Neutral Citation Number: [2011] IEHC 409

THE HIGH COURT

2011 147 JR

BETWEEN/

P. M.

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 28th October, 2011

1. This application for leave to apply for judicial review raises two fundamental issues. The first question is whether the applicant has available to her an effective remedy before the decision of the Minister to refuse to grant the applicant a declaration of refugee status under s. 17 of the Refugee Act 1996 ("the 1996 Act"). The second question is whether, in any event, the applicant is precluded by either (i) the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") and (ii) Order 84 from challenging the decision of the Minister to refuse to grant her refugee status.

2. The applicant is a Botswanan national who arrived in the State on 30th January, 2009, whereupon she sought asylum. She contended that because of her pygmy status she would not be in a position to resist the instruction of her villagers that she take up a position as a fetish priestess which would be inconsistent with her own personal religious beliefs.

3. On 27th March, 2009, the Office of the Refugee Applications Commissioner recommended that she be refused refugee status. This was affirmed by the Refugee Appeal Tribunal by decision of 6th December, 2009. On 22nd January, 2010, the Minister refused a grant of refugee status to the applicant. An application for subsidiary protection was refused on 17th January, 2011. The process culminated in the making of a deportation order by the Minister for Justice, Equality and Law Reform on 26th January, 2011.

4. The present proceedings were commenced on 16th February, 2011. In these proceedings the applicant seeks to quash not only the deportation order, but also the decision refusing the application for subsidiary protection and, critically, the decision of the Minister refusing to grant the application a declaration under s. 17 of the 1996 Act that she was a refugee. Significantly, perhaps, neither the decision of the Commissioner or that of the Refugee Appeal Tribunal has been challenged in these proceedings.

5. At the heart of the applicant's case is the contention that the Refugee Act 1996, is *ultra vires* the provisions of Article 39(1) of the Procedures Directive 2005/85/EC (which is contained in Chapter V of the Directive) on the basis that no effective remedy has been provided against the decision of the Minister to refuse the applicant a declaration of refugee status. Article 39(1) provides:-

> "Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:
> (a) a decision taken on their application for asylum…."

6. To this may be added recital 27 of the Directive which provides:

> "It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court to tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also, with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State."

7. I propose now to consider these issues in turn. Before doing so, I should recognise that in April, 2011 Mr. Justice Cooke has referred certain questions arising from the status and jurisdiction of the Refugee Appeal Tribunal to the Court of Justice pursuant to Article 267 TFEU in the wake of his judgment in *HID v. Refugee Appeals Commissioner*. The answers given by the Court of Justice on that reference may yet possibly impact on some of the reliefs sought in this case

Time limits

8. In my judgment in *D. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 37, I held that the time limit contained in s. 5 of the Illegal Immigrants (Trafficking) Act 2000, did not apply to those cases where the underlying complaint was that the State had not properly transposed the Procedures Directive into domestic law. I concluded my judgment by holding that:

> "An applicant in this situation may be barred from asserting European Union rights only if national procedural law complies with the principles of equivalence and effectiveness. As I have concluded that s. 5 of the 2000 Act fails these requirements, it follows that this limitation provision may not be impleaded or relied on as against the applicants so far as the claim based on the Procedures Directive is concerned."

9. Subsequent to the delivery of the decision, I granted a certificate of leave to appeal to the Supreme Court. It is understood that this appeal might yet be heard by that Court within the next few months. I nevertheless respectfully adhere to the views expressed by me in that judgment.

10. The respondents nevertheless contend that even if that is so, the provisions as to time limits contained generally in O. 84, r. 21(1) nonetheless apply. If this argument is correct, then it would follow that the applicant is still effectively time-barred inasmuch as the delay in challenging the decision of the Minister to grant refugee status is upwards of twelve months and that she has shown no

good reason as to why time should be extended

11. For my part, while admiring the ingenuity and inventiveness of the argument, it nonetheless cannot be accepted. Section 5 of the 2000 Act must be regarded as the governing time limit, so that if that time limit is inapplicable, then it would not be legitimate to resort to other, more general time limits contained in O. 84, r. 21(1). Put another way, the Oireachtas clearly intended to replace the general time limit for judicial review applications contained in O. 84, r.21(1) with a special time limit applicable to asylum and immigration matters.

12. If, however, that special time limit is inapplicable by reason of its non-compatibility with general principles of European law, this cannot have the effect of reviving the general time limit contained in O. 84, r. 21(1) for the very good reason that the Oireachtas never intended that this general time limit would ever apply to such cases.

13. On the assumption, therefore, that the Procedures Directive was never properly transposed into national law, it follows that, for the reasons set out in my judgment in *D.*, the special time limits contained in s. 5 of the 2000 Act are inapplicable. Nor do the general time limits contained in O. 84, r. 21(1) apply, since the Oireachtas clearly intended that these provisions would be supplanted by the special provisions of s. 5 of the 2000 Act.

14. We may now turn to consider the effective remedy issue.

Effective remedy issue

15. So far as the effective remedy is concerned, the first thing to note here is that the applicant has not really specified how it is contended that no adequate remedy has not been provided. Nor has it been explained how the applicant has been prejudiced by the suggested absence of such a remedy.

16. Next, it must be observed that Article 2 of the Directive draws a distinction between decisions taken at first instance on the one hand and a "final decision" on the other. A final decision is defined as meaning:

> "a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome….."

17. It not clear whether the decision of the Minister under s.17(1) of the 1996 Act represents either a first instance or a final decision within the meaning of Article 2 or, indeed, whether it is a decision on the asylum application within the meaning of Article 39(1). It is true that s. 17(1)(b) empowers the Minister to grant an applicant a declaration of refugee status, an adverse decision of the Refugee Appeal Tribunal notwithstanding: see the discussion of this question in my judgment in *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 291.

18. Yet, in practice and save for quite exceptional cases, the decision of the Refugee Appeal Tribunal is effectively the final decision so far as refugee status is concerned. Of course, in the event that the Tribunal finds affirmatively for the asylum seeker, the Minister must grant the applicant refugee status: see s. 17(1)(a).

19. If the resolution of this question were critical to the decision in this case, then, given these uncertainties, it is plain that the question of whether the Minister's decision under s. 17(1)(b) was "a decision taken on their application for asylum on application for asylum" within the meaning of Article 39(1)(a) would have to be referred for resolution to the Court of Justice pursuant to Article 267 TFEU.

20. In my view, however, this issue is not critical, because even if the Minister's decision pursuant to s. 17(1)(b) can be regarded as coming within the scope of Article 39(1)(a), all that this means is that the State is accordingly obliged to ensure that a person thereby affected has an effective remedy against that decision. One way or the other, it is plain that an applicant has access to an effective remedy via the application for judicial review procedure provided for in O. 84 RSC: see, *e.g., B. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296, *ISOF v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457, *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2011] IEHC 38, *Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107 and *Efe v. Minister for Justice, Equality and Law Reform* [2011] IEHC 214.

21. In view of this case-law, it is unnecessary to explore this matter further in any detail. It is clear that the modern law of judicial review is sufficiently flexible and accommodating so that every legal right and entitlement - whether deriving from the common law, statute, the Constitution, ECHR or the European Union law itself – can and will be adequately protected. In any event, as I have already pointed out, the applicant has not indicated how or in what manner she has been denied an effective remedy.

Conclusions

22. In summary, therefore, I am of the view that even if the Minister's decision to refuse to grant the applicant a declaration of refugee status under s. 17(1)(b) of the 1996 Act comes within the scope of Article 39.1 of the Procedures Directive, this will be of little consequence in itself, since the Irish law of judicial review guarantees her an effective remedy. The applicant has not in any event specified how Irish law failed to afford an effective remedy.

23. For these reasons, I will refuse the applicant leave to apply for judicial review on the grounds canvassed in this judgment. Insofar as the applicant seeks to rely on the issues referred to the Court of Justice in *HID*, I will adjourn the balance of that application for leave pending the outcome of the reference.