Neutral Citation Number: [2010] IEHC 317

THE HIGH COURT

JUDICIAL REVIEW

2007 1731 JR

BETWEEN

S. U. AND N. T. U. (A MINOR ACTING BY HER MOTHER AND NEXT FRIEND S. U.)

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND MICHELLE O'GORMAN SITTING AS THE REFUGEE APPEALS TRIBUNAL

Respondent

JUDGMENT of Mr. Justice Cooke delivered the 30th day of July, 2010.

1. At the close of submissions on behalf of the applicants in this case on Wednesday, 28th July 2010, the Court indicated that it was unnecessary to hear a reply on behalf of the respondents as the Court was satisfied that it was not appropriate to quash the decision of the Refugee Appeals Tribunal ("RAT") which is sought to be challenged. This is the statement of the Court's reasons for so finding.

2. By order of 2nd February, 2010, leave for this application was granted by Hanna J. on the basis of the following two grounds:

> (i) The RAT failed to observe the terms of the UNHCR Handbook in arriving at its decision. The procedures were not carried out in a spirit of justice and understanding. No proper allowance was made in respect of the age of the applicant and the observations of the social worker from the HSE.
>
> (ii) No proper assessment of the applicant's credibility was undertaken.

3. The challenged measure is an appeal decision of the RAT dated 28th November, 2007, which upheld the negative recommendation in a s. 13 report by the Refugee Applications Commissioner, dated 23rd February, 2007. The history recounted by the applicant as the basis for her fear of persecution if returned to Nigeria was that she had twice been trafficked from that country for prostitution in the United Kingdom, first in 2004, and then in 2006. Following the death of her father in Nigeria, when she was twelve years old, she had lived in Nigeria with an aunt.

4. In 2004 a friend of the aunt took her to Halifax in the United Kingdom where she stayed with this friend's wife looking after her three children. The man then attempted to take her to Germany, it is said for the purposes of prostitution, but the British authorities stopped them at Dover where the man was arrested as a trafficker. She was interviewed and was then placed with a family for two weeks before being sent back to Nigeria unaccompanied and, apparently, without any arrangements having been made for her reception there. She says she met a woman who paid for her to get back home to Benin where she again lived with her aunt. She claimed that she was beaten by her aunt and by relatives of the trafficker because of his detention in the United Kingdom.

5. However, she got to know a Mr. Umeh in Benin and became pregnant by him. A friend of her aunt trained her as a hairdresser and said she would take her to London to work. Instead the applicant found herself in Belfast in a house with other girls and expected to work as a prostitute. With the help of a client called Fred she escaped and came to Dublin in August, 2006. Her child, the second named applicant was born on 23rd September, 2006. She claimed asylum here on 4th October, 2006. A Eurodac search by the Refugee Applications Commissioner provided information to the effect that her fingerprints matched those of a woman using a different name and giving a date of birth of 5th May, 1988, who had been assessed as being sixteen years old on her arrival in the United Kingdom on 17th December, 2004.

6. In the s. 13 report the Authorised Officers, while making some comments on aspects of the applicant's story as giving rise to "credibility issues" and taking into account the fact that she was a minor, essentially base their conclusion upon a finding that she would not be at risk of serious harm if returned to Nigeria. It is said in para. 4.7 of the report: "…given the age and maturity of the applicant, … she would have at least attempted to resolve her problems herself in Nigeria if they were supposedly the basis for her fear. This damages the credibility of the well-foundedness of her fear." In other words, while they express scepticism in relation to some details of the facts and the history given, the Authorised Officers accepted as a premise for assessing the availability of protection in Nigeria, the fact that the protection she needed arose out of her having been trafficked for prostitution.

7. In the Contested Decision of the Tribunal, the Tribunal member first sets out a detailed summary of the history given and the claim made by the applicant. This includes a note of what was said on the applicant's behalf at the hearing by Sara Murphy. She was the social worker assigned to the applicant as a minor by the HSE when she first entered the asylum system. She was with the applicant throughout the s. 11 interview and at the ORAC and assisted her at the Tribunal hearing.

8. In the section setting out definitions and relevant provisions of law, the Tribunal member sets out a series of points from the UNHCR Guidelines from the UNHCR Handbook and from the 1997 Guidelines as recommended by the "Separated Children in Europe Programme - Statement of Good Practice". The analysis of the claim is made over four pages of which one is devoted to the comments on the account given by the applicant and three to the consideration of the availability of protection for the applicant in Nigeria if returned there. In the three short paragraphs dealing with the applicant's story, the Tribunal makes the following comments.

1. If the trafficker's family in Nigeria wanted to seek her out it was incredible that they did not do so in 2005 to 2006

when she was living with her aunt.

2. Her account of being sent back by the British authorities did not appear plausible given their obligations to her in relation to her age, and

3. It is not plausible that her aunt's friend would have paid for her training as a hairdresser if she was going to use her as a prostitute in London.

9. While these comments indicated some scepticism on the part of the Tribunal member on those particular aspects of the story, it is plain that the decision contains no express or even implied finding of lack of credibility in the essential element of the applicant's claim, namely, that she was a minor who had been trafficked at least once from Nigeria to the United Kingdom for prostitution. Nor is this a decision in which the Tribunal member having disbelieved the claim, proceeds to consider the possibility of national protection or internal relocation on the conditional basis, - " even if the story was accepted as true…" . The Tribunal member expressly states: "The refugee process is forward looking and country of origin information would suggest that if the applicant were to return to Nigeria she could avail of state protection and protection from various NGOs."

10. There follows a detailed survey of that information as to the position in Nigeria of girls in relation to such trafficking. It is, apparently, a problem but is prohibited both by federal and state law and there is strong political will to tackle it. A national agency, the NAPTIP, has been established with a mandate to operate throughout the country using the police in order to suppress the practice. None of this would be relevant had the Tribunal member not accepted that the applicant had a subjective fear of retaliation by her traffickers if returned to Nigeria. It is on that basis that the Tribunal member reaches the explicit conclusion that the applicant's fear has no objective basis in fact not because she was not trafficked previously but because she can obtain protection from its consequences on her return.

11. The first reason why this decision cannot be quashed as unlawful is that the grounds raised are directed at the issue of credibility based on the allegation that the appraisal of the applicant's account was in some way inadequate because of a failure to make allowance in accordance with the UNHCR Guidelines for the fact that she was a minor. As indicated above, the Court is satisfied upon a detailed reading of the decision as a whole that there is no finding of lack of credibility such that the assessment of the applicant's story as she gave it either in the s. 11 interview or at the appeal hearing, is effectively irrelevant as is the fact that she was a minor when giving it. Her essential account was accepted and formed the basis of the issue which actually determined the appeal namely, the availability to her of protection in Nigeria against the reprisals she claimed to fear from her traffickers.

12. It is, of course, the case that in granting leave Hanna J. was alive to this aspect of the case. He said at p. 16 of the transcript of his judgment.

> "Moreover, it seems at least arguable that the Tribunal member's findings on credibility were the core and basic findings in the case and the findings on state protection were auxiliary and, that in the circumstances, this is not an appropriate case for the credibility findings to be severed from the decision. At this stage the respondents have not established that the same decision would have been reached had the applicant's core claim been fully accepted and were the negative credibility findings not made."

13. Clearly, those observations were made tentatively on the consideration of the leave application and were not intended to and could not bind this Court on a substantive hearing of the review application. However arguable the point may have appeared then, the Court is now satisfied that the findings on credibility such as they are, did not constitute the core or basic findings. Moreover, the determining finding on appeal was clearly that on the availability of state protection. In the Court's judgment, no issue of severance actually arises precisely because there is, as described above, no actual finding of lack of credibility from which the determining finding requires to be severed.

14. The second reason for refusing *certiorari* is that the first ground is based upon a false premise, namely, that the decision is illegal for failure to observe the terms of the UNHCR Handbook or Guidelines. The Handbook and the Guidelines and the Statement of Good Practice in the Separated Children European Programme are all useful and authoritative sources of guidance to decision makers in the asylum process as McGuinness J. recognised in the case of *V.Z. v. Minister for Justice* [2002] 2 I.R. at 135. But that is all that they are: guidelines. They have no force of law and a decision of the Tribunal cannot be quashed by reference to some identified discrepancy between its contents and a guideline unless the discrepancy represents some legal flaw which vitiates the decision as a matter of Irish law.

15. The third reason for refusing the substantive application is that no such flaw has been demonstrated in this decision whether by reference to the UNHCR Handbook or otherwise. On a number of occasions during the course of submissions, the Court inquired of counsel for the applicant as to which specific guidelines had not been observed in the decision, which guidelines ought to have been observed, and how the content of the decision would necessarily have differed had these alleged failings not occurred. The reply to these queries was to the effect, as the Court understood it, that the applicant did not know what the approach of the Tribunal member to the guidelines had been as it was not apparent from the face of the decision.

16. In the written legal submissions the argument was made: "In circumstances where the applicant has established a *prima facie* case that the UNHCR Handbook was not followed in arriving at the decisions, it is submitted that it is incumbent upon the Tribunal to place evidence before the Court as to the procedures by the Tribunal in dealing with cases of unaccompanied minors". This argument is inspired in the English case mentioned later in this judgment. Counsel was frank in stating the basis of the challenge to the decision. It was directed at requiring the Tribunal to state what its policy was in relation to treating unaccompanied minors or, as they are now more correctly to be described, "separated children". It was argued that the decision was unlawful unless it was patent on the face of the decision what the policy was and how it had been applied in this case. Counsel submitted that as a matter of fair public administration, the applicant should know from the face of the decision what the system in place was and that there was a duty of cooperation imposed on organs of the State such as the Tribunal, to inform the Court and to make candid disclosure of the measures that are in place to ensure that best practice is complied with in dealing with minors.

17. The Court is satisfied that these submissions are misconceived and based on a misunderstanding of the function of the High Court in judicial review vis-à-vis the role of the Tribunal as the administrative decision maker and an applicant alleging illegality in a decision. It is not the function of the High Court to facilitate the elucidation of matters of policy through the mechanism of O. 84 of the Rules of the Superior Courts. Its function is to control the legality of administrative decisions by reference to general principles of law and the Constitution and to the statutory rules and conditions under which the decisions are adopted. The burden of establishing the illegality alleged lies with the applicant. If the complaint of the applicant is that the basis by which the decision was reached is not clear from its content, the decision may well be flawed but only it if infringes the obligation to state reasons. Here, the reason for

rejecting the appeal is clearly stated and explained namely, the availability of State protection.

18. In the context of a Tribunal appeal decision it is not enough in the Court's judgment to simply allege that the applicant does not know whether the UNHCR Guidelines were followed. She, or rather her solicitor and counsel know what those Guidelines contain. The applicant was present at all stages where the Guidelines might have fallen to be applied. She was accompanied at the hearing and in the s. 11 interview by the allocated social worker who spoke for her. It is accepted that in s. 4.2 of the s. 13 report, the Authorised Officers cite correctly the relevant guidelines and it is expressly agreed that no fault can be taken with the treatment of the applicant as a minor at that stage. As already mentioned, p. 16 of the Tribunal decision explicitly quotes the principles relating to the treatment of minors drawn from those guidelines. In those circumstances a clear and strong presumption arises in the judgment of the Court, in the absence of any contradicting factor in the decision, that the Tribunal member has both had regard to and applied those principles. That being so, it lies with the applicant to identify which guideline or principles have not been in fact applied and in what respect the conclusion reached is mistaken or untenable as a result. This has not been done in this case.

19. As already indicated, in support of this argument, reliance was placed by counsel on the following passage from a judgment of the English Court of Appeal, a judgment of Donaldson M.R. in R *v. Lancashire County Council* [1986] 2 All E.R. at 941:

> "But in my judgment, the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure. Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative of public law court, is a post war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim namely, the maintenance of the high standards of public administration."

20. This is what might be called "sound-bite jurisprudence" in which a passage or sentence is extracted from a judgment of apparent relevance and invoked as illustration of a more general principle but without full regard to the actual scope of the statement made in the context of the case in question or to the manner in which it was there applied. That case concerned a challenge to a refusal by a local authority of a discretionary student grant to the daughter of a British national who had not been resident in the local authority area in question but had been working and living in Hong Kong for thirteen years. The issue which faced the authority was one of fact as to whether the student should be treated as "resident" and whether the father was only "temporarily resident" in Hong Kong. The issue of law on judicial review concerned the extent of the duty of the authority to disclose the factors it took into account in exercising its discretion in such cases. It was in that context that the quoted statement was made. Clearly no similar context exists here.

21. The Tribunal member is not exercising a discretion. The decision stands or falls by reference to the validity of the reasons upon which it is stated to be based. Moreover, the judgments in that English case make it clear the principle quoted from it has application in judicial review to circumstances where, on obtaining leave, an applicant has shown that the decision is *prima facie* irrational such that there are grounds for inquiry into whether something immaterial has been considered or something material omitted. In such circumstances as Donaldson M.R. said:

> "It really does not help to assert baldly that the relevant matters and no irrelevant matters were taken into consideration without condescending to mention at least, the principal factors on which the decision was based".

He also went on to say:

> "I would like to express my agreement with Parker L.J. that the grant of leave to apply for judicial review does not constitute a licence to fish for new and hitherto unperceived grounds of complaint and with Sir George Waller, that the appropriate response by the respondent will depend on the facts of each case which are almost infinitely variable".

In that regard, Parker L.J. cautioned:

> "I would not wish it to be thought that once an applicant has obtained leave he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him."

22. This Court agrees and suspects that insofar as those judgments are authority for the proposition that in particular circumstances a deciding authority may have a duty of disclosure and cooperation, the law in this jurisdiction is probably no different. The Court is satisfied, however, that it is a proposition which has no application in the present case. (It is instructive to note also that, notwithstanding the criticism made of the limited information given by the respondent authority in that case, the substantive application was refused.)

23. For all of these reasons the Court is satisfied that the grounds upon which leave was granted have not been sustained on this hearing. The Tribunal member was clearly aware that the applicant was a minor and alive to care that must be taken in assessing the credibility even of an adolescent minor. But her basic story was accepted and it was not demonstrated or even suggested that the appraisal of a claim to fear persecution or serious harm could have been any different has she been treated or assessed in some other unspecified manner. The application is accordingly refused.