Neutral Citation: [2014] IEHC 291

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 936 J.R.]

BETWEEN

M. O. I.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE ATTORNEY GENERAL AND THE HUMAN RIGHTS COMMISSION

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 30th day of May 2014

1. In these telescoped proceedings, the applicant seeks to quash a decision of the Refugee Appeals Tribunal. The applicant says he is a Nigerian national born on 91h July 1987. The basis of his asylum claim is his fear of death by reason of his father's association with a secret cult whose aim is to make its members wealthy by killing the children of its members. He claims that his sisters have been killed by the cult. He says that they both died in their sleep following screams and with blood coming from nose, ears and mouth. The applicant claimed that the secret cult killed his sisters "via a spiritual attack". At first instance and at appeal, the claim was rejected.

2. The proceedings were instituted by a notice of motion dated 7th July 2010, grounded on the affidavit of the applicant's solicitor filed in the Central Office of the High Court on 7th July 2010 within the 14-day period stipulated for the institution of the proceedings, by s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Mr. Cullen's affidavit exhibits the various documents but in breach of the provisions of O. 84, r. 20(2), RSC the facts relied upon in the statement grounding application for judicial review are not verified. I note that the statement grounding the application for judicial review does not set out any narrative as to the underlying claim or the manner in which the claim was processed by the protection decision makers. In accordance with the Rules of Court, it does indicate the applicant's name, address and description. On7tth April 2014, the applicant swore a verifying affidavit.

3. Counsel for the respondent says that the absence of an averment as to the facts relied upon in the grounding pleading means that the proceedings were not properly constituted and initiated within the time allowed by s. 5 of the 2000 Act by reference to the decision of the Supreme Court in *K.S.K Enterprises Ltd v. An Bord Pleanala* [1994] 2 I.R. 128. I accept that this submission is correct. However, applicants who fail to comply with the time limits may seek an extension of time but must provide good and sufficient reason for such extension. Counsel for the respondent argues that no discernible reasons have been advanced in support of an application for an extension of time, and in any event, the decision of Finlay Geoghegan J. in *Jolie v. Refugee Appeals Tribunal* suggests that an application to extend time should be grounded on affidavit as to the reasons for the delay and the justification for the extension of time. No such affidavit is before: the Court.

4. It is my view that the interests of justice would not be served by permitting a procedural point such as this to prevent an applicant from obtaining an order of *certiorari* of an asylum decision if such were justified. Therefore, before considering whether the Court's discretion should be exercised to extend time to permit the applicant to verify on affidavit the facts relied upon, I shall consider the merits of the application.

5. The applicant advanced five grounds in support of the contention that the decision was made unlawfully, but at the hearing of these proceedings, abandoned four of them and limited his case to an omnibus plea that "the respondent fails and refuses to apply the provisions of s. 3(1) of the European Convention on Human Rights Act 2003 to his decision".

6. This complaint is particularised by reference to the content of the notice of appeal which contains a section in the following terms:

> **"The European Convention on Human Rights**
> It is clear that the quality of justice and policing administered in Nigeria are, according to the country of origin reports, in breach of Articles 3 and 6 of the European Convention on Human Rights. Police corruption by folk cults is rife. It is submitted that the Applicant is entitled to protection against refoulement to Nigeria under Articles 2, 3, 5, 8 and 10 of the European Convention on Human Rights in light of the enclosed Country of Origin information. It is submitted that the Member is under an obligation, under *inter alia* Section. 3 of the European Convention of Human Rights Act 2003, and under Article 6 of the revised EU Treaty, to act in a manner compatible with the said Convention and in particular with the said Convention rights of the Applicant. The Applicant advises that, in circumstances of any refoulement, he faces a threat to his life, faces inhuman or degrading treatment, faces breaches of his right to intellectual liberty, and denial of his right to freedom of expression.
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> With regard to what amounts to inhuman or degrading treatment or punishment, we refer to the following passage from the decision (in relation to Article 3 of the European Convention on Human Rights (ECHR)) in the case of *Pretty v. The UK* [2002] 35 EHRR 1, where the court said as follows:
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> > 'As regards the types of 'treatment' which fall within the scope of Article 3 of the Convention, the Court's case-law refers to 'ill treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see *Ireland v. the United Kingdom*, cited above, p. 66, § 167; *V v. the United Kingdom [GC],* no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of

> Article 3 (see amongst recent authorities, *Price v. the United Kingdom*, no. 33394/96, §§ 24-30, ECHR 2001-VII, and *Valasinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII).'
>
> It is contended that enforced religious/cult belief or participation is such an intellectual humiliation.
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> It is sometimes argued that freedom of conscience - such as Atheism - may be exercised privately without expression. Any refoulement would consequently be in gross breach of Article 10 of the European Convention on Human Rights. (The possibility or validity of this concept of private language or private belief is arguably refuted by Wittgenstein Cf *Philosophical Investigations* paragraph 269ft)."

7. The argument which Counsel appears to make is that this section of the notice of appeal was not addressed in the decision of the Tribunal Member and, in particular, the Tribunal Member is required to address the provisions of the European Convention on Human Rights in an asylum decision.

8. The passage quoted from the notice of appeal addresses circumstances which apply when the Minister is considering whether or not to deport a person from the State. The passage has no bearing on the question of whether or not a person should be entitled to a declaration of refugee status. I reject the applicant's claims in this regard.

9. Counsel also argues that the obligation to address the provisions of the Convention arise from ss. 2, 3 and 4 of the European Convention on Human Rights Act 2003.

> Section 2 of that Act provides:
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> "2.-(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

10. It should be noted that section 1 of the ECHR Act 2003 provides the definitions to be used throughout the Act and expressly refers to an "organ of the State" as including "a tribunal or any other body (other than...a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised." As such, the definition clearly indicates that the Refugee Appeals Tribunal comes within the provisions of s. 3 of the ECHR Act 2003 which is referable to an "organ of the State" rather than s. 2. It is clear that s. 2 applies specifically to "a court" which does not include the Refugee Appeals Tribunal for the purposes of the section and the applicant's claims in this regard must fail.

11. I reject the argument that s. 2 of the European Convention on Human Rights Act 2003 requires the Tribunal Member to apply or consider the provisions of the European Convention on Human Rights in deciding on an asylum claim. Self evidently, the section is directed to the duties of a Court to interpret and apply the law of the State in a manner compatible with the State's obligations under the Convention.

12. Section 3 of the Act provides:

> "3.-(1) Subject to any statutory provision ... every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

13. The terms of s. 3(1) of the ECHR Act 2003 are addressed to "every organ of the State" and following the definition outlined above includes "a tribunal or any other body (other than...a court)" which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised" which clearly encompasses the Refugee Appeals Tribunal. As such, subject to any statutory prov1s10n or rule of law, the Tribunal shall perform its functions in a manner compatible with the State's obligations under the Convention provisions. In this regard, "functions" includes powers and duties and references to the performance of functions includes references to the exercise of the powers and the performance of the duties. Thus, it is evident that the Refugee Appeals Tribunal comes within the ambit of s. 3 of the ECHR Act 2003.

14. The sole function of the Tribunal is to consider appeals and either affirm the recommendation of the Office of the Refugee Applications Commissioner or recommend that an applicant should be declared to be a refugee. In short form, the function of the Tribunal is to determine whether an applicant is a refugee within the meaning of s. 2 of the Refugee Act 1996. It is clear that in carrying out this function, the Tribunal, as an organ of state, is obliged to do so in a manner compatible with the State's obligations under the ECHR. However, it is eminently clear that only certain rights under the ECHR are relevant to the performance of the functions of the Tribunal.

15. Counsel refers to the decision of the Supreme Court in *Bode (A Minor) v. Minister for Justice, Equality and Law Reform* [2008] 3. I.R. 663 which found that rights under the Constitution and Convention had to be considered by the Minister when making decisions under s. 3 Immigration Act 1999. In light of this, counsel submits that the good administration of justice would not allow of a fractured approach to the application of legislation. In this regard, it is submitted that if the Supreme Court found that s. 3 of the ECHR Act 2003 is applicable to decisions made under the Immigration Act 1999, it must equally be applicable to decisions made under the Refugee Act 1996. It is contended that any other approach to the interpretation of the ECHR Act 2003 is damaging to the rule of law.

16. It is useful at this juncture to set out the actual finding of Denham J. from *Bode (A Minor) v. Minister for Justice, Equality and Law Reform* [2007] IESC 62 in this regard:

> "76. The basic premise of the applicants, and of the High Court, that the constitutional and convention rights of the applicants were in issue in the IBC 05 scheme, was misconceived. Thus much of the pleadings, judgment and submissions related to matters not in issue.
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> 77. The High Court found that the second applicant had not complied with the requirements of the scheme. However, it then fell into error in its analysis of the IBC 05 scheme.
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> 78. I am satisfied that the scheme was an exercise of executive power by the Minister. It did not purport to address, nor did it address, constitutional or convention rights. It was a scheme with clear criteria. On the face of the documents the criteria were applied to the second applicant, and he failed to meet the criteria.

79. As the IBC 05 scheme did not address constitutional or convention rights, applicants who were not successful were left in exactly the same position as they had been prior to their application. There was no interference with any constitutional or convention rights. Consequently, it was an error on behalf of the High Court to consider the application of the scheme as an arena for decision making on constitutional or convention rights, whether they be as considered by the High Court: (1) the rights of the child under Articles 40.3 and 41 of the Constitution; (2) rights under article 8 of the European Convention on Human Rights; or (3) rights under article 14 of the Convention or other rights. It follows, also, that in establishing the criteria for judicial review, the High Court took too expansive an approach. Neither constitutional nor convention rights were in issue, at issue was whether or not the Minister acted within the stated parameters of the executive scheme.

80. Insofar as the issue of rights under the Constitution and the Convention were considered and decisions made on these issues, it was a premature analysis by the High Court. Issues as to the constitutional and convention rights of the applicants have yet to be considered by the Minister. Insofar as the review extended into this arena it was in error.

81. This conclusion as to the Minister's decision is sufficient to determine the appeal. However, I consider it would be of assistance to refer to the arena where constitutional or convention rights may be considered.

Section 3 of the Immigration Act 1999 - deportation order
82. The fact that the applicant failed on his IBC 05 scheme application does not mean that constitutional or convention rights will not be considered. The IBC 05 scheme is entirely separate from the Minister's function under the Immigration Act 1999, as amended, where a decision may be made as to whether or not a deportation order should be made in respect of a foreign national.

83. In making a deportation order the Minister must comply with s. 3 of the Immigration Act 1999, as amended. The Minister is required to have regard to a wide range of matters in s. 3(6) of the Immigration Act 1999. This section states:-

> "In determining whether to make a deportation order in relation to a person, the Minister shall have regard to -
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> (a) the age of the person;
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> (b) the duration of residence in the State of the person; (c) the family and domestic circumstances of the person;
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> (d) the nature of the person's connection with the State, if any;
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> (e) the employment (including self employment) record of the person;
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> (f) the employment (including self employment) prospects of the person;
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> (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
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> (h) humanitarian considerations;
>
> (i) any representations duly made by or on behalf of the person;
>
> (j) the common good; and
>
> (k) considerations of national security and public policy, so far as they appear or are known to the Minister."

84. Thus, bearing in mind the case law of this court, the Minister is required to consider in this context constitutional and convention rights of the applicants. This statutory process provides a forum for consideration of the relevant rights. The s. 3 process is sufficiently wide ranging for the Minister to exercise his duty to consider constitutional or convention rights of the applicants. This has yet to be done in this case as the pre-existing deportation order has been quashed on consent."

17. While the *Bode* case referred to the application of an administrative scheme by the Minister, the comments of Denham J. are equally applicable to the function of the Refugee Appeals Tribunal in hearing an appeal of a refusal to recommend refugee status. In my view, the applicant's claims in this case are similarly misconceived. It is evident that a claim for refugee status has a distinct procedure with a clear set of criteria. To qualify as a refugee, a person must come within a specific definition within the terms of the Refugee Act 1996. As such, a decision on an appeal to the relevant to the assessment of refugee status. Rather, the granting or refusal of refugee status is a statutory power provided under the Refugee Act 1996. As a claim for refugee status does not address constitutional or convention rights, applicants who are not successful are left in exactly the same position as they had been prior to their application. No question of deportation or refoulement arises at this stage. There is no interference with any constitutional or ECHR rights as a result of a refusal to recommend refugee status.

18. This is not to say that both Constitutional and Convention rights and principles are not applicable to a decision of the Refugee Appeals Tribunal and must not be followed. It is clear that an applicant could raise a claim for breach of fair procedures and constitutional justice and I or the right to a fair trial pursuant to Art. 6 ECHR where there is a perceived legal or procedural flaw in the manner in which the Tribunal hearing was conducted, for example. However, while the rights available under the constitution and the convention are applicable to the manner in which the Tribunal carries out its functions, they simply do not arise in terms of making an assessment on refugee status. It is clear that pursuant to the provisions of Reg. 9 of the EC (Eligibility for Protection) Regulations 2006 a Tribunal Member may be guided in his or her assessment of the gravity of any claimed acts of persecution by reference to the violation of basic human rights and in particular those rights from which derogation cannot be made under Art. 15(2) of the Convention. However, this is not to be confused with some form of general assessment by a Tribunal Member of an applicant's constitutional and convention rights as the basis for a claim for refugee status. In my view, such a claim by the applicant is misconceived. In this case the cannot be said that he failed to have regard to them in reaching his conclusions.

19. The dicta of Denham J. in *Bode* with regard to the assessment of an applicant's constitutional and convention rights when the

Minister is considering the making of a deportation order is instructive as it highlights the different function which the Minister is performing in carrying out that task. It is clear that in that scenario the assessment of such rights is required as it is evident that a significant alteration occurs in an applicant's position when a deportation order is issued against them. Further, taking into account the criteria to which the Minister is required to have regard to in s. 3(6) of the Immigration Act 1999 and the refoulement provisions in the Refugee Act 1996, it is clear that the constitutional and convention rights of an applicant are in issue when the Minister is considering the making of a deportation order.

20. Even if it was accepted (which it is not) that the Tribunal Member was required to examine Convention rights in the making of his decision on refugee status and that he breached such a requirement, it is not evident as to what remedy would avail the applicant in these proceedings. In this case the applicant seeks *certiorari* of the decision of the Tribunal Member grounded on the failure and refusal of the Tribunal to apply the provisions of s. 3(1) of the ECHR Act 2003 to his decision.

21. In these circumstances, I reject the argument that the Refugee Appeals Tribunal is required, by virtue of s. 3 of the European Convention on Human Rights Act 2003, to consider the provisions of the European Convention in determining an asylum application.

22. Section 4 of the Act provides:

> "4.- Judicial notice shall be taken of the Convention provisions and of-
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> (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,
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> (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
>
> (c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,
>
> and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

In my view, this section is addressed to the obligations of a Court and creates no obligation in respect of the functions of the Refugee Appeals Tribunal and I reject this argument.

23. Counsel has also sought to argue that because of the manner in which the jurisprudence of, European Court on Human Rights has come to be relevant when considering the proper application of Community law, these circumstances create an obligation on the Refugee Appeals Tribunal to consider the provisions of the European Court on Human Rights because of the provisions of the Qualification Directive and the Procedures Directive governing the processing of applications for asylum in the European Union.

24. The Charter of Fundamental Rights and the provisions of Article 6 of the Treaty on the Functioning of the European Union certainly have application where Community law is applied. No provision of Community law requires protection decision makers to apply the provisions of the European Court on Human Rights when taking protection decisions, save that the Charter equivalent of Article 6 on a right to an adequate remedy readily applies to the procedures whereby protection decisions are taken. A full panoply of rights to a fair hearing, due process, right to be heard, right to examine witnesses, right to reasons for decisions and all other associated rights uncontroversially apply to the decision making process in this area. But nothing the applicant has argued persuades me that merely because the existence of the Procedures and Qualification Directive as instruments of Community law, that this somehow triggers a requirement on a decision maker to consider the Articles of the Convention and whether the conduct sought thereby to be outlawed should be somehow assessed to see whether the conduct complained of in the claim constitutes such category of conduct.

25. I refuse the applicant leave to seek judicial review.