THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 910 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

A.A.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cross delivered on the 31st day of January, 2012

1. This is an application for judicial review by way of an order of *certiorari* to take up and quash the decision of the respondent as notified by letter dated 16th June, 2010, to refuse the applicant's application pursuant to s.17(7) of the Refugee Act 1996, as amended.

2. Leave was given after a contested application by Hogan J. who on 8th April, 2011, decided to limit the grounds to the following:-

> "In determining to refuse the applicant's application pursuant to s.17(7) Refugee Act 1996 the Minister acted unreasonably and reached unreasonable conclusions in that the assessment of the potential risk to the applicant (and hence the possibility of a favourable outcome in a fresh asylum claim) did not have proper regard to the evidence before the Minister."

History

3. The applicant is a Nigerian national born on 26th May, 1971, who arrived in the state on 23rd November, 2004, and made an initial application for asylum on that date.

4. The basis for this claim was that he risked persecution at the hands of his extended family for refusing to become "head priest" at their village shrine and because he was a homosexual and had suffered persecution on that basis and would continue to suffer persecution if he returned to Nigeria.

5. It was decided that the applicant should be refused refugee status and a deportation order was made in respect of the applicant on 27th February, 2006. A subsequent application to the respondent to exercise his discretion to revoke the deportation order was refused.

6. These various decisions of the respondents were challenged by way of judicial review and the applicant was refused leave to challenge same.

7. The applicant was diagnosed HIV positive in December 2004, when he arrived in the State. This issue had not, however, been raised in the applicant's original application and he then made an application pursuant to s.17(7) to the respondent to exercise his discretion to allow the applicant to be readmitted into the asylum system on that basis of his HIV status.

8. A judicial review application was compromised on 20th May, 2010 and that judicial review application [2010 No. 281 J.R.] was settled by agreement whereby the applicant agreed to supplement a fresh application pursuant to s.17(7) of the Refugee Act 1996, as amended and would be afforded a period of 28 days to make the application and that the said application would be confined to the applicant's HIV status.

9. It is this revised s.17(7) application that was the subject of the ministerial decision in respect of which leave was granted by Hogan J. as referred to above and which is the subject of this application.

10. In granting the leave on the limited basis as outlined above, Hogan J. stated in this matter:-

> "There remains the question of the consideration which the Minister actually gave to the possible risks facing the applicant. The Minister took the view that there was nothing in the relevant country of origin information which would suggest that the applicant was at risk of persecution by virtue of his HIV status. But is this is correct?"

Decision

11. The decision dated 3rd June, 2010, to refuse the application to be readmitted to the process referred to the criteria to be applied by the Minister in such decisions as follows:-

> "Is there a reasonable prospect of a favourable view being taken of a new asylum claim by the applicant despite the

unfavourable conclusions reached earlier, having regard to the new information presented by his solicitors."

The relevant portion of the decision states as follows:-

> "Country of origin information indicates that there are 2.6m people living with HIV in Nigeria. No case has been put forward which would suggest that the applicant would be at risk of persecution from the authorities of Nigeria. No case has been put forward which would suggest that he would be at risk of persecution from a group whose operations within the State are knowingly tolerated by the authorities or that the authorities are unable, unwilling or refuse to offer protection. No overriding circumstances that would differentiate Mr. A. from any other Nigerian man in his position has been put forward that would warrant further investigations by ORAC."

The Submissions

12. I have been furnished and have considered the affidavits herein and the exhibits as well as the submissions of both the applicant and the respondent and the authorities which they have kindly furnished in book form.

13. Mr. Saul Woolfson, B.L., on behalf of the applicant argued that the task facing the Minister was not to decide whether or not the applicant had demonstrated that he would be successful as a matter of probability in any future application rather whether he had demonstrated new issues of substance showing some reasonable prospect of a favourable decision.

14. Mr. Woolfson argued that the applicant had in the COI information furnished documentary details of discriminatory treatment of HIV suffers in Nigeria including discrimination from employees of the State, in hospitals and other State institutions as well as a certain failure of the State to protect persons with HIV.

15. Mr. Woolfson also indicated that the COI documentation indicated that the RAT had in previous cases allowed refugee status on the basis of HIV status and discrimination and accordingly that the decision of the respondent was to the effect that there was no basis for any grounds of persecution was irrational.

16. Mr. Woolfson also submitted that the Minister merely by reciting that he had seen and taken into account the COI documentation had not performed his functions. What was required was an analysis of the documents to show that he had properly considered the COI information. Mr. Woolfson also submitted that the Minister ought not to have concluded that Mr. A. could not be differentiated from any of the other Nigerian men in his position and the insertion of this sentence in the operative portion of the decision indicated not just an irrelevant factor but also suggested that the Minister was using that irrelevant factor as one of the grounds that he was refusing the relief sought.

The Respondent's Arguments

17. Ms. Ann Harnett O'Connor, B.L. on behalf of the respondent submitted that discrimination is not the same as persecution. What the Minister must decide is whether there was a reasonable prospect on the basis of the evidence submitted that a favourable conclusion would be reached by the Tribunal and an applicant could only be granted refugee status if he ultimately is able to produce evidence that he has a well founded fear of persecution.

18. Ms. Harnett O'Connor further contended that in respect of the cases referred to in the COI information, only two of these refer to Nigeria, one of which has nothing to do with HIV status. In the other case [69/321/03BC] it was submitted that the applicant's claim was not allowed primarily because of discrimination/persecution because of the applicant's HIV status but on other grounds as follows:-

"The applicant stated at interview that she had been raped whilst staying with her parents in XXX but this assertion was not queried subsequently. The applicant's solicitor Mr. XXXX was required in his written submissions to inform the Tribunal that Mrs. XXXXXX and her baby daughter born in Ireland had both been diagnosed as HIV positive. I can only summarise that this condition resulted from the rape of the applicant in XXXX. If this conclusion is correct then I must ask if the applicant has been rejected by her husband and I expect that this may be the case. This may explain why, if her husband is a doctor she did not receive the support and protection to which she was entitled. Indeed it is possible that there is no circumcision problem and that the issue of further Christian/Muslim rioting is no more than a remote possibility. For the applicant, what happened in XXXX is the issue and this, in my view is the reason why she has come to this country. It seems to me that this applicant has been rejected by her family and, if returned to Nigeria would be forced to spend her life with her infected daughter as virtual outcasts in a society where is notable demarcation between those who may live within society and those who must live beyond the pale."

19. Accordingly, Ms. Harnett O'Connor indicated that the real core of the decision had nothing to do, or very little to do with the applicant's HIV status but rather the fact that she had been raped, had been made pregnant and had therefore gone outside the pale.

20. Ms. Harnett O'Connor conceded that in the COI information there is evidence of discrimination but not so that it would amount to persecution. Accordingly, it was open to the Minister to decide what he did and the way he did so.

The Law

21. In my opinion, the criteria that the Minister indicated that must form the basis of his decision was correct and indeed Mr. Woolfson does not dispute this fact. The Minister indicated that his criteria was whether there was a reasonable prospect or a favourable review being taken in a new asylum claim by the applicant. In *L.H. v Minister for Justice, Equality and Law Reform,* Cooke J. (28th October, 2011) stated:

> "Whether the Minister grants or refuses his consent under s. 17(7) in a given case he remains bound by the obligation to comply with s.5 of the Act of 1996. Accordingly, if one leaves aside the issues of a 'new claim' as compared to the original application for asylum and of failure to make it earlier, when the Minister is asked to consider an application under the subsection the essential issue to be addressed is whether the material he is asked to examine as the basis for a further application contains potentially the ingredients required to establish that the applicant comes within the definition of 'refugee'. Does the material point to the possible existence of a well-founded fear of persecution: does that relate to the country he has fled; is its source a state authority or some source tolerated by state authorities; and does the reason for the persecution have a Convention nexus? While there is an obvious overlap between the ingredients of a claim to refugee status and the circumstances that may attract the prohibition on refoulement, the Minister is not, in the view of the Court, considering the possible application of that prohibition but only whether, if remitted to the Commissioner for investigation, the further application may establish that the applicant is a refugee."

22. I accept and apply the reasoning of Cooke J . in *L.H.* (as cited above) I agree with Mr. Woolfson that in order for the applicant to succeed in his s.17(7) application to the Minister - providing he has satisfied the requirements of new information (as in this case) what must be established is not very onerous.

23. In *G.K. v. Minister for Justice* [2002] 2 I.R. 418 at 426 and 427, Hardiman J. stated:-

> "... and the application for leave proceed on the basis only of the pure hypothesis [in that case] that what was said in the respondent's letter might not be correct, and was therefore inadequate unless confirmed by an affidavit by or on behalf of the first respondent. I do not believe that this is the position in law. A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

24. McCarthy J. in *O.H. (a Minor) v. Minister for Justice* [2008] 344 J.R utilised the above quotation to answer the point made in that case, which is identical to the point made in the instant case by Mr. Woolfson that the Minister had failed to engage with the COI and had merely quoted in a mechanical fashion that reports have been submitted.

25. I do not consider that the fact that the decision of *O.H. v Minister for Justice, Equality and Law Reform* (as cited above) or the earlier decision of Hardiman J. in the *G. K. v. Minister for Justice* (as cited above) were delivered prior to the decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* (21st January, 2010) is at all relevant.

26. While the decision of *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 640 and *O' Keeffe v. An Bard Pleanala* [1993] 1 I.R. 39, have been clarified by the *Meadows* decision to include questions of proportionality, the test in relation to the judicial review still remains the tests as set out in *Keegan* and in *O'Keeffe* i.e. unreasonableness or irrationality - see *O.O.O-A (& Ors) v. Minister for Justice, Equality and Law Reform*, Clark J., 28th January, 2011 ([2009] 348 J.R.).

27. There is, in fact, no evidence to counter the Minister's statement that he did consider the COI documents and indeed reference to the number of HIV suffers in Nigeria is supportive of the claim that he indeed considered these documents.

28. I accept that the COl documentation presents a number of grounds in which someone with HIV status may be discriminated against in Nigeria. The discrimination is not from the State though some State employees e.g. in hospitals may have discriminated from time to time.

29. The issue before the Minister in this regard was whether this discrimination amounts or could amount to persecution (as sometimes discrimination may do so).

30. I further hold that the statement by the Minister in his decision that:-

> "No overriding circumstances that would differeniate Mr. A. from any other Nigerian man in his position has been put forward that would warrant further investigation by ORAC is an irrelevant consideration.

Indeed as Mr. Woolfson persuasively argued if all 2.6m persons living with HIV in Nigeria were the subject of persecution and were to make an asylum application that would on the face of it be irrelevant. If each and every one of the sufferers from HIV in Nigeria could establish a well founded fear of persecution and could satisfy the other requirements dealing with asylum then each and every one of them could succeed in an application. The fact that the applicant, Mr. A. in this case is no different from the others is not relevant.

31. I am not, however, of the view, that by including this statement in his decision, the remainder of the decision has been in any way polluted or affected by this irrelevant consideration.

32. The Minister has stated that he has considered all the COI documents and the decision of McCarthy in *O.H.* (as cited above) is indicative that is sufficient in the absence of any evidence to the contrary.

33. I believe that the statement by the Minister to the effect that there are 2.6m people living with HIV in Nigeria is, as was stated by Ms. Harnett O'Connor accurately referable to the COI documentation and is indicative of the fact that the Minister did indeed consider it.

34. I do not believe that any interpretation of the *Meadows* decision suggests that the Minister is obliged in making his decision to go through the COI documents and analyse them in any forensic manner.

35. It is sufficient that he has considered the documents if his statement that the applicant would not be at risk of persecution is not irrational or unreasonable.

36. In my view, this statement that "no case has been forward would suggest that the applicant would be at risk from persecution from the authorities of Nigeria" is not an irrational or unreasonable statement and indeed, it was entirely reasonable and rational for the Minister to conclude that the level of discrimination referred to in the documents did not and could not amount to persecution in this particular case.

37. I am further of the view that the previous decisions of the RAT which in certain circumstances indicated that discrimination because of HIV status of an applicant could result in a favourable refugee declaration are not relevant to this application as these decisions to do not relate to Nigeria and the situation therein. The one decision referred to that seemed to relate to HIV and Nigeria was not (as discussed above) based on the HIV status of the applicant but rather on the other matters considered.

38. The answer for the purposes of a judicial review application to the rhetorical question posed by Hogan J. in his granting of leave in this case: "But is this correct?"

(a) The minister has stated that he considered the documents.

(b) There is no evidence to suggest that he did not.

(c) There is some corroborative evidence to indicate that indeed he did consider the documents.

(d) The court having examined and been referred to the COI documents finds that there is nothing in the COI

documents that would suggest that the decision that the applicant was not at risk of persecution by virtue of his HIV status was irrational or unreasonable.

39. Accordingly, for the above reasons this application should be refused.

APPROVED: Cross, J