This judgment is circulated in redacted form to avoid identification of the parties

Neutral Citation Number: [2007] IEHC 163

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 567 JR]

BETWEEN

T. Y. O.

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 28th day of February 2007

1. The applicant in these proceedings seeks leave to challenge by way of judicial review a deportation order dated the 6th May, 2005 made by the respondent in respect of him. The applicant is a native of N. He was born on the 11th May, 1985. He arrived in the State on the 27th August, 2001 as an unaccompanied minor aged 16 years.

2. In his asylum application, the applicant stated that he fled N. as he feared for his life on social and religious grounds. He stated that his twin brother had been sacrificed by the elders of his village in a traditional ritual ceremony and that he feared he might also be killed. He also stated that when he was age 13 or 14 years, his twin half siblings were also sacrificed. The applicant stated that he reported his brother's killing to the police but they did nothing as it was a traditional ritual. The applicant stated that he then met a pastor who offered him protection. He stayed with him for a week. They both then travelled to Ireland.

3. On the 28th August, 2001 the applicant made application to the Refugee Appeals Commissioner for refugee status. On the 2nd August, 2002 a recommendation was furnished by that Commissioner that he should not be entitled to such status. On the 16th September, 2002 the applicant appealed this recommendation to the Refugee Appeals Tribunal. On the 13th May, 2003 that tribunal refused the application. Subsequently the respondent made the deportation order which is challenged in these proceedings which was notified by letter dated the 20th May, 2005. The applicant subsequently retained his present solicitors having been previously represented by the Refugee Legal Service throughout the asylum process.

4. In the course of an affidavit sworn for the purposes of an injunction (albeit obviously at short notice) the applicant deposed:

> "On diverse dates up to and including the 15th July, 2003 representations were made by me and on my behalf to the respondent that I should be permitted to remain in the state on humanitarian grounds." This is followed by a sentence reciting that the respondent had made a deportation order on the 6th May, 2005 and that, as a consequence, at the time of the making of the order, there was before the respondent no adequate up to date material dealing with any change of circumstances as to his country of origin or his personal life since the 15th July, 2003.

5. These statements on oath are followed by another, wherein it is contended that since the date of his application to be allowed to remain in this state on humanitarian grounds and the making of the deportation order on the 6th May, 2005 a total period of 22 months had elapsed during which time the applicant had continued his studies at a Community School and that he had "managed to pass his Leaving Certificate". It is further deposed that had the applicant had a further opportunity to study for that examination he would have obtained a better result.

6. The applicant stated that his Leaving Certificate examination results were affected by the deportation and subsequent return to Ireland of his friend O.E. who was attending the same school.

7. That this was the factual basis upon which the court was invited to grant relief is confirmed by an earlier, short affidavit sworn by the applicant himself in the application for leave, wherein it is clearly deposed that the first development which took place after the application to remain in the state on humanitarian grounds (stated to have been made on the 15th July, 2003) was the receipt by him of the deportation order of on the 26th May, 2005.

8. The only inference to be drawn from all the contents of these affidavits is that a period of 22 months elapsed during which time the status quo was entirely unaffected and which position was subsequently followed by the deportation order in May, 2005. While the applicant arrived in this State as an unaccompanied minor, it will be noted, that on the basis of his date of birth as set out in his affidavit, he is now aged 21 years.

9. An undertaking was given to the Court on the application for an injunction stage whereby the applicant was permitted to remain in the State.

10. On the 31st January, 2006 a replying affidavit was filed by Sean McNamara, Assistant Principal Officer in the Department of the respondent. Mr. McNamara points out first, that the date of the representations furnished by the Refugee Legal Service was in fact the 7th July, 2003. This was acknowledged by letter from the respondent on the 15th July, 2003. Thus it is not correct (were it so suggested) to any that representations were made on the later date. This in itself is an insignificant issue.

11. Of more significance however is the fact that Mr. McNamara points out that after July, 2003 a total of three further sets of representations were made to the respondent. This was done on the 14th October, 2003, the 3rd December, 2003 and the 29th October, 2004. These representations were transmitted by the Refugee Legal Service and letters from that service are exhibited in Mr. McNamara's affidavit. All three sets of representations were acknowledged by the respondent by letter sent to the service. The contents of these later representations are of importance.

12. *Inter alia* they consist of a number of certificates from teachers in the Community School for attendance and participation in classes; but also, and more noteworthy, in excess of 70 letters written in November, 2003 by other students then attending the school. These letters, in rather similar format, request the respondent to permit the applicants to remain in the State on humanitarian grounds. One would not think that such a gesture would be easily forgotten, involving as it must have, considerable organisation. It could hardly have escaped the applicant's attention.

13. Included also in these representations was a letter from Dr. Andrew Connolly of the Parnell Adult Learning Centre operated under the aegis of the County Dublin Vocational Education Committee. This letter, (sent separately) dated the 13th August, 2004 states

inter alia

> "T. has already completed the Leaving Certificate exams but would like to repeat them to improve his grades as he feels he could achieve a better result in that case. I am sure that with the opportunity to repeat the Leaving Certificate exams he could improve his grades and would be a good candidate for further education. …" (emphasis added).

14. This letter permits of only one inference, that is that the applicant had sat the Leaving Certificate in 2004 (and so informed Dr. Connolly), and intended to repeat it the following year. This inference can reasonably be drawn from the grounding affidavits sworn on behalf of the applicant. It was the premise upon which counsel for the applicant opened this case on instructions. It subsequently transpired, in the course of submissions that it was necessary to correct this false impression. Only during the course of the case was counsel informed by a person accompanying the applicant, that in fact he had not sat the Leaving Certificate at all in the year 2004 but had done so in the year 2005.

15. Thus rather than a period of 22 months having elapsed between the receipt of representations and the decision to deport, in fact a total period, of 6 months elapsed. The terms of Dr. Connolly's letter quoted above can only lead to the conclusion that it was written were on the basis of information which had been provided by the applicant for the purposes of being forwarded to the respondent. A further inference which can be drawn is that the applicant who was by then an adult aged 19 years, had misinformed Dr. Connolly. No controverting evidence has been put before the court.

16. In the full year which elapsed between the filing of Mr. McNamara's affidavit and this matter coming before the court for hearing no supplemental affidavit was sworn by the applicant either explaining the errors outlined, or apologising for them or seeking to correct the entirely incorrect impression which had been created on what was, after all, the fundamental premise of the application, that is to say the alleged but entirely incorrect elapse of time of 22 months between the final representation to the Minister and the decision to deport.

17. It may be remarked in passing that a substantial amount of country of origin information was also exhibited in the grounding affidavits. This related to the position in the applicant's state of N.. No reliance was placed on this material. Understandably so, as the reports post-dated the decision made by the Minister, and therefore could not possibly have been considered by him at the time the decision was made. In fact any issues raised in these reports ultimately formed no part of the applicant's case and will therefore be disregarded.

18. A further feature of this case is that no specific change in educational or living circumstances were identified by the applicant which might have had a bearing on the decision other than that, apparently, the applicant had apparently been attending continuing education courses. No information has been put before the court as to any detriment or prejudice suffered or any information which might have led the Minister to arrive at a different decision.

19. It is an unfortunate but unavoidable conclusion that the facts of this claim as now known and ascertained, lead only to the conclusion that there has been a want of candour and good faith in placing relevant facts before the court. This absence of candour unfortunately takes a number of forms. In the first place there has been the omission of relevant material, that is in particular the existence of three sets of representations which were forwarded by the Refugee Legal Service after the 7th July, 2003. This omission is fundamental in that it permitted the case to be advanced on an entirely false evidential basis. On that, in turn, an injunction was sought and an undertaking furnished.

20. It is quite clear that the applicant's legal representatives were not informed or instructed as to these serious omissions or as to the fact that the applicant had not sat his Leaving Certificate at all in 2004. Unfortunately the intent to create a false impression on the part of the applicant is reinforced by the contents of Dr. Connolly's letter, and the absence of any evidential response whatever to Mr. McNamara's affidavit.

21. The court is unaware whether, at any time, the Refugee Legal Service subsequently was asked to furnish its file to the applicant's current solicitors or whether any request was made of the Legal Service to clarify or confirm the instructions which formed the basis of this application. This despite Mr. McNamara's affidavit having been available for one year prior to hearing.

22. The want of candour and absence of credit arising from these matters would be sufficient to justify the court in declining judicial review on that basis alone. This can only be laid on the door of the applicant and not his legal advisors who I am satisfied are in no way to blame for what occurred here. It follows that the applicant has not established locus standi.

Legal Authority

23. In the course of submissions reliance was placed on certain, alleged, similarities between the instant case and that of *Butusha v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 29th October, 2003) Peart J., where a decision followed a 13 month delay from the initial request for submissions, and in the context of an absence of any acknowledgement from the respondent. These facts were sufficient, in the context of the applicant's illness and its relevance to the circumstances to justify a finding by Peart J., in a leave application, that there had been an apparent or *prima facie* absence of fair procedures.

24. As has been pointed out by Mr. David Conlon Smyth B.L. on behalf of the respondent, even in *Butusha* Peart J. specifically pointed out that within a period of "many months" after the receipt of a final representation, the Minister would have been perfectly within his rights to act upon the information which was furnished from time to time by the applicant's solicitor and reach a decision to deport. The elapse of time was seen too in the context of the absence of any response from the Minister in relation to each or any of the representations.

25. As is now apparent, none of the factual comparators for this finding is reflected in the instant case. Nor is there new evidence sufficient to provide a basis for leave on any allegation of justiciable administrative misconduct by reason of delay in decision making.

26. Having regard to each of the foregoing circumstances the application for leave will be declined not only upon the basis of want of candour and lack of credit (sufficient in themselves), but further because, quite plainly, the evidence is insufficient to support a stateable ground for the relief sought. The evidential basis in the affidavits filed on behalf of the applicant has been fatally undermined and discredited. No *locus standi* has been established.

27. The court will decline the application for leave to seek judicial review.

28. In this judgment the court has specifically refrained from making any criticism of legal representatives who must and can only proceed on the basis of instructions furnished to them. The facts of the case however raise a question as to whether, as a matter of

prudence a solicitor retained after the asylum process is completed should where possible and relevant obtain the full applicant's file from the Refugee Legal Service. Clearly issues of client privilege may arise. But this may be dealt with by waiver. Had the Refugee Legal Service file been provided to and been perused by the applicant's solicitors, this case surely would not have proceeded.

29. While appreciating that legal representatives must sometimes act on instructions, particularly in emergency situations, what occurred here was not unprecedented (see *Akujobi and Others v. The Minister of Justice, Equality and Law Reform*) (Unreported, High Court, 11th January, 2007, MacMenamin J.)