Neutral Citation Number: [2010] IEHC 172

THE HIGH COURT

2008 1261 JR

BETWEEN/

H.I.D. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND E.O.)

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER, REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

2009 56 JR

BETWEEN/

B.A.

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER, REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 19h day of January, 2010.

1. In these cases two legal issues have been raised of potential importance and legal substance and the applications for leave have been listed for hearing as test cases because these issues are said to have been raised in a number of other cases as well. The two issues can be stated in the form of questions as follows:

> 1. Is the direction given by the Minister under s. 12(1) of the Refugee Act 1996 to both the Refugee Applications Commissioner and the Refugee Appeals Tribunal that priority be given to the examination and determination of a category of applications for asylum by reference to a single country of origin namely, Nigeria, lawful having regard to the provisions of the "Procedures Directive" that is, Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status?
>
> 2. The second issue arises out of the need to reconcile the asylum process as established by the 1996 Act comprising the section 11 interview; the section 13 report and recommendation by the Commissioner, the Tribunal appeal decision, together with the decision on the application by the Minister under s. 17, with the procedures apparently envisaged by that Directive. Is the "effective remedy before a court or tribunal" against the determination of an asylum application at first instance, as required by Article 39, to be regarded under the existing arrangements of the 1996 Act as provided by the appeal from the s. 13 report to the Tribunal or by the availability of judicial review to the High Court?

2. Because of the ruling which the Court will make below it is neither necessary nor appropriate to go in detail into the problems of interpretation which those questions raise. The immediate issue for the Court is whether these cases are appropriate vehicles for the trial of those issues given the restraints which are placed upon the grant of leave by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

3. In each case an order of *certiorari* is sought to quash the s. 13 report of the Commissioner in circumstances where each applicant had availed of the right to appeal to the Tribunal before the judicial review procedure was commenced. In the *D.* case, the appeal is still pending. In the *A.* case not only has the appeal been availed of but it has been concluded by an appeal decision of 25th November, 2008. In that case the lapse of time from the notification of the s. 13 report until the commencement of the judicial review proceeding is in excess of four months. In the *D.* case the lapse of time from the s. 13 report which would require to be covered by an extension of time is approximately nine weeks.

4. The *D.* case presents the additional difficulty that the Tribunal appeal has been initiated but postponed and there is now a substantial case law of the Supreme Court and of the High Court to the effect that the latter will not intervene by way of judicial review in advance of the completion of the asylum process by the Tribunal decision except in rare and exceptional cases. In a judgment delivered immediately before the commencement of the hearing in these two cases, this Court endeavoured to summarise that case law by saying that the Court will only intervene "where it is necessary to do so in order to rectify a material illegality in the report which is incapable of, or unsuitable for, rectification by the appeal; which will have continuing adverse consequences for the applicant independently of the appeal; or is such that if sought to be cured by the appeal, it will have the effect that the issue, or that some wrongly excluded evidence involved, will not be reheard but will be examined only for the first time upon the appeal". (*Adeyemo v. MJELR & Anor.*, 14th January, 2010)

5. Accordingly, in the *D.* case the additional issue arises as to whether the Court should decline to exercise its jurisdiction to

intervene in the asylum process before the Tribunal appeal has given rise to a decision.

In order to explain the approach the Court has decided to adopt in these cases it is necessary to outline briefly the context in which the two above legal issues arise.

6. Viewed purely as a piece of national legislation, the Refugee Act 1996 (as amended) presents no great difficulty for understanding the significance or effect of the procedures put in place for the reception, examination and determination of applications by asylum seekers or of the functions of the agencies involved. The asylum application is made to the Refugee Applications Commissioner who interviews the applicant, carries out such investigation and inquiry as is needed, compiles a report and makes a recommendation to the Minister as to whether the declaration of refugee status should be made or refused. If the recommendation made is in the affirmative, the Minister is obliged to grant the declaration under s. 17 (1) of the Act. Where the recommendation is negative, the applicant is entitled to appeal to the R.A.T. Subject to certain exclusions, the appeal will involve an oral hearing before a member of the Tribunal leading to a decision which will either affirm or reject the Commissioner's recommendation. Again, if the appeal is successful and the recommendation is positive, the Minister must grant the declaration under s. 17 (1). If the recommendation is negative, however, the Minister "may" still grant the declaration thus indicating that the Minister retains some degree of discretion under the Act notwithstanding the negative recommendation of either the Commissioner or the Tribunal.

7. It is therefore clear so far as the wording of the 1996 Act is concerned, that the s. 13 report with recommendation and the Tribunal decision are decisive in character only where the recommendation is positive. Where the recommendation is negative, the "determination" of the asylum application under the Act is made by the Minister because it is only his final decision after the exercise of his possible discretion under s. 17 (1) which decides the matter.

8. The Procedures Directive was adopted on 1st December, 2005 and its Article 43 required that it be transposed by the Member States by 1st December, 2007 or, by 1st December, 2008 so far as the legal aid requirements of Article 15 were concerned.

9. It is accepted that no transposition of the Directive by means of the normal statutory instrument under the European Communities Act 1972 has taken place although the complementary Qualifications Directive (2004/83/EC) has been transposed by the European Communities (Eligibility for Protection) Regulations 2006. This is not because of any default as such on the part of the State but because the view was taken that the minimum standards for procedures required by the Directive were already catered for and put in place in the arrangements and provisions of the 1996 Act as it then stood. As counsel for the applicants accepted in the course of submissions, mechanical transposition of a directive by legislative action at national level is not always necessary if existing laws already provide for the objectives sought to be achieved. (See the judgment of the ECJ of 23rd May, 1985 in case 23/84 *Commission v. Germany* [1985] E.C.R. 1661 at para. 23: see also the analogous observations of the High Court in the judgment in *C.C.D. Teo v. An Bord Pleanála & Others* (Unreported, Cooke J., 6th February, 2009) at paras. 21 and 22).

10. Thus, the two issues advanced as the basis of grounds in these cases arise, in effect, out of the need to reconcile the pre-existing procedures for determination of asylum applications under the 1996 Act with the arrangements which would appear to be envisaged in order to give effect to the minimum procedural standards laid down by the Directive.

11. So far as concerns the first issue, the "prioritisation" of applications, the case made is that the direction given by the Minister under s. 12 (1) of the Act, ("the Direction",) to both the O.R.A.C. and the R.A.T. to give priority to all applications made by nationals of Nigeria, is unlawful because it is incompatible with a minimum standard of processing and scrutiny required by the Directive. In particular, it is incompatible with Article 23 which contains, it is said, an exhaustive list of the cases in which Member States may prioritise or accelerate the first instance examination of applications and which does not permit blanket prioritisation of categories of applications by reference only to a single country of origin. The respondents dispute this interpretation of the Directive and maintain that the processing arrangements and choices in that regard are left entirely to the discretion of the national authorities.

12. The second issue arises out of the apparent dichotomy between the appeal function attributed to the Tribunal under the 1996 Act prior to the Minister's determination of each application under s. 17 on the one hand; and the requirement, on the other, of Article 39 of the Directive that the Member States provide an effective remedy before a court or tribunal against the first instance determination of asylum applications. The respondents say that the entitlement to apply for judicial review before the High Court provides the effective remedy required by Article 39. The applicants say that this cannot be so upon a correct interpretation of the Directive because that remedy must fulfil certain other requirements elsewhere in the Directive including, notably, those in Articles 8.3, 9.2, 10.1 and 15 and these are obviously not fulfilled by the High Court procedure.

13. In this legislative situation the Court is satisfied that, in principle, each of the two legal issues thus raised meets the threshold of substantial ground prescribed by s. 5 of the Act of 2000 and, accordingly, must also meet the threshold on the ordinary standard under O. 84 of the Rules of the Superior Courts.

14. As indicated, it is in these circumstances necessary to decide whether leave can be granted in each of these cases in order to permit those issues to be determined.

15. It is convenient to deal first with the *A.* case as it seeks to quash both the Tribunal decision of 25th December, 2008 and the s. 13 report of 25th August, 2008. In the case of the decision an extension of approximately four weeks is required given that the decision was notified to the applicant on or shortly after 6th December, 2008 and the judicial review proceedings initiated on 20th January, 2009. For relief in respect of the s. 13 report, however, the required extension of time is over four months.

16. The Court considers that there is no "good and sufficient reason" within the meaning of the 2000 Act for extending the time in respect of the relief sought against the s. 13 report in that case. Not only is the length of time considerable but it is clear that within the statutory time limit of fourteen days or any acceptable time thereafter, no intention to seek judicial review was formed which was then prevented from being followed up by some excusable cause such as the illness of the applicant or the non-availability of legal assistance. On the contrary, legal advice was available and a decision was taken to challenge the s. 13 report but to do so by the reasonable and logical course of the appeal to the Tribunal. Furthermore, that remedy was then pursued to its conclusion. More importantly, however, there is no real necessity to allow the applicant to seek relief against the s. 13 report when the statutory time limit has not been met, given that the Tribunal decision can be challenged and both of the legal issues proposed to be raised as grounds can be determined by reference to that decision.

17. Thus, it can be said that the validity of the Tribunal appeal decision is dependent upon whether it falls to be characterised as a step in the first instance determination of the asylum application by the Minister's decision under s. 17 or constitutes the effective remedy for the purposes of Article 39 against a first instance determination made by the Commissioner as apparently envisaged by Annex 1 of the Directive. The issue as to the legality of the s. 12 Direction is also capable of being decided by reference to the R.A.T.

decision because, on the stance taken by the respondents, that forms part of the first instance determination and it is the acceleration of the first instance determination which is claimed to be tainted by the illegality of the Direction.

18. In the *A.* case therefore leave will be granted to seek relief against the decision of the Tribunal but not to challenge the s. 13 report upon the basis that the applicant has demonstrated no good and sufficient reason to extend the time for that purpose and also because it is unnecessary to do so in order to provide the applicant with an effective remedy against the first instance determination of his application. It should be noted that on any view of the issue, the Directive requires that a s. 11 interview must take place and a s. 13 report must be made. It has been explicitly acknowledged in this case that no complaint is made that any of the procedural standards required by the Directive have in fact been breached so far as concerns the interview and the report other than the general allegation that all Nigerian claims are taken out of order and are given less detailed consideration. Those complaints are equally capable of being examined at the conclusion of the process by reference to the Tribunal decision. Even if the Court should ultimately find that the Direction is incompatible in principle with the requirements of the Directive, it would be entitled to refuse to quash the s. 13 report if it considers that there is an absence of proof that the Direction has had any impact in fact upon the interview or the report made in this case.

19. The position in the *D.* case is somewhat different. The examination process has been suspended and no Tribunal decision has yet been made. The extension required is some nine weeks which is, in itself, substantial. It is also clear that here too, there was an implied decision not to seek judicial review at the relevant point when, on legal advice, it was decided to take the appeal route. Nevertheless, the case can validly be made, in the Court's view, that where the status of the Tribunal appeal has been put in issue by reference to the discrepancy between s. 17 (1) of the Act and Article 39 of the Directive, an appellant ought not to be compelled to exhaust the right of appeal until that uncertainty has been resolved. It might, of course, be argued that in the light of the approach adopted by the Court above in the *A.* case, the Court ought to refuse leave in respect of the "prioritisation" ground in the *D.* case because that issue could also be tried after the applicant has concluded the Tribunal appeal.

20. Nevertheless, as these cases are intended to be heard together as test cases and as both issues are to be decided by the Court, the Court will exercise its discretion to grant leave in the *D.* case by reference to the prioritisation issue also. If the Court should decide that the s. 12 Direction is illegal and has tainted the processing of applications for asylum from Nigeria as a result, it would be unjust to now require the applicant to proceed to an appeal which the judgment in the *A.* case might ultimately hold to be unlawful. It should be noted that while the issue as to "good and sufficient reason" for extending the time is most often decided in these cases on the basis of the criteria as to whether an intention to seek judicial review was formed at the correct time and the excuse or explanation given for the failure to do so, it follows from the case law that there may also be good and sufficient reason to extend time where the question to be decided is one of sufficient general importance.

21. In his judgment in the Supreme Court in *G.K. v. Minister for Justice* [2002] (1 I.L.R.M. 401 at 405) Hardiman J. put the matter in this way:

> "The statute does not say that time may be extended if there were 'good and sufficient reason for the failure to make the application within the period of fourteen days.' A provision in that form would indeed have focussed exclusively on the reason for the delay and not on the underlying merits. The phrase actually used, 'good and sufficient reason for extending the period' does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case."

Thus, the importance of these two legal issues together with the desirability that they be subject to definitive determination in the two chosen cases, constitutes, in the view of the Court, good and sufficient reason for extending the time in the *D.* case and for granting leave exceptionally to permit judicial review of the s. 13 report.

22. The order in the *D.* case will therefore be as follows:

> 1. The time for the application will be extended until 12th November, 2008;
>
> 2. Leave will be granted to seek the reliefs set out in s. (d) of the Statement of Grounds dated 12th November, 2008 at paragraphs:
>
> (1) *Certiorari* to quash the s. 13 report and recommendation of 20th August, 2008;
>
> (2) *Certiorari* to quash s. 12 (1) direction of the third named respondent;
>
> (8) An injunction restraining processing of the application for asylum pending determination of this proceeding;
>
> (10) Further and other relief;
>
> (11) Costs.
>
> 3. Those reliefs may be applied for upon a single ground which will be formulated as follows:
>
> "The applicant's claim for a declaration of refugee status under s. 17 (1) of the Refugee Act 1996 (as amended) has not been lawfully determined by means of a procedure which complies with the minimum standards required to be met by Council Directive 2005/85/EC of 1st December, 2005 in that:
>
> (a) The processing of the application has been unlawfully prioritised or accelerated as a result of a direction given by the third named respondent dated 11th December, 2003 which is incompatible with the provisions of the said Directive and in particular Article 23 thereof;
>
> (b) The said procedure deprives the applicant of an effective remedy against the first instance determination of his application for asylum before a court or tribunal in compliance with the requirements of Ch. V of the said Directive.

23. In the *A.* case the order will extend the time until 20th January, 2009 and will grant leave to seek the reliefs set out at s. (d) of the Statement of Grounds dated 20th January, 2009 at paragraphs:

(7) An order of *certiorari* of the decision of the R.A.T. of 25th November, 2008;

(2) Certiorari of the s. 12 (1) direction of the third named respondent;

(5) (6) To be reformulated as follows: A declaration that the procedures for determination of asylum applications provided for in the Refugee Act 1996 (as amended) and the European Communities (Eligibility for Protection) Regulations 2006, fail to comply with the minimum standards prescribed by Council Directive 2005/85/EC of 1st December, 2005 by depriving the applicant of an effective remedy against the first instance determination of the application as required by Article 39 of the Directive;

(9) An injunction restraining deportation of the applicant pending determination of these proceedings;

(11) Further and other relief.

(12) Costs.

24. Leave will be granted to seek those reliefs by reference to the same ground as formulated above for the *D.* case.