Neutral Citation Number: [2008] IEHC 431

THE HIGH COURT

2008 1136 JR

BETWEEN

J. A.

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
ATTORNEY GENERAL AND IRELAND

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 18th day of December, 2008

1. The applicant is seeking leave to apply for judicial review of five decisions relating to him:-

> a. The decision of the Office of the Refugee Applications Commissioner (ORAC) to make a negative recommendation in respect of him;
>
> b. The decision of the Minister for Justice, Equality and Law Reform ("the Minister") not to grant a declaration of refugee status to him;
>
> c. The decision of the Minister not to grant subsidiary protection to him;
>
> d. The decision of the Minister to make a deportation order in respect of him;
>
> e. The decision of the Minister not to exercise his discretion to revoke that deportation order under section 3(11) of the Immigration Act 1999.

2. At the start of the leave hearing in the present case, counsel for the respondents indicated that she wished to make a preliminary objection to the consideration of the leave applications in respect of each of the five decisions on the basis of the delay in commencing the within proceedings.

(i) Extension of Time

3. The applicant commenced the within proceedings on 13th October, 2008. He is therefore outside of the 14-day time limit allowed by section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, in respect of each of the following decisions:-

> a. By 15 months in respect of the ORAC decision – that decision was notified to the applicant on 4th July, 2007;
>
> b. By 13 months in respect of the Minister's decision not to grant a declaration – that decision was notified to him on 27th July, 2007; and
>
> c. By 2 months in respect of the decision to make a deportation order– that decision was notified to him on 1st August, 2008.

4. The respondents submit that no reasonable explanation has been proffered by the applicant in respect of the delay. In his grounding affidavit, the applicant states as follows at para. 6:-

> "I say that I am ignorant of legal matters, and my understanding of the process which I was going through is very limited. I say that I was advised by my then legal representative that an appeal should be made to the Refugee Appeals Tribunal. I say and believe that I was asked further details about my asylum claim, and that an appeal form was being submitted."

5. At paragraph 15, he states that "now is the first time I have procured the representation which allows me to bring these proceedings."

6. The respondent argues that the excused proffered was wholly insufficient. It is submitted that the applicant was legally represented at all material times, albeit by a number of different legal representatives, and could therefore reasonably have been expected to institute proceedings in each instance within the 14-day period. Reliance is placed on *Azubugu v. The Refugee Appeals Tribunal* (Unreported, High Court, Peart J., 27th July, 2007), where Peart J. noted the factors listed by Finnegan J. in *G.K. v. The Minister for Justice, Equality and Law Reform* [2001] 1 ILRM 401 (i.e. the period of delay, the reason for the delay, the *prima facie* strength of the applicant's case, and other personal circumstances affecting the applicant),and the factors listed by Clarke J. in similar circumstances in *Kelly v. Leitrim County Council* [2005] 2 I.R. 404 (i.e. the time prescribed in the relevant statute, whether any third party rights were affected, the legislative policy, blameworthiness of the applicant, the nature of the rights involved, and the merits of the applicant's case), and stated as follows:-

> "To these in my view could be added the question of whether during the permitted time the applicant had either made a decision to commence proceedings, or could reasonably be expected to have been able to decide to commence such proceedings. […] Finally, it may be necessary to consider whether the applicant had legal advice available to her during the 14-day period, should she have wished to seek it."

7. The respondent submits that the final factors are particularly relevant herein.

8. Reliance is also placed on *Bugovski v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 78. In that case, Gilligan J. refused to grant an extension of time on the basis that there was no oversight on the part of the lawyers who were acting for the applicant at the material time.

(ii) Failure to move promptly

9. The Minister's decision not to grant subsidiary protection to the applicant was notified to him on 25th June, 2008. The decision not to revoke the deportation order was notified to him on 24th September, 2008. The applicant commenced the within proceedings on 13th October, 2008. The respondents submit that that applicant has failed to move promptly within the period set out in O. 84, r. 21 of the Rules of the Superior Courts 1986, and that no consideration should be given to those challenges on that basis.

The Court's Assessment
10. In the context of an application for an extension of time to bring a leave application in *O'Connor v. Private Residential Tenancies Board* [2008] IEHC 205, this Court held as follows:-

> "The obligation of the Court to enforce time limits is based upon the need to have some finality in those proceedings which may be the subject of judicial review. It is very important that the courts do not readily grant such extension when the issue is raised at the hearing. What reasons are advanced here to explain the delay and/or to justify it?"

11. Insofar as the only inference that can be drawn from the applicant's affidavit is that the reason that he is advancing in explanation for the inordinate periods of delay in the present case relates to the failure of his legal representatives to make the appeal on his behalf or to advise him adequately or at all, it must be recalled that in *C.S. v. The Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 343, McGuinness J. held as follows (p.363):-

> "This court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself."

12. Of further relevance are the following observations of MacMenamin J. *in Akujobi v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 19:-

> "It is not a satisfactory explanation to place blame baldly on the applicant's previous advisors. No other evidence to this effect has been adduced other than assertion. No affidavit has been filed from the applicant's previous advisors, the Refugee Legal Service."

13. In the view of this Court, it is a gross injustice to indict a firm of lawyers in open court without those lawyers being put on notice of the proceedings and give an opportunity to respond to that submission. To act in such a way is unfair as a matter of basic principles. If an applicant intends to put forward as an explanation for his delay the incompetence or inefficiency of his legal representatives, he must afford those representatives the opportunity to swear an affidavit on the subject. In the absence of any such affidavit in the present case, and in the absence of any evidence that the legal representatives whose conduct the applicant seeks to impugn were put on notice of those allegations and given an opportunity to answer them, I consider the explanation proffered by the applicant to be inadmissible.

14. No further reason has been proffered by the applicant for the delay. In the circumstances, I must infer that there is no reason for the delay, and most certainly no good or sufficient reason, and I therefore refuse to grant any extension of time.

15. With respect to the respondent's contention that the applicant failed to move promptly in respect of two of the decisions, it must be noted that as the relief sought is *certiorari*, the relevant period prescribed by O. 84, r. 21 RSC is six months and the applicant was not strictly, therefore, out of time in respect of either of those decisions. That notwithstanding, it is well established that the time limits set out in O. 84, r. 21 are outer limits and the requirement to act "promptly" within those outer limits is not to be disregarded. This Court noted in *F.U. & Ors v. The Minister* (Unreported, High Court, Hedigan J., 11th December, 2008) that such a failure to act "promptly" may be accorded due weight in appropriate cases. In *O.S.T. v. The Minister* (Unreported, High Court, Hedigan J., 12th December, 2008), this Court noted that the Supreme Court has held that although judicial review is an important legal remedy, that there is no absolute right to its use and there are limitations to its application. In that case, the applicant had allowed a period of two and a half months to elapse before issuing proceedings in respect of a subsidiary protection decision. Having considered the circumstances of the case, the court was not satisfied that the applicant had moved promptly and therefore refused leave to apply for judicial review of the decision.

16. The same considerations apply in the present case, in the view of the court. This is a case that has been characterised by delay from the outset. The court acknowledges that the period of time that elapsed between the notification to the applicant of the s. 3(11) decision and the issue of the within proceedings might not be considered inordinate in ordinary circumstances. The court is of the view, however, that that period of delay must be considered in the light of the previous inordinate and inexcusable periods of delay. In those exceptional circumstances, I must refuse to consider the leave applications in respect of the subsidiary protection decision and the s. 3(11) decision.