

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2010 988 JR**

**BETWEEN**

**HASSAN SHEEKH ALI**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**JUDGMENT of Mr. Justice Cooke delivered the 25th day of March 2011**

1. By order of the Court (Clark J.) of the 29th July, 2010, the applicant was granted leave to bring the present application for judicial review of the respondent's decision (the "Contested Decision",) of 18th June 2010 under s. 18(4) of the Refugee Act 1996 (as amended) refusing his application for family reunification in respect of his adult sister and three children of his deceased brother then living as undocumented refugees in Ethiopia.

2. Leave was granted upon a single ground as follows:-

"The respondent erred in law in finding that an applicant must be financially capable of supporting his adult sister and three children of his deceased brother who are in her care in order to benefit from refugee family reunification with dependents pursuant to the provisions of s. 18(4) of the Refugee Act 1996."

3. The background to the application can be briefly described as follows. The applicant is a native of Somalia who came to the State in July 2007, claimed asylum and was subsequently granted refugee declaration on the 30th April, 2008. In Somalia the applicant had been a married man with seven children. He says that his wife and two of those children and his mother were killed in Somalia. At the time his household also comprised his adult sister and three children of his deceased brother. When he fled from Somalia in 2007, he left both his own children and his two nephews and niece in the care of his sister. In or about March or April 2009, the sister sought refuge with the three children in Ethiopia where they have remained since.

4. In April 2009, the applicant applied to the respondent under s. 18 of the Act of the 1996, to have all of those members of his household, that is to say his own five children, his sister and the two nephews and niece, given permission to be reunited with him in this State as family members of a refugee. As a result of subsequent exchanges between the applicant's representatives and the respondent and/or the Office of the Refugee Applications Commissioner, the application was dealt with separately with regard to the applicant's five children on the one hand and the sister and remaining three children on the other. In short, by the date on which the Contested Decision in respect of the latter was adopted on 18th June, 2010, the five children had been granted permission to enter the State with a view to their relationship to the applicant being verified by DNA tests. Family reunification under s. 18 was later granted to them so that the present proceeding is concerned only with the position of the applicant's sister and the two nephews and niece.

5. The applicant's personal situation is complicated by the fact that he is seriously ill and severely disabled. He suffers from a combination of chronic hepatitis, aortic aneurysm, cardiomyopathy and heart disease. He has sustained kidney failure and must undertake dialysis three times per week. He would be in need of a kidney transplant but his medical advice is that he is not a candidate for such an operation because of his other problems such that his condition is considered irreversible. The case could be considered unusual, therefore, in that while the applicant is seeking to have the Minister admit his sister and the three children on the basis that they are dependent on him, one of the humanitarian considerations urged upon the Minister is that because of his medical condition and his inability to work and properly look after his own children here, he too would be dependent upon them and particularly upon his sister and the older nephew in caring for and supporting his household in this country.

6. When the application for family reunification was made and in subsequent further submissions and exchanges of correspondence with the Family Reunification Section of the Department, it was on the basis that the applicant had been supporting all of those members of his household in Somalia and subsequently in Ethiopia and that they were dependent upon him. Although subsisting in this country on disability benefit, the applicant supported this proposition by submitting evidence of money transfer made to the family. These consisted of irregular and varying amounts of between US\$100 to US\$400 (and on one occasion a remittance of US\$1,000) during the period from approximately March 2008 until early 2010. It was claimed that the family members in question were "wholly reliant on this money to pay for food and shelter and are as such financially dependent" upon the applicant. (See the letter of 4th February, 2010).

7. In accordance with s. 18(2) of the Act of 1996, the application had been referred to the Refugee Applications Commissioner, who gave a report on the 31st July, 2009. In relation to the financial support asserted at that stage, the Commissioner commented in s. 5.4 of the report as follows:-

"The refugee asserts that his niece and nephews are dependent upon him and submitted three money transfers receipts for €796.75 as proof of this dependency. The refugee claims to be in receipt of €204 in social welfare benefits each week. The refugee states on his questionnaire that he lives in a two bedroom house and pays €375 in rent per month. He receives €375 in rent allowance each month. According to his solicitor's letter dated the 29/07/2009 the applicant has applied for a FAS course on the 18th September, and would hope to have employment to further support his family and extended family should family reunification be granted to him."

8. The report otherwise concluded that the information provided by the applicant had been "consistent" with that given in his initial application for asylum in 2007. "Throughout the asylum process, the refugee consistently mentioned his children and his sister. He did not proffer any contradictory statements with regard to them. He mentioned the children of his brother on p. 8 of his second asylum interview and at p. 4 of his first asylum interview. He gave the same names and dates of birth for his niece and nephew on p. 5 of his first asylum interview as he did on his family reunification questionnaire".

9. The Contested Decision was given to the applicant by letter of the 18th June, 2010 accompanied by a memorandum dated the 17/06/2010 compiled and signed by Paul Brady of the Family Reunification Section and entitled "Family Reunification Consideration". This constitutes, in effect, the respondent's statement of the reasons for the refusal and it is the validity in law of these reasons which forms the basis of the challenge for which leave has been granted. The primary submission made is that in one part of his memorandum the author, on behalf of the Minister, has applied a wrong test when finding that the sister and the three children are not "dependent family members" in relation to the applicant.

10. The legislative context in which this issue arises, accordingly, is s.18 of the Act of 1996, and its subs (4) in particular. Section 18(1) provides that a refugee may apply to the Minister for permission to be granted to a member of his or her family to enter and reside in the State. A distinction is then made in subss. (3) and (4) between two categories of family members. Subsection (3)(a) provides that where the Minister is satisfied that a person who is the subject of an application is "a member of the family of the refugee" as defined for the purpose of that subsection, the Minister "shall grant permission". The persons coming within this category are, in effect, members of the immediate family of the refugee and particularly his or her spouse and minor children.

11. Subsection (4) then confers discretion on the Minister as regards the grant of permission to a wider category in the following terms:

"(a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.

(b) In paragraph (a), 'dependent member of the family', in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully." (Emphases added.)

12. Thus, the issue before the Minister on the application made to him in this case was whether the sister, nephews and niece came within this definition of "dependent member of the family". So far as the definition is based upon the family relationship, the sister clearly qualifies and it was argued that the nephews and niece also qualified upon the basis that they were "wards" of the applicant because he had assumed responsibility for them following the death of this brother and they had lived and been cared for and supported as members of his household ever since.

13. It is thus clear that in order for an application for family reunification to be successfully maintained under s. 18(4), two elements are involved. First, the person subject to the application must be a "dependent family member" which in turn involves demonstrating that the person comes within the degrees of relationship listed and secondly that the person is in fact "dependent" upon the applicant. Secondly, the Minister must exercise his discretion in favour of those dependent family members. By contrast to the entitlement under subs. (3), there is no right to the grant of permission upon the sole basis that the requirements of the definition of "dependent family member" are met. It is equally clear, however, that the exercise of the Minister's discretion does not arise unless the requirements of the first element are present. The Minister cannot exercise his discretion in favour of the grant of permission to persons who fail to come within the definition of "dependent family member".

14. It is this latter consideration which lies at the heart of the issue raised in the present case. This is because the final paragraph of the consideration memorandum under the explicit heading "Conclusion" is as follows:-

"Having considered all of the above information, it is concluded that the minister should not exercise his discretion, pursuant to s. 18(4) of the Refugee Act 1996, to grant permission to the subjects named above to enter and reside in the State and that the application should accordingly be refused."

15. On the face of it, therefore, the decision would appear to be based upon the exercise of the Minister's discretion to refuse and therefore, by implication, upon an acceptance that the subjects of the application did come within the scope of subsection (4)(b). This conclusion, however, can be said to be at variance with the findings apparently made in the earlier analysis set out in the memorandum. In particular, in Section 2 headed "Financial Dependency" the author appears to make the finding: "The refugee has submitted the above money transfer receipts as evidence that the subjects of the application are financially dependent upon him, however, the frequency and amount of money of money transfers do not satisfactorily establish that the four subjects are financially dependent upon the refugee". Earlier, under the heading "Durable Relationship" there is the finding: "The refugee has not provided any evidence to show why (the sister) is no longer capable of maintaining his two nephews and niece". Furthermore, in the statement of opposition, the respondent has pleaded: "On the proper construction of the respondent's decision, he decided that the person's concerned did not constitute dependent members of the family of the Applicant and s. 18(4) of the Refugee Act 1996, as amended, was not properly applicable to them".

16. Thus, if s. 18(4) was not properly applicable to the subjects of the application, the exercise of the Minister's discretion did not arise. On the other hand, if the Minister considered that it was necessary and appropriate to refuse the application by exercising his discretion, it could only be on the basis that the subjects did qualify.

17. The fundamental issue raised by the ground for which leave was granted in this case, thus, turns upon the way in which the memorandum is to be read. There is no doubt, in the judgment of the Court, that if the finding as to the applicant's financial inability to support his sister and the three children in the State, forms part of the conclusion that they are not "dependent members of the family" because they are not "dependent" financially upon him, there is an error of law. It is not disputed that so far as the concept of "dependence" in that context is concerned, the question is one of fact as to whether the subjects of the application are, in their circumstances in the country of origin "dependent" in the sense of reliant for subsistence on the means and support of the refugee. On the other hand, if the ability of the refugee to support them in this country is a factor taken into account for the purpose of the exercise of discretion in the grant of permission for reunification, there is no error because it is clearly open to the Minister to take into account the ability of the refugee to continue to support and maintain the family members in question after their arrival in the State. That is, obviously, a crucial consideration for the Minister in this case, given the admitted inability of the applicant to gain employment, his reliance upon disability benefit and the fact that he already has his own children to look after. Thus, to the extent

that it can be said that the refusal is based upon the exercise of discretion, it could not be said to be unreasonable or irrational for the Minister to conclude that family reunification in this case ought not to be extended to the sister and the three children.

18. Although it must be acknowledged that the memorandum in this case has been thorough and detailed in its assessment of the facts of the case and the submissions made, the Court is, on balance, satisfied that there is a sufficient degree of uncertainty raised as to the basis upon which the conclusion has been reached to justify that it quashed and that the matter be remitted to the Minister for reconsideration.

19. It must be acknowledged first that the memorandum does not focus exclusively upon the question of financial dependence based upon the remittances made by the applicant to Ethiopia. The consideration of "dependency" is approached in four sections under the headings "Durable Relationship", "Financial Dependency", "Physical or Mental Dependency" and "Any Other Consideration". In the first of these sections the history of the family relationships is looked at and the conclusion is reached that as the applicant has been living separate from the sister and three children since July 2007, "the refugee has not provided any evidence to show why (the sister) is no longer capable of maintaining his two nephews and niece". The question of physical or mental dependency does not arise because it was not relied upon in the submissions made. Under the heading of "Any Other Consideration" the question of the applicant's own medical condition is considered and the medical opinions are quoted and examined. The conclusion reached in this regard forms part of the conclusion as to the applicant's ability to support all family members financially should they be in the State: "Given the state of the refugee's health, it is not accepted that he would be in a position to support the subjects of this application".

20. The issue comes down finally to the significance to be attached to the findings made under the heading of "Financial Dependency". There, as already indicated, the analysis contains a twofold conclusion. First, it is found that the evidence of the money transfers does not amount to "evidence that the subjects of the application are financially dependent upon him", because "the frequency and amount of money transfers do not satisfactorily establish that the four subjects are financially dependent upon the refugee". Secondly, it is found that "the refugee has (not) sufficient income and resources to support and maintain the subjects of the application in the State".

21. As regards the first of these conclusions, the Court considers that it is difficult to accept that it flows from the premise upon which it is based. The passage in question is preceded by a direct quotation from the submissions made to the effect that the subjects in question "are wholly reliant on the money to pay for food and shelter and are as such financially dependent upon him". Given that the applicant is sustained only by disability benefit in this country, it does not appear to be a rational conclusion that the frequency and amount of money transferred" fails to prove that the recipients of the transfers are financially dependent upon the refugee. In the absence of any other information as to the sister having any other source of income or any employment or occupation, it does not appear to the Court to be reasonable or justifiable to conclude that the quoted claim of reliance on the remittances for food and shelter is factually wrong. Given the meagre resources of the applicant in this country, is it rational to suppose that he would part with the sums in question if he did not feel that the recipients were depending upon him to do so?

22. The uncertainty created by this conclusion is enhanced by the following finding that the refugee does not have "sufficient income and resources to support and maintain the subjects of the application in the State". Had that been clearly identified as a factor considered in the exercise of the discretion to refuse, no problem would arise. However, because it is expressed in effective support of the consideration of dependency as "financial dependency" there is sufficient ambiguity or lack of clarity in the decision to warrant it being reconsidered. It has been argued on behalf of the respondent that even if there was held to have been an error or ambiguity in the manner in which the issue as to the ability to support the subjects of the application was treated or expressed in the Contested Decision it ought not to be quashed because the Minister was in any event entitled to exercise his discretion to refuse on the basis of that factor. The Court cannot agree. It is not inconceivable that a different view of the application might have been taken if the author of the Consideration memorandum had first concluded that the the sister and three children were in fact dependent family members. As that factor goes to the exercise of discretion it is appropriate that the application be remitted for full reconsideration in the light of this judgment.

23. There will, accordingly be an order of *certiorari* quashing the decision, so that the case can be reconsidered by the respondent. The Court would however, emphasise that in granting the relief sought, it is not holding that the Minister is precluded from taking account of a refugee's inability to support dependents in the State as a factor in the exercise of the discretion. As pointed out earlier in this judgment, the Minister's discretion under s. 18(4) can only be exercised in respect of "dependent members of the family". Accordingly, in making a determination on an application based on s. 18(4) the Minister must first come to a decision as to whether subjects of the application come within that definition as a matter of fact. To do so he must be satisfied that the subjects of the application come within the scope of the specific relationships listed and are either dependent upon the applicant or suffering from mental or physical disability. It is only when one of those criteria has been met that the exercise of the discretion can arise. The Minister is not, however, precluded in exercising discretion from taking into account factors such as the ability of the refugee to support and maintain the family members in question having regard to his own personal, medical and financial position.