Neutral Citation Number: [2009] IEHC 232

THE HIGH COURT

JUDICIAL REVIEW

2008 1359 JR

BETWEEN

O. L.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE LEGAL AID BOARD

NOTICE PARTY

JUDGMENT of Ms. Justice Irvine delivered on the 6th day of May, 2009

The applicant is an Algerian national, who applied for refugee status in Ireland on 4th October, 2002. He sought asylum by reason of an alleged threat to his life in Algeria from terrorists on account of his having served in the National Armed Forces.

The applicant attended for interview with the Refugee Applications Commissioner on 18th February, 2003. Subsequent thereto, by a report dated 8th April, 2003 the Refugee Applications Commissioner recommended that the applicant should be refused refugee status.

On 19th May, 2003, the Refugee Legal Service entered an appeal on the Applicant's behalf against the recommendation of the RAC. The appeal took place on 22nd October, 2003. The Refugee Appeals Tribunal affirmed the recommendation of the Refugee Applications Commissioner on 29th November, 2003. On 12th December, 2003 the applicant was informed that the RAT had affirmed the recommendation of the RAC. By letter dated 15th December, 2003 the Refugee Legal Service sought the advices of Junior Counsel as to whether or not the decision of the RAT raised any issues which would justify an application for judicial review. Counsel replied on the 18th December 2003 indicating that in his opinion the RAT had erred in incorrectly applying the law in relation to the failure of state protection. He also reminded his instructing solicitors of the strict time limits for an application for judicial review under s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000.

By a letter dated the 18th December 2003, marked urgent, the applicant's solicitor wrote to the Judicial Review Unit of the Legal Aid Board enclosing the opinion of junior counsel for the purpose of seeking Legal Aid on the applicant's behalf to permit him institute proceedings in the High Court seeking judicial review. This in turn stimulated the Legal Aid Board to seek a further opinion from Michael Lynn B.L. regarding the likely success of judicial review proceedings. By letter dated the 31st December 2003, Mr. Lynn advised that there was a very strong prospect that judicial review proceedings, if instituted, would be successful insofar as he was of the opinion that the RAT had failed to apply the correct legal principles in its decision. Notwithstanding the opinions of counsel the application for legal aid was refused pursuant to the provisions of s. 28(2) (b), (c) and (e) of the Civil Legal Aid Act 1995, on the grounds that any such intended judicial review proceedings were likely to be unsuccessful. This decision was notified to the Refugee Legal Service by letter dated the 13th January, 2004 from the legal services section of the Legal Aid Board and no mention was made in that letter of the advice that had been received from Michael Lynn B.L. Consequently, judicial review proceedings were not commenced on the applicant's behalf and the applicant was never advised of the content of the two opinions of counsel referred to above.

The chronology, which is not in dispute in the present proceedings, shows that by letter dated 26th February, 2004, the respondent notified the applicant that it was his intention to deport him from the country. On the 26th August 2004 the first named respondent signed a deportation order in relation to the applicant. Subsequently, by notice dated 21st December, 2004, the respondent wrote to the applicant enclosing a deportation order.

The applicant instructed James Sweeney, his present Solicitor in March 2008. He obtained the applicant's file from the Refugee Legal Service on 24th June, 2008 as appears from para.16 of the applicant's affidavit of 22nd November, 2008. It is common case, that that file of documents included amongst its contents the two opinions of counsel referred to above both of which advised of the likely success of judicial review proceedings if maintained against the decision of the RAT.

The present proceedings were commenced by notice of motion dated the 2nd December, 2008. The application for leave to apply for judicial review is grounded upon the affidavit of the applicant of 22nd November 2008. Since the applicant swore his affidavit grounding the present application for leave to apply for judicial review he has apparently married a Polish national, Malgorzata Sawras. In an affidavit dated 23rd February, 2008, Malgorzata Sawras has sworn that she married the applicant at a Mosque on the South Circular Road, Dublin on 26th October, 2008.

The court for the purposes of this judgment is dealing with a net point of law and that is whether or not, in the

circumstances of the present case, the court should extend the time so as to permit the applicant to maintain his application for leave to apply for judicial review to seek to challenge the deportation order dated 26th August, 2004 which was notified to him on 21st December, 2004.

Conclusions
The court has considered the evidence available to it in the affidavits delivered on the applicant's behalf in the within proceedings. The court has also considered the submissions made by counsel on behalf of the applicant and the respondents in relation to this preliminary application. It is accepted that the extension of time sought on the applicant's behalf is made a significant number of years beyond the two week statutory time limit provided for by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000.

The applicant submits that the court should excuse his delay in applying for leave to seek judicial review of the decision of the RAT on the basis that he was never advised of the content of the legal opinions referred to earlier in this judgment thus influencing his decision not to embark upon such proceedings at an earlier time. Until his file was handed over to his present solicitors on 24th June, 2008 he had no idea that the refugee legal service had been advised as to the likely success of judicial review proceedings. This is the applicant's explanation for failure to commence proceedings up to the 24th June 2008.

Unfortunately, the applicant's affidavit of the 22nd November, 2008 puts forward no explanation for his failure to institute proceedings post 24th June, 2008. The proceedings were not issued until the 2nd December, 2008. In this regard, counsel for the applicant relies solely upon the potential strength of the case to be made on the applicant's behalf if the extension of time is granted. The fact that the applicant has a realistic prospect of successfully maintaining these proceedings in respect of the decision of the RAT, should the court grant the extension of time now sought, is not seriously disputed by the respondents.

The respondents rely upon a number of decisions in support of their assertion that the applicant has not discharged the obligation upon him to show why the extension of time now sought should be granted. They rely upon the decision of Finnegan J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2001] ILRM 401 where he stated that the court, in deciding whether or not to exercise a discretion to extend the time in any given case, should consider the following matters:-

- The period of delay.
- The reason for the delay.
- The *prima facie* strength of the applicant's case.
- The complexity of the legal issues.
- Any language difficulties or difficulties in obtaining an interpreter.
- Any personal circumstances affecting the applicant.
- The requirement of justice.

The applicant also relied upon the decision of McGuinness J. in *C.S. v. Minister for Justice*, *Equality and Law Reform* [2005] 1 I.R. 343 where she stated that in a case such as the present one, the applicant should set out personally in his affidavit the circumstances which gave rise to any delay either on his own part or on the part of his solicitor. The respondents further relied upon the decision of McGovern J. in *H.I. v. Minister for Justice*, *Equality and Law Reform & Ors* (Unreported, High Court, 19th June, 2007) where he held that unless an applicant satisfies the court that there is good and sufficient reason why the time limit should be extended that the court should not enter upon the merits or otherwise of the grounds which would be argued in relation to the challenged proposed.

In the present case, significant reasons have been furnished to excuse the failure to institute proceedings as between the date of notification to the applicant of his intended deportation on 21st December, 2004 and 24th June, 2008, being the date upon which his solicitors received his legal file from the notice party. Accordingly, had the present application been made within fourteen days of 24th June 2008, the applicant would have had no difficulty in convincing this Court that it should extend the time so as to permit him to maintain these proceedings. However, the applicant has put no evidence before the court to explain the circumstances in which the court could consider granting any extension of time beyond a period of 14 days commencing 24th June, 2008. It appears to this Court that as of 24th June 2008, the applicant's solicitor had available to him the two opinions of counsel referred to earlier in this judgment and all material necessary to reach a decision regarding whether or not an application for leave to apply for judicial review ought to be made. It further goes without saying that the strict statutory time limits pertaining to applications of this nature are well known to all involved in the asylum process. Indeed, as already stated this time limit was referred to by Mr. Edwards B.L. in his opinion furnished as early as 18th December 2003.

In looking at the period of the delay, as required by the decision in *G.K. v. Minister for Justice, Equality and Law Reform*, this Court can excuse without difficulty the delay between 21st December, 2004 and 24th June, 2008. However, the court cannot excuse the period of delay thereafter for which no reason has been proffered by the defendant's advisers. Since 24th June 2008, the applicant has been represented by a firm of solicitors fully appraised of the legal issues potentially involved in any claim for judicial review and during all of that period that firm was aware of the potential strength of the applicant's case from the opinions of counsel on the applicant's file at the time it was given into their possession.

In his affidavit grounding the present application no personal circumstances have been put forward which could justify the court exercising its discretion to extend the time provided for in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, to permit the applicant to maintain these judicial review proceedings. The court in this regard noted that the applicant's marriage to Malgorzata Sawras on 26th October, 2008 and this fact cannot not lend any particular weight to the applicant's application for an extension of time to bring the within application. He was not married at the time of the decision of the RAT and his marriage further post dates the signing of the Deportation Order by the first named respondent. Further, the marriage took place several months after the applicant's solicitors had received his file from the

Refugee Legal Service.

The court rejects the submission by counsel on behalf of the applicant that the court must effectively ignore the statutory timeframe provided by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, as a consequence of the decision of the European Court of Justice in *Metock et al.v. Minister for Justice, Equality and Law Reform* (C-127/08) [2009] 2 WLR 821. In that case the Court of Justice was asked to consider (*inter alia*) whether a national of a non-member country who was the spouse of a European Union Citizen residing in a state in which he was not a national, benefited from the provisions of Article 3(1) of the Parliament and Council Directive 2004/38/EC, a directive concerning the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states.

Recitals 5 to that Directive provides as follows:-

> "(5) The right of all Union citizens to move and reside freely within the territory of the member states should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality."

According to Article 2(2)(a), for the purpose of the Directive, "family member" means *inter alia* the spouse.

Article 7 deals with the rights of Union citizens to residence on the territory of another member state. The right of residence so provided is stated in Article 7(2) to extend to family members who are not nationals of a member state who accompany or join the Union Citizen in the host member state.

The relevant aspect of the decision in *Metock* concerned a Nigerian national who was refused asylum in Ireland in 2005 and in respect of whom the Minister for Justice made a Deportation Order in September 2005. He subsequently married a Polish national who had resided and worked in Ireland since April 2006. They were married in November 2006. Later in February 2007 the Nigerian national applied for residence and was refused on the ground that he did not satisfy the condition of prior lawful residence in another member state under the 2006 Regulations.

The Court of Justice was asked to consider whether the spouse of a Union citizen, who has exercised his right of freedom of movement by becoming established in a member state whose nationality, he does not possess, who accompanies or joins that citizen within the meaning of Article 3(I) benefits from that directive irrespective of when and where the marriage took place and of the circumstances in which he entered the host state. In this regard the court concluded that Article 3(I) of Directive 2004/38 had to be interpreted as meaning that a national of a non member country who is the spouse of a Union citizen residing in a member state whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of how the national of a non member country entered the host member state.

It may well be the case that arising from the decision in *Metock* that the respondent can contend that the respondent is not entitled to execute the Deportation Order which he has signed in relation to the applicant but this is not a matter which concerns the court on the present application and the decision of this Court has no bearing on any remedy that the applicant may have arising from that decision should the respondent seek to effect his deportation. In this regard, the court records that for reasons already stated, it has refused an application on behalf of the applicant to extend the grounds for leave in the present proceedings to include an order that by virtue of the decision of the European Court of Justice in *Metock et al.* that it would be unlawful and contrary to the applicant's EC/EU rights to have him deported having regard to his marriage to Ms. Sawras on 26th October, 2008.

For the aforementioned reasons, the court will refuse the extension of time sought.