Neutral Citation Number: [2010] IEHC 246

THE HIGH COURT

JUDICIAL REVIEW

2008 298 JR

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

L. S.

APPLICANT

AND

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

AND THE REFUGEE APPLICATIONS COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered on the 4th day of June, 2010

1. The applicant is an Armenian National who prior to her arrival in the State was living in Chechnya with her Chechen spouse. Following her arrival in the State in 2000 she sought asylum.

2. Her claim related to the fact that her husband was targeted in various ways, including serious assaults by reason of his unwillingness to join Chechen Forces fighting the Russians and in addition there were threats that she would be raped. Her claim for asylum therefore is very closed linked to that of her husband. It may be noted that she was not regarded as Chechen, and so was permitted to leave the region as other members of her family did but in a situation where her husband was considered to be Chechen by the authorities, though he considered himself Russian, and so not permitted to leave she remained with her husband until they fled together to Ireland. Here they claimed asylum but on 22nd November 2001, she was informed that ORAC had recommended that she be refused asylum status.

The recommendation

3. The applicant who was anxious to appeal registered with the Refugee Legal Service (R.L.S.) and on 7th December 2001 she was informed in writing, that her case had been assigned to a particular solicitor on the R.L.S. Private Practitioner Scheme. Having regard to the statutory time limits that applied, it was necessary that a notice of appeal be served by the 13th December 2001. This did not happen. That it did not happen was the fault of her solicitor. He did submit an appeal out of time on 7th January 2002, but this was rejected by the R.A.T. The response of the solicitor to this development was that he sought the consent of the Minister to the applicant re-entering the asylum system. Correspondence in relation to this request passed between the applicant's solicitor and the Department of Justice between January and July 2002 but did not produce the outcome desired by the applicant or her solicitor. Ms. S. has averred that although she spoke little English that she made many attempts during the period to contact the solicitor that had been assigned to her but without success. It appears from an affidavit sworn by Ms. Mary Conroy, solicitor of the R.L.S. in the present proceedings that the applicant was not alone in the difficulties that she experienced and that other clients of the same solicitor had similar problems and indeed that members of the R.L.S., themselves had difficulties in establishing contact with him. On foot of a request from Ms. Conroy and some of her colleagues, the solicitor in question was removed from the R.L.S. Private Practitioner Panel and indeed I have been told that the person involved no longer practices as a solicitor.

4. In November, 2002, the applicant and her husband left the jurisdiction. The applicant has explained that her purpose in leaving the country was to try and locate their daughter from whom she and her husband had become separated. She says that they spent a period of time in the Ukraine and then in June, 2005 flew to the Netherlands. In May, 2006 the Dutch Authorities returned her to Ireland pursuant to the Dublin Regulation.

5. While the applicant was absent from the State, the R.A.T. had brought the judgment of Butler J. in *D. v. The Refugee Appeals Tribunal* (Unreported, High Court, January 22nd, 2003), to the attention of her then solicitor and invited him to make submissions having regard to the terms of the judgment. The *D.* case suggested that in certain circumstances the R.A.T. had a discretion to accept appeals outside the statutory time limit. However, despite the invitation no such submission was made.

6. Following on the applicant's return to the State, the R.L.S. by letter of the 20th September, 2007, requested the R.A.T. to allow the applicant submit a fresh notice of appeal or alternatively requested them to accept the late notice of appeal that had been submitted by the former solicitor. By letter dated the 19th December, 2007, the R.L.S. were informed by the R.A.T. that the chairperson had considered the request but had refused it. The R.L.S. sought reasons for this, but by letter of 7th January, 2008, were informed that reasons are not furnished by the chairperson.

7. The present notice of motion issued on 28th April, 2008. Subsequently on 21st November, 2008 an open letter from the R.A.T. provided reasons for the decision and those reasons were again set out in the course of an affidavit sworn in the present proceeding. It was explained that the chairman of the tribunal had indicated that he did not consider it appropriate to accept the most recent late submission of an appeal given the length of time which had passed between the original application in 2001 and the request in 2007 and the fact that the applicant had failed to participate actively in the asylum process, to the extent that she was outside the State for an extended period of time.

8. In the course of the present proceedings the applicant has sought to challenge the initial decisions of R.A.T. to refuse to accept a late appeal, to challenge the refusal of the Minister to permit the applicant to make a fresh application pursuant to s. 17(7) of the

Refugee Act, 1996 as amended and finally to challenge the most recent consideration of the issue by R.A.T.

9. Insofar as the challenge to the Minister's decision is concerned, I am satisfied that this cannot succeed. Section 17(7) provides:-

> *"A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act, without the consent of the Minister."*

In correspondence the Minister has pointed out that Ms. S. is not a person to whom he has refused to give a declaration. It seems to me that this is a complete answer to this aspect of the challenge.

10. Insofar as the challenge to the refusal by R.A.T. to accept a late appeal is concerned, there is no doubt that the applicant was ill-served by her former solicitor. Her case to submit a late appeal was a compelling one when the statutory deadline was missed through no fault of her own.

11. However it must be appreciated that once the applicant began to experience difficulties, it was her responsibility to try and rectify the situation. Obviously, one has to have full regard to the fact that the applicant was dealing with a legal system that was strange to her and that she spoke little English. However, it must be appreciated that making all allowance for that, it was just unacceptable that she took no steps, whether by returning to the R.L.S. or otherwise, and would appear to have simply let matters drift. She then compounded matters by leaving the State and remaining outside the State for an extended period until returned pursuant to the Dublin Regulation.

12. It seems to me that her conduct has been such that it is impossible to argue that the approach taken by the R.A.T. to a late appeal at this stage was not one that was open to it. While, no blame attaches to her for the initial missing of the deadline to appeal, her behaviour since has certainly contributed to the considerable delay that has occurred.

13. The initial refusal of the R.A.T. chairman to state his reasons for taking the decisions that he did, is regrettable. However, reasons have now been furnished, albeit, only after proceedings issued. It must be said that there is nothing surprising in the reasons that were eventually furnished.

14. I have considered whether the failure to state reasons initially provides any basis for invalidating the chairman's decision. The question of relying on reasons furnished late in the day was considered by Kelly J. in the case of *Deerland Construction Limited v. Aquaculture Licences Appeal Board* [2008] I.E.H.C. 289. The issue arose in a specific statutory context but in the course of his judgment Kelly J. referred to the case of *Nash v. Chelsea College of Art and Design* [2001] EWHC (Admin) 538. In the course of his judgment in that case Stanley Burton J. set out the following principles:-

> "In my judgment, the following propositions appear from the above authorities.
>
> (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J. put it in *R. v. Northamptonshire C.C.* ex parte W. [1998] E.L.R. 291) 'the adequacy of the reasons is itself made a condition of the legality of the decision', only in exceptional circumstances if it all, will the court accept subsequent evidence of the reasons.
>
> (ii) In other cases, the court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
>
> (a) Whether the new reasons are consistent with the original reasons.
>
> (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
>
> (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
>
> (d) The delay before the later reasons were put forward.
>
> (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly."

15. In the present case there was no statutory obligation to furnish reasons. The desirability for providing reasons derived from general administrative law principles. The desirability of providing reasons has to be seen in the context that the background to the decision was obvious to all and equally the reasons for not accepting a late appeal must have been obvious to all.

16. In these circumstances I do not believe, what I have already referred to as the regrettable failure to provide reasons provides even an arguable basis for invalidating the decision. No timely challenge was ever brought to the initial consideration, and it is impossible to conclude that the R.A.T. in 2007 when asked to consider the situation created by a deadline missed in January 2001 was not entitled to adopt the position it did.

17. In these circumstances I am not prepared to permit the challenges to proceed.