering from any mental or physical disability. It was noted that F. had not been mentioned in the asylum application and that the applicant had not seen his family since 1994.

5. The RAC report also noted a disparity with the documentation submitted in support of the family reunification application when compared to the applicant's asylum application: the marriage certificate submitted with the family reunification application was signed by his father, S.O., in 2003. The applicant had stated in his asylum application that his father, S.O., died in 1976 and his brother, of the same name, died in 1992. Some 16 months after receiving the RAC report, the Minister informed the applicant, by letter dated March 21st 2005, that he was considering revoking the grant of refugee status on the basis of that disparity. The applicant replied promptly to the Minister, stating that it was not his birth-father but his foster-father, also named S.O., who had signed the marriage certificate; thereafter, he submitted death certificates in respect of his father and brother, bearing the dates 1976 and 1992. On 1st November, 2006, the Minister informed the applicant that he had accepted the explanation given and no longer intended to revoke his refugee status. The Minister made no reference to family reunification.

6. Meanwhile, on 21st March, 2006, the applicant informed the Minister that he and his wife, M.O., had divorced, and he sought to withdraw the application for family reunification in respect of her. He attached a doctor's report showing that he was suffering from stress, exacerbated by the absence of his family, and requested an early decision in the matter. He noted at that stage that he was willing to answer any questions relating to the application.

The Minister's Decision on Family Reunification

7. On 19th August, 2007, the Minister decided to reject the application for family reunification. In his decision, the Minister made the following findings:-

> (1) The birth certificates submitted by the applicant are invalid because they contain different holographic stickers; and because there were inconsistencies in relation to the certificate, entry and margin numbers.
>
> (2) No mention was made of F. during the asylum process.
>
> (3) There is no evidence that G. was dependant on the applicant; he does not therefore fall within the terms of s. 18(4).
>
> (4) Because the applicant is now divorced from M., she is not a member of his family within the meaning of s. 18(3)(b).

8. Soon afterwards, judicial review proceedings were commenced in respect of the Minister's decision. An ex parte application for leave was granted by Finlay Geoghegan J. on 10th December, 2007. Nothing turns on the third and fourth findings in the present case; the applicant's complaints surround the first and second findings.

The Applicant's Submissions

9. It is complained that the Minister acted in breach of fair procedures by failing to raise with the applicant his concerns in respect of the veracity of the birth certificates and the fact that F. had not previously been mentioned. As a result, the applicant was unaware of the Minister's concerns and had no opportunity to make representations to the Minister to dispel those concerns. It is contended that in order to comply with fair procedures, the Minister should at a minimum have brought his doubts to the attention of the applicant and allowed him an opportunity to rebut those doubts. Reliance is placed, in this regard, on the decision of *Nguedjdo v. The Refugee Applications Commissioner* (Unreported, High Court, ex tempore judgment of White J. 23rd July, 2003) and *Idiakheua v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., May 10th, 2005).

10. The applicant submits that this situation cannot be compared to the statutory asylum process, in respect of which it has consistently been held that there is no obligation for the decision-maker to engage in a debate with the applicant. It is submitted that the process by which an application for family reunification is decided is a statutory administrative function in relation to which there is no interview, no oral hearing, and no right to appeal, at least on a statutory basis. Moreover, this is not an area in relation to which

a complaint can be made to the Ombudsman.

The Respondent's Submissions
11. At the outset, the respondent points out that the applicant is not precluded from making a fresh application for family reunification and, in that application, to make representations as to the veracity of the birth certificates and his relationship with F.

12. In addition, the respondent seeks to compare the function of the Minister in the present case to the function of the Minister when considering an application under the IBC/05 scheme. The respondent contends that as a result, instead of the principles relating to fair procedures set out in *Nguedjdo* and *Idiakheua,* upon which the applicants seeks to rely, the relevant principle is that set out by the Supreme Court in *Bode v. The Minister for Justice, Equality and Law Reform* [2007] IESC 62. In that case, the applicant was refused admission to the IBC/05 scheme because the Minister was of the view that the evidence supplied with his application form was not sufficient evidence of residency in the State. The High Court had held that in the circumstances, fair procedures required that the applicant should have been asked, by letter, to provide documentation evidencing residency in the State, before the Minister made his final decision. The Supreme Court came to a different conclusion, as follows:-

> "There is no general duty on an administrative body to give the opportunity to provide additional material after the closing date for application."

13. On that basis, it is submitted that the Minister is entitled to make a decision based on the documentation submitted and that he is not obliged to enter into a debate or to engage in correspondence with the applicant.

The Court's Assessment
14. The matter of family reunification is a matter of great urgency and importance. The fundamental importance of the family unit and its right to be protected is enshrined at the heart of the Irish Constitution. It is further protected by Article 16 of the Universal Declaration of Human Rights and Article 8 of the European Convention on Human Rights, among other domestic, regional and international instruments. The right of a refugee to apply for family reunification is protected by s. 18 of the Refugee Act 1996 and under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Recital 4 of that Directive provides as follows:-

> "Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective […]."

15. Thus, family reunification is not only a way of bringing families back together, but it is also essential to facilitate the integration of third-country nationals into the State and into the EU. Refugees finding themselves alone in a foreign country which has admitted them, traumatised by the events that brought them there, more than ever need the society and support of their immediate family. Every effort must be made to ensure such reunification occurs as quickly as possible.

16. In this context, the Court finds the timeline in the present case to be most disturbing. The requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled to a decision within a reasonable time (see Awe v. The Minister for Justice, Equality and Law Reform [2006] IEHC 6; Iatan and Others v. The Minister for Justice, Equality and Law Reform and others [2006] IEHC 30; K.M. and G.D. v. The Minister for Justice, Equality and Law Reform [2007] IEHC 234). The applicant in the present case applied for family reunification in June, 2003 and did not receive a decision until August, 2007; there was, therefore, a delay of over 4 years. This is a most unsatisfactory state of affairs. Bearing this in mind, the Court is of the view that the fact that it is open to the applicant to make a fresh application for family reunification does not provide an answer to the applicant's difficulties. According to information provided on the website of the Irish Naturalisation and Immigration Service (INIS), "[t]he average time processing for Family Reunification applications is 24 months (as at January 2008)." Thus, if the applicant was to submit a fresh application, each of his children would have reached the age of majority by the time a decision was reached.

Fair Procedures
17. In the first instance, the Court notes that the facts and circumstances of the *Bode* case were very different to those of the present case. The administrative IBC/05 scheme that was at issue in *Bode* cannot be compared to the section 18 procedure by which the Minister assesses an application for family reunification; the IBC/05 scheme was not placed on a statutory basis whereas the right to family reunification is grounded not only in s. 18 of the Refugee Act 1996 but also in regional and international law and practice. The subject-matter of the Supreme Court decision in *Bode* is, therefore, qualitatively different to that of the present case, and the principles set out therein cannot be applied by analogy to the present case.

18. The Court accepts that on the face of the documents submitted, questions do arise as to their veracity. It is, of course, incumbent on the respondent to carefully examine documents submitted in support of an application for family reunification. However, where such an examination gives rise to concern as to the validity of the documents submitted in a family reunification application, constitutional justice requires that the Minister must enter into communication with the applicant and afford him or her an opportunity to explain inconsistencies and/or dispel doubts in that regard. A letter requiring a satisfactory explanation would suffice.

19. In the circumstances of the present case, the respondent ought to have notified the applicant that he doubted the validity of the birth certificates and offered a chance to comment. This is particularly so because at a particular stage in this case, when a document had been doubted and the applicant notified of the doubts, he had been able to satisfy the Minister as to its validity and it was decided not to revoke his refugee status.

20. For the purposes of clarity, I would reiterate that the obligation of communication between the Minister and an applicant applies only in the unique and special situation where the Minister is unsatisfied as to the validity of documentation submitted in support of an application for family reunification, in circumstances where that dissatisfaction has the potential to impact on the Minister's final decision in the matter. Failure to elicit a possibly complete answer could, after all, result in a two-year delay in family reunification while the applicant made a new application, as suggested by the respondent. The Irish Constitution, which places such importance on family unity, could not countenance such an injustice. This in no way impacts upon the decided case law of the Court in relation to the obligations of decision-makers in the statutory asylum process who are, in general, under no obligation to enter into a debate or correspondence with an applicant. As is well established, the requirement of fair procedures may be different in relation to different types of applications.

Conclusion

21. In the light of the foregoing, I am satisfied that the Minister has acted unlawfully and in breach of fair procedures and I will grant the reliefs sought. An order of *certiorari* will be granted quashing the Minister's decision of 29th August, 2007; I will also grant a declaration that the said decision was unlawful; and I will remit the application for family reunification for reconsideration by the Minister. It is incumbent on the Minister to consider the explanations proffered by the applicant, and it is imperative that those involved in the decision-making process act urgently, in the light of the unacceptable period of delay that has already elapsed. I would also express considerable doubt as to whether, save for exceptional circumstances, a two year delay in arranging the reunification of the family of a person granted refugee status is an acceptable delay in the light of both Article 8 of the European Convention on Human Rights and the role of the family which is enshrined at the heart of the Irish Constitution.