Neutral Citation Number: [2012] IEHC 221

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 812 J.R.]

BETWEEN

Z. M. H. [Somalia]

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 24th day of May 2012

1. This is the judgment of the Court on the substantive hearing of an application for judicial review seeking an order of *mandamus* and declaratory orders in respect of an application by the above named applicant under s.18 of the Refugee Act 1996, (as amended) for family reunification as a refugee with her husband, two sons and an elderly mother who are said to be, like her, nationals of Somalia but who are now living in Ethiopia as undocumented refugees from that country. The applicant arrived in the State in 2007 and successfully sought asylum having been granted a declaration of refugee status by the respondent Minister in May 2008.

2. By order of the Court (White J.) of the 7th September, 2011, leave for this application was granted to apply for those reliefs on the basis of the nine grounds set forth in the statement of grounds dated the 6th September, 2011.

3. Although nine grounds are thus set forth in the statement of grounds the essential issue which is raised for the decision of this Court on the hearing has been directed at the reasonableness or rationality of the apparent decision of the Minister to insist upon the production of passports, or at least, identity documentation in respect of the family members concerned and in particular the applicant's husband when, it is argued, the Minister has made it quite plain that his policy is to reject by way of proof for the purposes of s. 18, passports or personal identification documents issued to Somali nationals by Somali embassies abroad including the embassy of that country in Addis Ababa. Although leave was granted on the basis of a primary claim for an order of *mandamus* to compel the Minister to make a decision on the application, it was effectively conceded by counsel for the applicant at the hearing that the Minister had not actually refused to make a decision and that he had not delayed the making of a decision to such an extent as would constitute in law a *prima facie* indication of a refusal to discharge the public duty which is at the basis of the entitlement of the High Court to issue an order of *mandamus.* In practical terms the debate at the hearing reduced itself to a claim on behalf of the applicant that something in the nature of an impasse had been reached in the exchanges with the Minister on the application that could only be unblocked, as it were, by some form of declaratory relief from the Court as to what forms of proof of identity and paternity the Minister was entitled reasonably to require of the applicant for the purpose of satisfying him that the applicant was validly entitled to the necessary grant of family reunification authorisation and travel visas under s. 18(3) of the Act of 1996.

4. Before addressing the specific legal issues raised by this application some general observations may be useful. The first relates to the legal context in which the issues arise. There is no specific "right" in international law to family reunification. It is strongly encouraged in the advices and guidelines of the UNHCR as a process which facilitates declared refugees to integrate in the long-term into their countries of asylum. Thus the arrangements for family reunification in s. 18 of the Act of 1996, do not have a specific foundation in any obligation of international law including the 1951 Geneva Convention. Nevertheless, the Oireachtas has conferred on the respondent Minister the power to reunify the families of declared refugees residing in the State and the exercise of that power is mandatory under s.18 (3) in the case of immediate family members such as the husband and the children of the present case, but is discretionary and dependent upon proof of dependence under s. 18(4) in the case of other family members such as the applicant's mother here. The exercise of the Minister's powers under s. 18 must, of course, be discharged in compliance with constitutional principles and reasonably and fairly on the basis of an objective consideration of the relevant materials put before the Minister (See, *inter alia*, *East Donegal Co-operative v. Attorney General* [1970] 1 I.R. 317).

5. The second preliminary observation is that while it is the Minister who must "be satisfied," the onus lies with an applicant to provide the information, evidence and documentary proofs which the Minister is entitled reasonably to require in order to be satisfied that the conditions of the provisions are applicable in a given case.

6. The further general observation must be made that there can be no doubt but that the Minister is justified in taking special care in the processing of applications for family reunification originating or claiming to originate from Somalia. As has been amply illustrated in judgments of the High Court here as well as in other jurisdictions, Somalia has, for many years been a failed state devoid of any form of reliable civil administration including particularly public registries of births, marriages and deaths, with the result that no reliance can be placed upon any form of documentation in the nature of personal identification purporting to emanate from that state or from its embassies including its embassy in Addis Ababa which is the location of very large numbers of those fleeing from Somalia. The international situation in the entire area is, however, notoriously fraught and complex. While there are, no doubt, many genuine cases of Somali refugees living in undocumented status in Ethiopia and adjacent countries in dire circumstances, the Contracting States of the Geneva Convention are entitled to be alert to the fact that there are also large numbers of economic migrants from other states in the area who seek to exploit that situation by pretending to be Somali nationals and who produce forged documentation to that effect. For this reason the Minister is clearly entitled to be astute and rigorous in insisting upon adequate proofs in order to be satisfied that the requirements of s.18 are met in each individual case both in respect of the genuine existence of the claimed family membership and of the identity of the persons the subject of applications.

7. A final general observation that must be made is that, to an appreciable extent, the parties in this case appear to have been at cross purposes and to some degree at least, this is possibly attributable to a hiatus between the making of the original application and its reactivation by the Department after a lapse of years. In effect, the applicant's claim is based upon an assertion that the

Minister has failed for an excessive period of time to give a decision on the original application. On the other hand, the Minister asserts that the processing of the application was "brought to a halt" on the 7th September, 2011, by the application *ex parte* to Hedigan J. at a point when the Minister was still seeking additional proofs in order to be placed in a position to make the decision now sought to be compelled.

8. In order to appreciate the context in which these issues fall to be decided, it is necessary to summarise briefly the course of the application and the responses to it. The application for family reunification was originally made on the 11th June, 2009 enclosing what were put forward as an original marriage certificate, birth certificates for all family members, a medical report in respect of the mother, together with copies of money transfers designed to show the dependence of the family members upon the applicant. The application was referred to the Refugee Applications Commissioner as required by s. 18 and, following completion of a questionnaire requested by the Commissioner which was returned in July 2009, followed by some additional supporting documents shortly afterwards.

9. On the 21st August 2009, the Commissioner wrote to say that a report had been furnished to the Minister followed by a request to submit some additional documentation including the four outstanding passports for the family members which had previously been requested. On the 24th August, 2009, the applicant's solicitors applied to the Department of Justice to obtain a copy of the Commissioner's report under s.18(2) of the Act of 1996, pursuant to s.7 of the Freedom of Information Act 1997. That was furnished to them by letter of the 21st September, 2009. The report noted that original passports had not been submitted. The report stated: "as the applicant, Ms. Hassan, has stated in FR Questionnaire that she would submit the passports when they become available, this has been made to finalise the investigation into her case. A letter will issue from ORAC today requesting the applicant to submit two death certificates in respect of her deceased father and brother and to forward these together with the outstanding passports ...".

10. There was then silence between the parties until, on the 11th March, 2011, the INIS wrote to the applicant's solicitors Messrs Daly, Lynch, Crowe & Morris, (DLCM) requesting additional documents and information including passport photographs of the subjects of the application and "any original documentation which attests to the (applicants) identity and your relationship to them ie. passports, identity cards". Additional information was requested as to compliance with the formalities for marriage under Somali law, whether polygamous marriages were valid there and whether the applicant or her husband had any other spouses. The letter ended: "The Department of Justice and Law Reform reserves the right to request such further or other information (to include DNA) and/or documentation as may be deemed necessary and/or appropriate".

11. By letter of the 27th April, 2011, the applicant's solicitors requested time to supply the information and documentation requested. In response a letter of the 28th April, 2011, allowed a period of six weeks for that purpose. On the 12th May, this was replied to saying "rest assured our client is making continued efforts to organise the requested documents and they will be submitted when to hand". The letter enclosed current passport photographs, but said the applicant's "family members do not have valid passports or national identity cards. Whereas there is a Somali Embassy operating in Addis Ababa we note that current department policy appears to be that identity documents issued by Somali embassies are not attached any evidential weight. In these circumstances we would be reluctant to advise our clients to incur the expense in obtaining documents at that Embassy. If you are requiring her to obtain such documentation from the Embassy, can you please assure our clients that they will be accepted as valid evidence of identity". On the 9th June, 2011, DLCM wrote saying, "our client instructs that she is presently awaiting receipt of further outstanding documentation which is en route from Ethiopia. All outstanding supporting documentation will be submitted once these documents are to hand. We would ask that you refrain from taking further steps to determine this matter until you hear further from our office in this regard". Given that, as a matter of law, an order of *mandamus* can only issue to compel a public authority to perform a public duty when there has been wrongful refusal to do so or when a delay in so doing is so excessive as to give rise to the implication that it is tantamount to a refusal, it could not, in the view of the Court, be said in the light of that letter that there had been any such basis for the issue of an order of certiorari as of the 9th June, 2011. In response, on the 13th June, 2011, the Department said that it would "allow a further 28 days from the date of this letter to submit the requested information/documentation".

12. On the 29th June, 2011, DLCM wrote forwarding two current passport photos for each of the subjects of the application together with receipts for money transfers from the applicant to her family and a medical report in respect of the applicant's mother. The letter requested a decision on the application within 28 days.

13. On the 27th July, 2011, DLCM wrote requesting an urgent decision on the outstanding application having regard to the deteriorating famine situation in Somalia and the flood of refugees into Ethiopia. This was acknowledged by letter of the same day (27th July, 2011,) saying that "this office will be in contact with you shortly". The following day on the 28th July, 2011, INIS wrote saying "please note that passports are the only documents that can confirm identity that DNA may also be required by the Minister to confirm the familial relationship. I wish to advise you therefore, that original passports in respect of each of the subjects of your client's family reunification application are required and that DNA evidence may be required on receipt of same".

14. On the 2nd August, 2011, DLCM responded expressing surprise because of the Minister's "widely stated position not to confer or grant identity documents, including passports, which issue from Somali embassies with evidential weight of probative value in determining the applications pursuant to s. 18 of the Refugee Act 1996". The letter copied and quoted an extract from a recent UK Home Office Report on Somalia of the 27th May, 2011, pointing to the unavailability of any identity documentation of reliable quality from Somalia because "there are no registries containing information which can establish the identity of individuals considered citizens in Somalia". Further exchanges of brief letters ensued but the exchange culminated with a letter of the 2nd September, 2011, from the INIS in which the Minister's position at that point was stated in the following terms: "Please note that an identity document is required to establish that the husband of your client and the biological father of the children is the same person, (ie. the person who married your client is the same person as the father of you client's children). A DNA test will establish paternity, but it will not prove the marriage between your client and the biological father. I wish to advise you therefore that an original passport in respect of your client's husband is required and that DNA evidence may be required on receipt of same".

15. When queried as to the consistency of the demand for original passports with the apparent policy of the Department, as explained in the replying affidavit of Evelyn Lamey, that Somali Embassy documentation of this kind was unacceptable not only to the respondent but to the participating Member States in the European Union to the Schengen Agreement, counsel for the respondents insisted that it was lawful and reasonable for the Minister to require (at least in the case of the applicant's husband) the presentation of such a passport on the basis that it formed part of the "general picture" thereby enabling the Minister to satisfy himself as to the reality of the parental relationships in question and as to the identity of the father as the parent of her children and the man she claims to have married in Somalia in 1998.

16. As already indicated the primary relief sought to be obtained in this application cannot be granted, namely the order of *mandamus*. It is well settled that an order of mandamus can only issue from the High Court to compel a public authority to perform a public duty which it is obliged to perform by law when there has been a wrongful refusal to do so or where the delay in so doing is so

egregious as to be tantamount to a refusal (*R. (Butler) v Navan U.D.C.* [1926] I.R. 466 at 470, *Point Exhibition Company v Revenue Commissioners* [1993] 2 I.R. 551). In circumstances where the applicant, after a silence from August, 2009 until April, 2011 made a number of express requests that a decision be postponed because additional documents were being obtained and would be furnished, the Court could not accept that there has been any refusal or any such excessive delay. With the letter of the 29th June, 2011, the applicant furnished further information and demanded a decision within 28 days. This demand was reiterated in a letter of the 27th July, 2011, and judicial review proceedings were threatened. The *ex parte* application was made five days after the letter of the 2nd September, 2011, had been sent by the INIS. That letter is inconsistent with any refusal on the part of the respondent but made it clear that an original passport of the husband was required and that DNA evidence might also be required.

17. It follows from the above finding that the declaratory reliefs sought at paras (2) and (3) of the order of the 7th September, 2011, could not be granted either. The only issue that remains, therefore, is whether the Court can or should grant any declaratory relief in relation to the complaint raised, namely, that it is irrational or unreasonable on the part of the Minister to require the production of Somali passports when there is a clearly stated policy that they are not regarded as acceptable proof of identity.

18. In the judgment of the Court, the requirement indicated in the final position of the INIS in the letter of the 2nd September, 2011, namely, that an original passport for the husband be produced, could not be said to be irrational or unreasonable. Both because of the statutory requirements of s.18 of the Act of 1996 and of the consequences for the State's international obligations in issuing authorisations for international travel, the Minister is both entitled and obliged to satisfy himself that authorisations for family reunification and the travel visas that necessarily issue as a result are validly issued to persons who have the genuine family relationship claimed with the refugee and that their identities as the individuals concerned have been authentically established. In other words, the Minister is entitled to demand reasonably verifiable proof that the applicant is the mother of the two sons nominated in the application and that the person she claims to be her husband is the natural father of those two boys. As the Minister has made clear, those paternal relationships may ultimately have to be verified by recourse to DNA evidence. In addition, the Minister is entitled to be satisfied that the individuals who may arrive to seek to land in the State are the same individuals that the applicant has nominated as those family members and that they are the individuals from whom the DNA evidence was taken.

19. The respondent has explained to the Court that when the appropriate stage in the investigation arises, arrangements can be made if the applicant and the family members agree to provide DNA evidence, (the Minister has no entitlement to require them to do so) for the necessary samples to be taken under the supervision of an Irish embassy official at the foreign location. The embassy official is therefore in a position to verify and record the connection between the identified individuals and the samples they have provided. If the family membership connection is established by the evidence, the embassy official is then in a position to issue the necessary visa and travel documents to those individuals.

20. Although, as already pointed out above, it is acknowledged not only by the respondent but by other immigration authorities, that considerable doubt always surrounds the authenticity of identity documents issued in the name of the Somali authorities at foreign embassies, the Court does not consider that it is unreasonable or irrational for the respondent to insist upon the presentation of such a passport when an applicant acknowledges that it can be obtained. That is on the basis that it is but one of a number of steps required to be taken in order to establish some verifiable basis for the identities claimed and the family relationships asserted. As the Minister made clear in the correspondence, Somali passports are not rejected outright, but only as "the sole means" of establishing identity. While the request to produce a Somali passport does not exclude the possibility that a false passport procured from some wholly unofficial non-Somali source may be presented, if it is actually issued in, say, Addis Ababa where the State also has an Embassy, it does at least present the opportunity of having the Irish representative confirm with that embassy that the family member in question did personally present at the Somali embassy and was accepted as being a Somali even if the particular identity rests only on the person's own verbal claim. The degree of weight to be attributed to it ultimately will obviously depend on the cumulative effect of other proofs and information offered and particularly on any eventual DNA results but the mere fact that passports are requested or suggested as part of the material the Minister wishes to consider does not mean that the request is irrational or unreasonable especially when the applicant has previously given the Minister to understand that they were being applied for.

21. For all of these reasons the Court is satisfied that none of the claims for relief in respect of which leave was granted has been made out. The application is refused.