Neutral Citation Number: [2012] IEHC 8

THE HIGH COURT

2008 1227 JR

BETWEEN

S. A.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 17th January, 2012

1. In the course of this application for leave to apply for judicial review an issue has been raised by the respondents regarding the proper construction of O. 40, r. 14 RSC 1986 concerning the swearing of affidavits in the English language. This is now required to be determined by me as a preliminary issue.

2. The problem arises in this way. The applicant is an Afghan national who sought asylum here based on his membership of a tiny Maoist organisation, the Afghan People's Liberation Army ("SAMA"). He maintains that he has a well founded fear of persecution by the Taliban should he returned to Afghanistan. To this end the applicant seeks to challenge the validity of a decision of the Refugee Appeal Tribunal dated 22nd September, 2008, as rejected that claim. In the course, however, of the application for leave to apply for judicial review the question, the preliminary issue to which I have already alluded duly arose.

3. In the course of his asylum questionnaire the applicant stated that his first languages are Hazaraghy and Dari. The applicant left blank the question as to whether he spoke any other languages. The s. 11 interview was conducted in Dari with an interpreter and the applicant's notice of appeal to the Refugee Appeal Tribunal sought the assistance of a Dari interpreter. Yet the grounding affidavit sworn by the applicant was sworn in English and, furthermore, no explanation has been offered as to how the applicant's solicitor was able to take appropriate instructions with regard to the prosecution of the proceedings.

The requirements of O. 40, r. 14

4. It is against this background that the respondents contend that the proceedings should be struck out *in limine* on the ground of non-compliance with O. 40, r. 14. The present version of r. 14 was inserted by the Rules of the Superior Courts (Affidavits) 2009 (S.I. No. 95 of 2009) and the rule in relevant part provides as follows:-

> "14. (1) A person taking an affidavit shall certify in the jurat of every affidavit taken by him:-
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> (a) that he personally knows the deponent, or
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> (b) that the deponent has been identified to him by some person personally known to him and named in the jurat who certifies his personal knowledge of the deponent, or
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> (c) that the identity of the deponent has been established by him by reference to a relevant document containing a photograph of the deponent before the affidavit was taken,
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> and in a case to which paragraph (c) applies shall give particulars of the relevant document concerned.
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> (2) A person taking an affidavit shall, where it appears to him that the affidavit is sworn by any person who appears to be illiterate or blind, certify in the jurat that the affidavit was read in his presence to the deponent and, that the deponent fully understood it, and that the deponent made his signature or mark in his presence. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court is otherwise satisfied that the affidavit was read over to and fully understood by the deponent."

5. This entire issue was recently examined by Cooke J. in *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 223, a case where a Pakistani national challenged the validity of a decision of the Minister to refuse him long term residency status. It emerged in the course of the hearing that the applicant had been relying on a friend to translate the affidavits and to give instruction to his instructing solicitor. The applicant was furthermore obliged to retract from an earlier averment in an affidavit on the ground that he had not understood it properly. As Cooke J. noted, it appeared that the applicant spoke "insufficient English to read the text of a draft affidavit put before him for swearing". This meant that the applicant was "illiterate" for the purposes of r. 14.

6. It followed, therefore, that:-

> "as the applicant appears to have little or no understanding of English, this was not a case in which the affidavit should in any event have been sworn in the English language. The correct approach is that the affidavit should be sworn originally by the applicant in the language he speaks. This should be translated by an appropriately qualified translator and both the original and the certified translation should be put in evidence as exhibits to an affidavit in English sworn by the translator. It is true that there does not appear to be any direct authority in this jurisdiction on this point in modern times. It is also possibly the case that there has been a practice whereby a non-English speaking deponent swears an affidavit in English containing an averment or a certificate in the jurat to the effect that it has been first read over to the deponent in translation and a separate affidavit is filed by the interpreter to that effect. This latter practice appears to have been based upon a precedent in an old edition of *Daniel's Chancery Forms*, but was criticised by Vaisey J. in the English High Court *in Re Sarazin's Letters Patent* [1947] 64 R.P.C. 51. That judgment approved on the other hand the practice indicated for the swearing of an affidavit in a foreign

> language in the commentary on O. 41 of the Rules of the Supreme Court (England and Wales) and the note appears to have been continued in all subsequent editions: "When it is desired to file an affidavit in a foreign language the usual course is to obtain a translation by a qualified translator, and to annex the foreign affidavit and the translation as exhibits to an affidavit by the translator verifying the translation. The three documents are filed together".
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> In the view of this Court, a solicitor or Commissioner for Oaths administering an oath for the purpose of taking an affidavit owes a duty to the Court to be satisfied that the deponent is competent to make the affidavit in English. Such a duty is inherent in the nature of the function being performed and the authority conferred by law on such officers to administer an oath for that purpose. If the deponent is illiterate the procedure of r. 14 must be followed and if the deponent does not speak English the affidavit must be sworn first in the foreign language.
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> Having regard to the fact that the applicant in this case admits having sworn an affidavit which was inaccurate in a material particular and has sought to explain it on the basis that his English was insufficient to enable him to understand what the affidavit contained in that regard, these two affidavits are, in the judgment of the Court, inadmissible in evidence. This finding on its own is sufficient to require this application to be dismissed. There is no grounding affidavit. However, as the application is unfounded for other reasons and the terms upon which the application to the Minister for long term residency were made and refused are sufficiently established from the evidence lodged on behalf of the respondent, the Court will explain why *certiorari* ought not, in any event, to issue in respect of the contested decision in order to avoid further unnecessary litigation."

7. I respectfully agree with the construction of O. 40, r. 14 as so carefully set out by Cooke J. in *Saleem.* It follows, therefore, that in view of the information proffered in the course of the s. 11 interview, the grounding affidavit in this case should not have been sworn in English absent a full explanation by the applicant as to how he had a sufficient familiarity with the language in the light of his earlier statement as to his language proficiency during the course of the s. 11 interview. As matters currently stand, therefore, the affidavits are inadmissible in evidence for want of congruence with the requirements of r. 14.

Should the proceedings be struck out *in limine*?

8. This brings us directly to the next question: should the proceedings be struck out *in limine* for want of compliance with O. 40, r. 14? This question forces us to confront the purpose and intent of r. 14 and, more, indeed, more generally, rules of court of this nature.

9. The Rule of the Superior Courts 1986 may broadly be said to regulate civil procedure so that the proceedings before the court may be dealt with in a systematic and orderly fashion, constituent with the timely administration of justice on the one hand and fair procedures on the other. Order 40, r. 14 falls into this general category in that it seeks to ensure that the deponent of an affidavit understands the content of the affidavit. As Cooke J. noted in *Saleem,* r. 14(2) imposes certain affirmative obligations in that regard on the solicitor, notary public or commissioner taking the affidavit.

10. There is no doubt but that as both this case and *Saleem* illustrate, a certain laxness and complacency has crept into the practice of swearing of affidavits in recent times and the specific requirements of r.14 may have been overlooked through inadvertence in many cases. This does not mean, however, that non-compliance with this rule should result in the automatic exclusion of the affidavit in question. The Rules of Court themselves envisage that perfection is a quality given to few and so the Rules acknowledge this by allowing, for example, for the amendment of pleadings, joinder of new parties, extension of time and the slip rule.

11. In this regard, I would venture to repeat what I said in the context of an application to extend time to deliver a defence in *O'Connor v. Nurendale Ltd.* [2010] IEHC 387:-

> "None of this, however, requires that the judicial discretion to strike out for want of defence must be exercised in an unbending, mechanical or unforgiving fashion. Quite the contrary: the courts must, to some extent, accommodate ordinary human frailties, failings and foibles, at least where it is possible to do so without material injustice to the other party."

12. This general approach to non compliance with procedural rules has been consistently followed in this jurisdiction. Thus, for example in *Director of Public Prosecutions v. Corbett* [1992] I.L.R.M. 674, 678 Lynch J. articulated similar sentiments, again, admittedly, in the content of an application to amend pleadings:-

> "The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While Courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendments should be made. If there might be prejudice which could be overcome by an adjournment then the amendments should be made and an adjournment also granted to overcome the possible prejudice and if the amendment might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses."

13. In *O'Leary v. Minister for Transport* [2000] IESC 16, [2000] 1 I.L.R.M. 132 McGuinness J. expressly approved this passage, saying that it represented "an application of principle which is in accordance with justice".

14. To this I would add the comments of Millett L.J. in *Gale v. Superdrug Stores plc* [1996] EWCA Civ 1306, [1996] 1 W.L.R. 1089:-

> "The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The Rules provide for misjoinder and nonjoinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice.
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> The general principles which govern the Court's approach to an application to amend the pleadings is to be found in the well-known and often cited passage in the judgment of Bowen LJ in *Cropper v Smith* (1883), 26 Ch.D. 700, 710-11:-

> 'It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or grace....It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.'"

15. Millett L.J. went on to add:-

> "I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a Court of Justice which has a universal and timeless validity."

16. These, accordingly, are the transcendent principles governing the application of the Rules of Court in circumstances where those self same rules have not been fully complied with. The Rules do not envisage that any judicial discretion to deal with non-compliance will be exercised in some formalistic and mechanical fashion, but rather that such discretion will be tailored as the justice of the individual case requires.

17. This would be especially true in asylum cases if non-compliance with r. 14 was to lead - more or less automatically - to the dismissal *in limine* of judicial review proceedings. It would hardly be consistent with the objectives of the Geneva Convention if such proceedings could be struck out merely because of a non-prejudicial error of this kind in circumstances where the applicant might well be shown to be ultimately entitled to asylum status. Here it must be recalled that unlike *Saleem* (where the case concerned an application for long term residency) the present proceedings does involve a claim for asylum status. Moreover, unlike *Saleem* - where confusion and prejudice was caused by an applicant repudiating a key part of an earlier affidavit sworn by him on the ground that he did not understand it - there is, as yet at least, no such suggestion here. Rather, the application is advanced on the sole ground that the affidavit as sworn does not comply - which, admittedly, it does not - with the requirements of O. 40, r.14.

Conclusions

18. It follows from the foregoing that I do not consider that this would be an appropriate case in which to exercise my discretion to strike out the proceedings *in limine* in this fashion at this juncture, at least without having given the applicant first an opportunity to mend his hand. To strike out at this juncture and in this fashion would represent an unbending, unforgiving, mechanical and formalistic application of the Rules of Court in a manner which might easily lose sight of the underlying objectives of the rule in question and the general requirements of justice.

19. I propose instead to stay the present application for a short period in order to enable the applicant and his advisers to comply with the requirements of O. 40, r. 14 by filing a fresh affidavit which does so comply with the rules. In the event that this were not to occur, then, of course, the respondents will be free to re-enter their motion and to apply again for a strike out of the proceedings