Neutral Citation Number: [2011] IEHC 291

THE HIGH COURT

JUDICIAL REVIEW

2010 995 JR

BETWEEN

O. S. AND F.O.S. (A MINOR

SUING BY HER MOTHER AND NEXT FRIEND O.S.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 7th day of April, 2011

1. This application for judicial review raises an important procedural question concerning the operation of s. 17(1)(b) of the Refugee Act 1996 ("the 1996 Act"). Does the Minister for Justice, Equality and Law Reform have an obligation to entertain submissions effectively challenging the validity of the Refugee Appeals Tribunal's decision to refuse to recommend refugee status prior to making a final decision under s.17(1)(b)? For the reasons I now propose to set out, I am of the view that the Minister has no such obligation.

2. Section 17(1)(b)(as amended) provides:-

> "(1) Subject to the subsequent provisions of this section, where a report under section 13 is furnished to the Minister or where the [Tribunal] sets aside a recommendation of the Commissioner under section 16, the Minister—
>
> (a) shall, in case the report or, as the case may be, the decision of the [Tribunal] includes a recommendation that the applicant concerned should be declared to be a refugee, give to the applicant a statement in writing (in this Act referred to as "a declaration") declaring that the applicant is a refugee, and
>
> (b) may, in any other case, refuse to give the applicant a declaration,
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> and he or she shall notify the High Commissioner of the giving of or, as the case may be, the refusal to give the applicant a declaration."

3. As we have seen, s. 17(1)(b) gives the Minister a discretion to grant a declaration of refugee status to an applicant, adverse recommendations to the contrary from the Office of Refugee Applications Commissioner and the Refugee Appeals Tribunal notwithstanding. The net question here is, as we have seen, whether the Minister is obliged to have regard to submissions emanating from the applicant before exercising his discretion under the sub-section. Before considering this question, it is, however, necessary first to set out the background facts.

The Background Facts

4. The first applicant arrived here from Nigeria in January, 2007 and she gave birth to her daughter, the second applicant, shortly thereafter. The first applicant sought asylum on behalf of both herself and her daughter on the basis that both claimed to have a well founded fear of persecution. The contention, in essence, was that they were both members of a social group, namely, females at the risk of female genital mutilation.

5. In broad summary the first applicant claimed that she had been circumcised when she was 13 and had suffered horribly as a consequence. She further claimed that her first daughter, V., had been forcibly circumcised in 2003 and had died as a result. She contended that her husband's father, KS, was a chief within the Traditional Ogboni Fraternity who insisted that all his granddaughters be circumscribed. In 2006 matters came to a head with regard to another daughter, P.. When relatives and other family members insisted that P. be brought for circumcision in 2006, the first applicant maintains that at that point she resolved to leave Nigeria. She then arranged with her husband to leave Nigeria through the auspices of an agent.

6. These contentions were rejected by the Commission and the Tribunal respectively. In its decision of 31st May, 2010, the Tribunal concluded that the first applicant was no longer at risk on the basis that "there has been no evidence to suggest that any past persecution will be repeated." So far as the second applicant was concerned the Tribunal relied heavily on a 2009 Norwegian country of origin report entitled "Mutilation of Women in West Africa." This showed that the rate of female genital mutilation was in significant decline. Whereas some 28% of women between the ages of 25 to 49 have been subjected to circumcision, the corresponding figure for those between 15 to 19 was said to be 13%. The report was also said to show that the decision-makers in such cases are the parents (and, specifically, the mother) and that only rarely (if at all) were grandparents actively involved in such decisions. The Tribunal member accordingly found against the applicants on the basis that their claims ran counter "to generally known facts and there are major credibility issues that fundamentally flaw these claims".

7. It is probably important to pause at this juncture to observe that the validity of the Tribunal decision is not presently before me and I express no view whatever in respect of the reasoning of the Tribunal member.

8. At all events, at this point the solicitors for the applicants sent a new letter on 17th June, 2010, to the Minister. In that correspondence they contended that the Tribunal had failed properly to consider the applicants' claims. This was followed by detailed submissions which critiqued the Tribunal's assessment, not least its reliance on the country of origin information. Specifically, it was said that the Norwegian statistics referred to the prevalence of female genital mutilation in West Africa *as a whole* as distinct from that prevailing in *Nigeria*. These statistics furthermore masked the fact that the applicants were from the Yoruba ethnic group and that "90% of the Yoruba ethnic group who live in south-west Nigeria practice female genital mutilation". There were extensive attachments (including other country of origin information) attached to these documents.

9. In the meantime the Minister responded by letter dated 30th June, 2011, indicating that he was refusing to grant the applicants refugee status for the reasons set out in the Tribunal decision. It appears that the Minister was somewhat taken aback by the applicants' solicitors correspondence, as it was "mistakenly considered to be one [made] pursuant to s. 17(7) of the Act of 1996" as no similar application had ever been received: see para. 13 of the affidavit of Ms. Angela Doyle of 17th January, 2011. Ms. Doyle further explained that the "the true nature of the application only came to light when consideration of it as a s. 17(7) application commenced, by which stage the decision to refuse the applicants' declaration of refugee status had issued".

10. The issue which thus presents itself for resolution is whether the Minister had any role in considering further submissions in the interval between the decision of the Tribunal and the ultimate decision of the Minister. If he had, then it seems obvious that the Minister's decision must be quashed, since it has been effectively conceded by the affidavit of Ms. Doyle that the Minister had no regard to the submission prior to the negative decision issuing in this case.

The Role of the Minister

11. It is axiomatic that the *East Donegal* principles (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317) apply to and govern the exercise of a statutory discretion such as that at issue in the present case. This naturally carries with it the premise that such powers must be exercised in accordance with fair procedures: see *Re Haughey* [1971] I.R. 217. The 1996 Act was enacted against this constitutional background and the Oireachtas is perfectly aware that this is the manner in which such powers must generally be exercised.

12. It is, of course, pellucidly clear from the language of s. 17(1)(b) that the Minister retains a discretion to grant the applicant a declaration of refugee status, a negative recommendation of the Commission and the Tribunal notwithstanding. Even if it were thought that there was some doubt about this - and it is, frankly, hard to see that there ever could have been - the existence of such a residual discretion has been made confirmed in a series of decisions from this Court: see, *e.g.,* the judgment of Cooke J. in *H.I.D. v. Refugee Applications Commissioner* [2010] IEHC 172 and that of Charleton J. in *FN v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88, 124.

13. The point, however, where I respectfully part company with the applicants is in their implicit suggestion that the Minister's discretion under s. 17(1) is somehow divorced from and entirely independent of the decisions of the Commission and the Tribunal. It is plain that it is not. The Minister must, of course, give consideration to the report of the Tribunal which informs him decision as to asylum status. While it is true that the Minister is obliged to give the applicant a declaration of refugee status where either the Commission or the Tribunal has made a positive recommendation to that effect (s. 17(1)(a)), the fact remains - as Cooke J. pointed out in *HID* - that in cases arising under s.17(1)(b)(*i.e.,* where the Tribunal has reported adversely to the claim) the ultimate decision rests with the Minister. The Minister might, for example, disagree with the Tribunal's negative assessment and nonetheless decide to grant the applicant refugee status.

14. The key point here, however, is that the Tribunal's conclusions and the Minister's ultimate decision are inter-linked as one part of a single administrative process. As counsel for the Minister, Ms. Butler SC, helpfully observed in her submissions, the true comparator here is the decision-making structure for planning appeals involving the report of the inspector and the decision of An Bord Pleanála. The Board is not, of course, bound by the inspector's report and it has not been heretofore suggested that the parties to a planning appeal have the right to make submissions on that report prior to the ultimate decision of the Board. This is because the inspector and the Board form part of one single, seamless administrative adjudication and the same is, in my view, true of the decision-making process involving the Tribunal and the Minister in cases arising under s.17(1)(b).

15. It is for these reasons that I suggest that, with respect, the arguments based on *East Donegal* are not well founded. This is quite different, for example, from the discretion conferred on the Minister by s. 18(4) of the 1996 Act with regard to the admission into the State for family reunification purposes of dependent members of the refugee's wider family. As I ventured to suggest in my judgment in *X. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446, the decision-making in that situation is divorced from and independent of the Commissioner's report and this is the key difference between the nature of the Minister's decision under s. 17(1) on the one hand and the discretion given by s. 18(4) on the other. As we have seen, in the former case, the Tribunal's report and the Minister's decision form part of one single adjudicatory process, whereas this is not the case with regard to the Minister's discretion under s. 18(4) so far as the admission of dependent family members is concerned. The discretion in the latter case is a free-standing one and is quite separate from and independent of the Commissioner's recommendations.

16. There is a further reason why the Minister's decision under s.17(1) must be regarded as being inextricably interlinked with the Tribunal's adjudication as part of one single administrative process. If it were otherwise, then, in effect, the Minister might well be asked to act - to adapt the graphic words of O'Donnell J. in *Wicklow County Manager v. Wicklow County Council* [2010] IESC 49 - "as a shadow court of judicial review". Indeed, something of the kind has already happened here, since the comprehensive and, indeed, impressive submissions advanced to the Minister on behalf of the applicants replicated the kind of submissions and arguments which might one expect would have been made had the decision of the Tribunal been challenged by way of judicial review.

17. But the Oireachtas never intended that the Minister would act a form of quasi-appellate court in respect of the Tribunal's decisions or that appellants would enjoy what amounted to a second right of appeal in the wake of the decisions of the Commission and the Tribunal. Quite the contrary: it was rather instead plainly contemplated that this form of challenge to the Tribunal's decision would come to this Court by way of judicial review. Here is yet a further difference between the functions of the Minister under s. 17(1) on the one hand and those arising under s. 18(4) on the other. In the latter case there is no right of appeal against the Minister's decision and in *X.* I held that the Minister could lawfully exercise his s. 18(4) powers from time to time as occasion required. This, in turn, meant that the Minister could conduct an internal review of a decision already taken pursuant to s. 18(4) to refuse to permit family reunification in a given case.

18. The position with regard to the operation of s. 17 powers is, as we have seen, quite different. Section 17(7) provides that the consent of the Minister is required should an applicant who has originally been refused status wish to make a second application for asylum. It is clear from the structure of that section in general, and the provisions of s. 17(7) in particular, that the Oireachtas intended that, generally speaking, at least, applicants would have one - and only one - opportunity to apply for asylum. All of this

tends to re-inforce that the view that the Minister's task is simply to make a decision in view of the Tribunal's recommendations as part of a single administrative adjudication.

Conclusions
19. To sum up, therefore, the premise underlying the applicants' submissions is that the Minister enjoys a separate free-standing discretion under s. 17(1) which is separate and distinct from the Tribunal's decision. But the reverse is, in fact, the case: the Minister's decision is inextricably linked with the Tribunal adjudication. The suggestion that the Oireachtas indirectly created a second tier of quasi-appeal which was to be shoe-horned in between the Tribunal adjudication and the Minister's ultimate s. 17(1) decision is, with respect, entirely fallacious.

20. It is for these reasons that I am of the view that the Minister had no obligation to entertain further submissions in the middle of what in truth was one seamless administrative adjudicative process on the question of whether an applicant should be granted asylum, so that the *East Donegal*-style challenge to the validity of the Minister's decision based on a failure to observe fair procedures must accordingly fail.