Neutral Citation [2012] IEHC 149

THE HIGH COURT

[2010 No. 92 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 21(5) OF THE REFUGEE ACT 1996

BETWEEN

MORRIS ALI

APPELLANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice O'Keeffe delivered on the 1st day of March, 2012

1. This is an appeal pursuant to s. 21(5) of the Refugee Act 1996 ("the Act") directing the respondent to withdraw the revocation of the declaration of refugee status dated 27th May, 2002, given to the appellant as notified by letter of 9th March, 2010.

2. A declaration is also sought that s. 21 (1)(g) of the Refugee Act 1996, constitutes a measure contrary to the provisions of Directive 2004/83/EC ("the Directive") and is accordingly void. The additional grounds being relied upon by the appellant:-

> (i) Regulation 11 (1) of the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) and Article 14(4) of the Directive apply only to refugee status applications on or after 10th October, 2006; and
>
> (ii) The respondent acted in breach of Article 38(1)(b) of Directive 2005/85/EC and in breach of fair procedures in failing to give the appellant the opportunity to submit in a personal interview, reasons as to why his refugee status should not be withdrawn.

Background

3. The appellant is a citizen of Sierra Leone having arrived in the State on 4th February, 2001. Having made an application for refugee status within the State following a recommendation by the Refugee Applications Commissioner that the appellant should be declared a refugee, the appellant was informed by letter dated 27th May, 2002, the first named respondent had declared him as a refugee and a declaration dated 27th May, 2002, was enclosed to him.

4. On 29th October. 2008, the appellant having pleaded guilty to the offence of possession of drugs for the purpose of the sale or supply contrary to ss. 15 and 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977 and was sentenced to eighteen months imprisonment On the same date he pleaded guilty to possession of a false instrument, a false south African passport and was sentenced to 12 months imprisonment hoth sentences to run concurrently.

5. By letter dated 4th September, 2009, the respondent informed the appellant that he proposed to revoke the appellant's declaration as a refugee under s. 21 (1)(g) of the Act (as amended) and under S.I. No. 518 of 2006, section 11 (1)(b). The basis for such proposal was stated to be the convictions above mentioned. The letter sought representations.

6. Subsequently, correspondence was exchanged between the respondent's and the appellant's advisers, in particular, by letter dated 6th November. 2009, from the said advisers. The representations were accompanied by a letter from the appellant's fiancee detailing the relationship between them and also a letter from the appellant dated 3rd November, 2009, detailing his regret of what had happened and his subsequent imprisonment. Further correspondence from the appellant's fiancee was sent in the letter of 24th November, 2009, and also a letter from her doctor dated 18th November, 2009, confirming his fiancee was pregnant and as she stated expecting the appellant's child.

7. The letter of representation sent by the appellant's solicitor dated 6th November, 2009, made representations in relation to the appellant generally, and submissions in relation to Regulation 11 (1)(a) and (b) of S.I. 518 of 2006.

8. It also contended that there was no provision in the 1951 Convention relating to the Status of Refugee ("the Refugee Convention") for revocation of refugee status as proposed by the Minister in respect of the appellant. It stated that Article 33(2) of the Refugee Convention. which informed the wording of Article 14.1 of the Council Directive and of Regulation 11 (1)(a) and (b) provided for an exception to the obligation of non-refoulement of refugees but did not provide for revocation of refugee status. It was stated that submissions were without prejudice to the appellant's contention that s.21 (1)(g) of the Act and/or Regulation 11 (1) and Article 14.4(a) and (b) of the Directive were incompatible with the Refugee Convention.

9. In the representations on behalf of the applicant, it was submitted that Regulation 11 (1)(b) of S.I. 518 of 2006 required to be addressed, which provided for revocation of refugee status where the refugee "*having been convicted in a final judgment of a particularly serious crime, constitutes a danger to the community of the State*". This required a conviction of "*a particularly serious crime*" constituting "*a danger to the community of the State*".

10. Reference was made to the fact that during his imprisonment, the applicant was transferred from Mountjoy Prison to an open

prison (Shelton Abbey). It was submitted that it would not be reasonable or lawful for the Minister to apply a fixed policy whereby all convictions under s. 15 of the Misuse of Drugs Act were deemed "*particularly serious crimes*". Details of any policy of the Minister in relation to the application of Regulation 11 (1)(b) were sought.

11. By letter dated 9th March, 2010, the appellant was informed that the respondent in accordance with s. 21 (1)(g) of the Refugee Act and s. (*sic*) 11 (1)(a) and (b) of S.I. 518 of 2006 had decided to revoke the declaration of refugee status. The grounds were that the appellant "*is a person whose presence in the State poses a threat to national security or public policy ('ordre public')*" and under s. 11 (1)(a) and (b) of S.I. No. 518 of 2006 on the basis:-

> *"(a) there are reasonable grounds for regarding him or her as a danger to the security !!f' the State, or*
>
> *(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the State."*

12. The letter informed the appellant that he might appeal to the High Court under s. 21 (5) of the Act.

The Minister's Consideration of Proposal to Revoke Refugee Status

13. A copy of the proposal and consideration by the Minister and his officials was sent on 15th March, 2010, to the applicant. The proposal cited that the appellant was being considered for revocation of his refugee status which had been based on the fact that he was convicted of possession of drugs for sale and supply. (In the opening lines of the letter reference was made to "convictions" for drug offences). It also stated that the appellant had convictions for the usc of a false instrument (South African passport) and the possession of crack cocaine for sale and supply. It was accepted at the hearing by the respondent that the reference to "crack" cocaine was inaccurate and that he was in possession of cocaine which the appellant argued was not as dangerous as crack cocaine. It was also accepted that the reference to "convictions" for drug offences was inaccurate.

14. The examination of the case dealt firstly with the allegation that s. 21 (1)(g) of the Act and/or Regulation 11 and the Council Directive were incompatible with the Refugee Convention. It was expressed on behalf of the respondent that each State is entitled to apply their own laws in the matters of how the governance of the conduct of refugees within their jurisdiction is regulated.

15. In dealing with the issues raised in s. 21 (1) and the letter it stated:

> *"Considering that Mr. Ali has received a conviction for the possession of drugs for sale and supply, it is clearly evident that he is in fact a person who poses a threat to public policy and is also guilty of being a danger to the security of the State insofar as he has endangered the lives and safety of others by being responsible for the supply of drugs".*

16. With regard to the issue as set out in Regulation 11(1) whether the appellant has been convicted of a particularly serious crime and which it was contended was of a more limited category than a "*serious crime*" it was stated that *"the fact remains that Mr. Ali was convicted of dealing in the sale and supply of drugs - namely crack cocaine which must be considered at least as a serious crime, and considering the devastation, this particular drug can cause within the community could also be considered to be a particularly serious crime, despite the relatively short custodial sentence".*

17. It was further contended in the review that the granting of refugee status to an individual in the State confers upon the individual certain rights and responsibilities. As a recognised refugee, a person is required to respect and uphold the laws of the land. It was clear it stated that the appellant had failed in this responsibility to the State that had provided him refuge.

18. In response to his personal statement of remorse and the fact that he had not provided any evidence that he himself was a drug user which might have explained his behaviour, the formal examination continued:"*his actions and involvement in criminal activity and in the sale and supp(v of' drugs and also, while not mentioned in any of the Garda reports, there is a suggestion on file that he was found to be in possession of what is described to be (cocaine dealing paraphernalia*" would indicate that he is a person with scant regard for the laws of the State. In this regard, it is now accepted by the respondent that the reference to being in possession of cocaine dealing paraphernalia was incorrect thought it was accepted (at the hearing) that the appellant had in his possession a weighing scales.

19. It was considered that the evidence submitted by the appellant's girlfriend/partner could not be considered as independent evidence attesting to his character because of the personal association involved.

20. The proposal to revoke was considered by various officials in the respondent's department and ultimately by the Minister, the respondent, who revoked the refugee status. One of the officials in the course of the consideration of the proposal stated (prior to the Minister's decision):-

> *"Mr. Ali was sentenced to 18 months imprisonment for the sale/supply of crack cocaine with a street value of €70. It is also suggested he was in possession of drug making equipment which implies he is a serious player in the drug scene. I presume the court took this into consideration as 18 months for drugs valued €70 alone seems to be very excessive. Mr. Ali is not a drug user, so he was in this business for monetary gain only. I recommend revocation of his asylum status"*

21. It was agreed by the respondent in the course of the hearing that there was no basis for this official's conclusion that the appellant was in possession of drug making equipment nor facts to support the implication that as a result he was a serious player in the drug scene. It was agreed that no reliance could be based by this Court upon the suggestion of "*crack*" cocaine.

22. The recommendation for the revocation of the asylum status of the applicant was supported by all the officials who reviewed the proposal and ultimately by the respondent having reviewed his official conclusions and recommendation. The review concluded by a recommendation that the applicant be considered for revocation of refugee status under s. 21 (1)(g) of the Refugee Act 1996 and under s. 11(1)(a) and (b) of S.I. 518 of 2006 due to his *convictions* for drug offences as outlined above.

Relevant Provisions

23. Section 21 (1)(g) of the Act provides:-

> *"(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given –*
>
> …

(g) is a person whose presence in the State poses a threat to national security or public policy ('ordre public), or ...

The Minister may, if he or she considers it appropriate to do so revoke the declaration.

(5) A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration."

24. Regulation 11 of the European Communities (Eligibility for Protection Regulations, S.I. No. 518 of 2006) provides:-

"(1) The Minister may refuse to grant or to renew or may revoke a declaration that a person is a refugee where-

(a) there are reasonable grounds for regarding him or her as a danger to the security oft he State, or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the State. "

25. Article 14.4 of the Directive provides:-

"Member States may revoke, end or realise to renew the status wanted to a refugee by a governmental. administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State."

26. Chapter 1, Article 1 of the Geneva Convention provides:-

"This Convention shall cease to apply to any person falling under the terms of section A if:

(i) He has voluntarily re-mailed himself of the protection of the country of his nationality: or

…

(iii) He has acquired a new nationality, and enjoys the protection of the country of his new nationality ..."

27. Article 32 (entitled "*Expulsion*") states:-

"1. The Contracting Stares shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself; and to appeal to and be represented .for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary. "

28. Article 33 (entitled "*Prohibition of expulsion or return* ('*refoulement*') ");-

"1. No Contracting State shall expel or return ('refouler ') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

29 Section 5(1) of the Illegal Immigrants (Trafficking) Act 2000 provides that a person shall not question the validity of a decision under s. 21 (as amended by s. 11 (1)(o) of the Immigration Act 1999) of the Refugee Act 1996 otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts. The section sets out the procedure for applying for leave to apply for judicial review.

Appeal to High Court

30. Order 84C of the Rules of the Superior Court provides for the procedure in statutory appeals. The appeal is commenced by way of originating notice of motion. The notice of motion is to specify the relief sought and the particular provision or provisions of the relevant enactment authorising the granting of such relief. The notice of motion is to be issued not later than 21 days following the decision by the deciding body to the intending appellant of notice of the deciding body's decision or within such further period as the court on application made to it by the intending appellant may allow when the court is satisfied that there is good and sufficient reason for extending that period and the extension of the period would not result in an injustice being done to any other person concerned in the matter. The notice of motion is to be grounded upon an affidavit sworn by or on behalf of the appellant. A respondent intending to oppose the appeal has to file in the Central Office a statement setting out concisely the grounds of opposition and if any facts arc relied on therein, an affidavit verifying such facts to be served before the return date the originating notice of motion. The appellant is at liberty to file a further affidavit applying to any matter verified in the affidavit of the respondent to be served within fourteen days of the service upon him of the respondent's statement of opposition and verifying affidavit.

31. At the outset of the hearing, counsel on behalf of the appellant (Mr. Leonard, B.L.) applied to admit additional affidavits sworn by the appellant. This was opposed by counsel on behalf of the respondents (Mr. Donnelly, B.L.).

32. The respondent submitted that the court should only have regard to the evidence that was available to the respondent at the time when he made his decision on 2nd March, 2010 and this applied to representations made on his behalf. Reliance was placed on the decision in *Murray v. Trustees and Administrators of the Irish Airlines* (*General Employees*) (*Superannuation Scheme*) [2007] ILRM 196 where Kelly J., *inter alia*, stated that:-

> *"I am of opinion that, as a general rule, this court, in hearing an appeal under s. 140 of the [Pensions] Act 1990, as inserted by s. 5 of the Pensions (Amendment) Act (i.e. the relevant section pertaining to appeals (as in that case).from the Pensions Ombudsman is confined to the material which was before the Ombudsman). If that were not so, then parties would be at large as to what material they could put before the court by way of affidavit and the hearing in this court would be an appeal in name only.*
>
> *The general rule which I have enunciated is of course is open to exceptions. In my view, in exceptional cases, there would be an entitlement to adduce evidence which was not before the Ombudsman when making his determination. Such circumstances are in my view those which are identified by the Supreme Court in Murphy v. Minister for Defence [1991] 2 I.R. 161 subject to the modification identified by Finnegan P. in the Ulster Bank Investment Funds Limited v. Ulster Bank [2006] IEHC 323."*

33. One of the affidavits which the applicant sought to introduce and which was sworn by him on 31st March, 2011, challenged, *inter alia*, matters which had come to light and been exhibited in the replying affidavit of Angela Doyle, sworn on 23rd June, 2010, on behalf of the respondent. Included in this was documentation requested from the respondent. The Grounds of Opposition put the applicant on proof that the cocaine for which he was convicted was cocaine and not crack cocaine. He was also put on proof in relation to possession of drug making equipment. The applicant's affidavit of 31st March, 2011, joins issue with these matters. I will admit as evidence paras. 11, 12, 13 and 14 of the appellant's affidavit which address these issues. Additionally, some of the matters stated are comments/submissions which could be made from the consideration of the Minister's decision. The additional evidence is restricted in character and ambit and should be admitted.

34. The applicant has not been cross examined on these affidavits and no further affidavit has been sworn on behalf of the respondent negativing such matters. In this context, the applicant's evidence in relation to these matters stand. Furthermore, I consider that as a matter of justice and having regard to the manner in which the consideration by the officials of the Minister is drafted and the conclusion based on such consideration it would not be fair to allow the respondent to assert the Minister's consideration stands having regard to the frailties in the consideration of the matter which in turn informed the respondent's decision.

35. As to the manner in which the Minister should perform his task under s. 21 (5), 1 refer to the decision of De Valera J. in *Lukoki v. Minister for Justice, Equality and Law Reform* (6th March, 2008), when the court considered the matter came down to a very narrow issue namely whether or not the Minister was reasonable in making the particular decision (in that case to revoke the applicant's refugee status). In that case, the court could find nothing to suggest that the Minister had acted unreasonably.

36. There is also the case of *Gashi v. Minister for Justice. Equality and Law* Reform in which Cooke J. (1st December, 2010) stated:-

> *"There is no doubt, however, that this proceeding (appeal pursuant to s. 21(5) of the Refugee Act 1996, as amended) is not confined by the judicial review rules as it is a statutory appeal in which the Court can 'as it thinks proper' either confirm the respondent 's decision to revoke or direct that he withdraw it. The court is not, therefore, limited to judging the legality oft he process by which the decision was made by reference only to the information before the respondent at the time. It can decide on the basis of the evidence now available whether the respondent was correct in finding that the original declaration had been given on the basis of information 'which was false or misleading in a material particular' in accordance with paragraph (h) of s. 21 (5) of the 1996 Act. "*

37. I adopt the foregoing reasoning of Cooke J. The procedure for an appeal under s. 21(5) is distinct from judicial review procedures. This Court on an appeal under s. 21(5) is not entitled to consider matters such as the appellant seeks to contend with, are outside the strict confines of the appellate process within section 21(5). It is, therefore, not necessary for me to consider the matters in this regard advanced by the appellant.

38. In my opinion having regard to the totality of the respondent's consideration (and that of his officials) of the proposal to revoke the refugee status of the applicant, it cannot stand as it is not a fair and accurate summary of the relevant admitted facts. Firstly, there was no evidence that it was crack cocaine as against cocaine and there was no specific consideration of cocaine. Secondly, the applicant had only one conviction for a drug offence and not *convictions* which is referred to in the opening paragraph and also in the recommendation in relation to the review which was ultimately considered and adopted by the respondent. The review states:-

> *"While not mentioned in any of the garda reports, there is a suggestion on file that he was found to be in possession of what is described to be 'cocaine dealing paraphernalia' which would indicate that he is a person with scant regard for the laws of the State. "*

There is no charge of having cocaine dealing paraphernalia and the other comment is not supported by the facts- that he had scant regard for the laws of the State.

39. The conclusion that he was a serious player in the drug scene, not a drug user and as a consequence was in the business for monetary gain only is premised on an unsupported conclusion that he was a serious player on the drug scene.

40. It was submitted on behalf of the applicant that s. 11(1)(b) did not apply as the applicant had not been convicted of a "*particularly serious crime*". In the review, this offence has been labelled (incorrectly) crack cocaine. The respondent and his advisers should have considered the separate constituents of the phrases "*serious crime*" and "*particularly serious crime*" based on an informed and correct version of the facts.

41. I propose to apply the reasoning in the *Lukoki* case. In all the circumstances, I am not satisfied that the respondent has acted in a reasonable manner in the preparation of the consideration of the appellant's claim, in the conclusions of the officials and the decision taken by the respondent which was reliant on such analysis and conclusions. The consideration has not been prepared in a

reasonable and sufficient manner to inform fairly the respondent.

42. I therefore propose to make an order under s. 21 (5) directing the Minister to withdraw the revocation of the declaration.