Neutral Citation Number: [2008] IEHC 384

THE HIGH COURT

2008 1022 JR

BETWEEN

O. S. T.

APPLICANT

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

RESPONDENTS

Judgment of Mr Justice Hedigan, delivered on the 12th day of December, 2008.

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

> (i) The decision of the Refugee Appeals Tribunal (RAT) to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that he should not be granted a declaration of refugee status;
>
> (ii) The decision of the Minister for Justice, Equality and Law Reform ("the Minister") not to grant subsidiary protection to him; and
>
> (iii) The decision of the Minister to make a deportation order in respect of him.

Background

2. The applicant is a national of Nigeria, a member of the Yoruba tribe and a Christian. He applied for asylum upon arrival in the State on 29th December, 2006. Until then, he had lived in Oyo State. He had qualified as a civil engineer and had worked in the construction business and as a parish pastor. The account of events given by him in respect of his asylum application was as follows. His father was a staunch member of the secret Ogboni fraternity; after he died in December, 2006, the fraternity sought to take control of the corpse and subject it to various rituals. When the applicant opposed those practices, he was incarcerated. He was released seven days later, after his father's burial. He claims to have been threatened with death if he did not join the fraternity and take over his father's role. He moved his family to Kano State; he joined them there briefly but then fled, leaving them behind.

3. ORAC issued a negative recommendation in respect of the applicant in January, 2007, making a number of adverse credibility findings. That decision was upheld on appeal by the RAT in May, 2007. The Minister informed the applicant in June, 2007 that he was proposing to make a deportation order, and invited him to make representations seeking leave to temporarily remain in the State and/or to apply for subsidiary protection. By letter dated 18th July, 2007, an application for leave to remain was made on his behalf, as was an application for subsidiary protection.

4. The applicant was notified by letter dated 25th June, 2008 that his application for subsidiary protection had failed, and that the Minister was considering whether or not he should be deported. He did not reply to that letter and made no attempt to update the representations made in support of his application for leave to remain. By a further letter dated 26th August, 2008, he was notified that a deportation order had been made in respect of him.

I. PRELIMINARY CONSIDERATIONS

5. Two preliminary matters arise for consideration: first, the applicant requires an extension of time in respect of his challenge to the RAT decision and secondly, the respondents have complained that the applicant did not move promptly to issue proceedings challenging the subsidiary protection decision.

Extension of Time: RAT Decision

6. The RAT decision was notified to the applicant by letter dated 23rd May, 2007. The within proceedings were not issued until 5th September, 2008 and so, the applicants were more than 15 months outside of the 14 days allowed under 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 for the bringing of the within leave application. Counsel for the applicant has sought to explain the delay by reference to what he describes as the traumatic experiences preceding the applicant's flight from Nigeria; no further explanation has been proffered.

7. The respondents submit that the applicant has failed to put forward a reasonable explanation for the delay. It is argued that the applicant did not take any action in respect of the RAT decision until a deportation order was made in respect of him, notwithstanding that he was legally represented at all relevant times.

8. The period of delay incurred by the applicant is some 32 times longer than the period envisaged by statute. There is no doubt in my mind that the delay is inordinate, bearing in mind that the applicant was legally represented at all material times. The purpose of the short time frame set out in section 5 of the Act of 2000 is to ensure that the relevant decision-makers can operate an efficient system for the delivery of decisions. That such a system is capable of functioning unhindered by excessive delays is clearly in the public interest. As was noted in *Rusu v The Refugee Applications Commissioner* (unreported, Hanna J., High Court, 26th May, 2006):-

> "The provisions of [the Act of 2000] as a whole and this subsection of it in particular represent the clear will of the Oireachtas in facilitating the efficient administration and functioning of the asylum system. Importantly, it bears the imprimatur of the Supreme Court: see In *re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360. The fourteen day period enshrined, as it is in statute, cannot be regarded with anything other than the utmost seriousness. It cannot lightly be assumed that a court will gently extend the hand of help and extend the time for the asking."

9. In cases such as the present, where there has been such an inordinate delay in the issue of proceedings, an extension of time may be given, in my view, only where reasonable, clear and creditable reasons of some weight are proffered to as to explain the delay. In my view, the applicant has failed to advance any such reasons. In his grounding affidavit he makes no attempt to explain the delay; he simply states that he has wished to challenge the RAT decision since being notified thereof. The only evidence that is before the Court in support of that assertion is a handwritten note that the applicant claims to have sent to his then legal representative, proposing reasons for challenging the RAT decision. That note is not dated and there is no evidence that it was ever sent to the RLS; indeed, the absence of an affidavit sworn by the member of the RLS to whom the applicant says he sent the note is conspicuous. In

the circumstances, I am not satisfied that there is good and sufficient reason to extend time, and will not do so.

Failure to move Promptly
10. The respondents complain that the applicant has failed to move promptly within the time allowed by Order 84, rule 21 RSC, which applies to the making of a leave application in respect of the decision to refuse subsidiary protection. That decision was notified to the applicant by letter dated 25th June, 2008. The applicant therefore allowed a period of two and a half months to elapse before issuing proceedings on 5th September, 2008. As the relief sought is *certiorari*, the relevant period for the making of a leave application is six months; the applicant was not, therefore, out of time. It is well established, however, that the six month period is an outer limit only; applicants have a further obligation to move "promptly" within that six month period. The respondents contend that in the light of the applicant's submission that he was desperate to challenge the RAT decision, he ought to have moved more promptly than he did in issuing proceedings to challenge the subsidiary protection decision, particularly given that the Minister had informed him, when notifying him of the failure of his subsidiary protection application, that he was now giving consideration to the making of a deportation order.

11. As I noted in *F.U. & Ors v The Minister for Justice, Equality and Law Reform & Ors* (unreported, Hedigan J., High Court, 11th December, 2008), the requirement to move promptly in compliance with Order 84, rule 21 RSC is not to be disregarded and a failure to do so may be given due weight in the appropriate case. Although judicial review is an important legal remedy, there is no absolute right to its use and there are limitations to its application (Denham J., *De Róiste v The Minister for Defence & Ors* [2001] 1 IR 190, at p.204). I am not satisfied that the applicant moved promptly and I will therefore refuse leave to apply for review of the subsidiary protection decision.

12. This application proceeds, therefore, with respect only to the decision to make a deportation order. That being so, it is helpful to further outline the context and nature of the decision.

II. THE MINISTER'S DECISION TO MAKE A DEPORTATION ORDER
13. The leave to remain representations made by the Refugee Legal Service on behalf of the applicant by letter dated 18th July, 2007 address certain of the matters set out in section 3(6) of the Immigration Act 1999, as amended, namely *(a)* age; *(c)* family and domestic circumstances; *(d)* duration of residence in the State; *(e)* employment record; *(f)* employment prospects; *(g)* character and conduct within and outside the State; and *(i)* representations made by or on behalf the applicant. It was also submitted that the applicant would face a risk to his life or liberty if returned, in breach of section 5 of the Refugee Act 1996, as amended, and Article 3 of the European Convention on Human Rights. Seven reference letters were appended, as was a country of origin information report.

14. In the departmental analysis of the applicant's file, dated 25th May, 2008 and approved on 31st July, 2008, it was found that refoulement was not an issue and that no issues arose under section 4 of the Criminal Justice (UNCAT) Act 2000, as amended. Under the heading "Section 3(6) of the Immigration Act 1999, as amended", sub-headings were expressly dedicated to sub-sections *(h)* and *(i)*. It was noted that the humanitarian considerations - (h) - were not such that the officer would conclude that he should be returned. The summary of the representations made on behalf of the applicant - (i) - merits citation in full:-

> "The Refugee Legal Service submitted, inter alia, that [the applicant] is enterprising and diligent and would be grateful for the opportunity to work in any capacity. He qualified as Civil Engineer. He is also a Pentecostal preacher. He has completed an Intermediate Total Station course and a Health and Safety course. The Refugee Legal Service submitted that to return the applicant to Nigeria would be in breach of Article 3 of the ECHR.
>
> [The applicant] submitted, inter alia, that he does not wish to return to Nigeria. He reiterated his fears regarding the [Ogboni] Society members and asserted that he would be profitable to the State because of his professional background.
>
> Please note also that the above representations received included references / petitions. Section 3(6)(g) refers."

15. Consideration was also give to Article 8 of the European Convention on Human Rights. Under the sub-heading "*Private Life*", the analysing officer stated that the deportation "may constitute an interference" with the applicant's right to respect for his private life, with respect to the work, educational and social ties that he had formed in the State and with respect to his personal development. The officer went on to state, however, that it was not accepted that the interference would have "consequences of such gravity as potentially to engage the operation of Article 8" and that as a result, the deportation would not constitute a breach of that right. Under the sub-heading "*Family Life*", the officer found that the applicant has no family connections in the State, and that his deportation would not therefore constitute an interference with his right to respect for his family life.

III. THE SUBMISSIONS
16. The applicant is seeking an order of certiorari quashing the decision of the Minister to make a deportation order in respect of him. His primary complaints with respect to the decision to make the deportation order centre on:-

> *(i) Consideration given to the matters set out in section 3(6);*
>
> *(ii) Delay between receipt of the representations and making of the decision; and*
>
> *(iii) Failure to adequately assess the interference with the applicant's private life.*

(i) Section 3(6) Analysis
17. The applicant contends that the Minister failed to expressly consider the matters set out in sub-sections (a), (b), (c), (d), (e), (f), (j) and (k) of section 3(6) of the Immigration Act 1999, as amended. It is submitted that there is a positive obligation upon the Minister to demonstrate that he has taken those matters into account. It is argued that the relevance of the matters set out in those sub-sections is immaterial; the complaint is that no account whatsoever was taken thereof.

18. The respondent contends that account must be taken of the letter, dated 26th August, 2008, by which the deportation orders were notified to the applicant, wherein it was expressly stated that the Minister "had regard to the factors set out in section 3(6) of the Immigration Act 1999 (as amended), including the representations received". Moreover, it is argued that the matters to which the sub-sections apply were of no relevance in the present case and it is contended that what is to be considered – and the way it is to be considered – depends on the facts of the case.

(ii) Delay

19. The applicant contends that the Minister acted in breach of natural and constitutional justice by delaying for a period of 13 months between the making of representations seeking leave to remain, on 18th July, 2008, and the making of the deportation order, on 26th August, 2008. Reliance is placed, in this regard, on *Abdukhareem v The Minister for Justice, Equality and Law Reform* (unreported, Gilligan J., High Court, 7th July, 2006), and the judgment of the House of Lords in *EB (Kosovo)(FC) v Secretary of State for the Home Department* [2008] 3 WLR 178.

(iii) Assessment of Interference with Private Life
20. It is contended that the Minister's failure to make any further assessment of that interference or the proportionality thereof constitutes a breach of natural and constitutional justice, rendering the decision to make a deportation order in respect of the applicant ultra vires and unsustainable in law.

21. The respondents submit that appropriate consideration was given by the analysing officer to the applicant's Article 8 rights. Reliance is placed on *Agbonlahor (a minor) v The Minister for Justice, Equality and Law Reform* [2007] IEHC 166.

V. THE COURT'S ASSESSMENT
22. The decision to make a deportation order is one to which section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies. The applicant must therefore show substantial grounds for the contention that the decision should be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

(i) Section 3(6) Analysis
23. In *Kouaype v The Minister for Justice Equality and Law Reform & Anor* [2005] IEHC 380, Clarke J. held, at paragraph 3.3, that in general terms there are two statutory prerequisites to the making of a deportation order:-

> "(1) The Minister is required to be satisfied that none of the conditions set out in s. 5 of the [Refugee Act 1996] are present; and
>
> (2) The Minister is also required to consider the humanitarian and other factors set out in s. 3(6) of the [Immigration Act 1999] insofar as they are known to him. […]"

24. Referring to the second prerequisite, Clarke J. held as follows (at para. 4.16):-

> "It is clear … that the only obligation that arises in those circumstances is to afford the person concerned an opportunity to make submissions and, provided that the submissions are made in accordance with the Act, to consider them or, if no submissions be made, to consider the matters set out in s. 3(6) "so far as they appear or are known to the Minister". The weighing of the various matters which might legitimately be taken into account under the section and which have been loosely described as "humanitarian grounds" is … entirely a matter for the Minister. In the absence of evidence that the Minister did not give the person concerned an opportunity to make submissions in accordance with the statute or did not consider those submissions, it does not seem to me that that aspect of the Minister's decision is reviewable by the courts."

25. At paragraph 4.17, he continued as follows:-

> "[…] given the very wide discretion conferred on the Minister in weighing the factors specified in s. 3(6) of the 1999 Act a challenge to the Minister's decision on that aspect of the process on the ground of irrationality would also be fraught with difficulty."

26. The view of this Court is that it is not incumbent on the Minister to refer to each and every matter that he has taken into consideration. To impose such a requirement would be to enforce a classic formalism which does not, in my view, enhance the quality of a decision; rather, it would encourage the adoption of a mechanistic approach comparable to the ritualistic ticking of boxes. Such an approach would serve only to reduce the depth of analysis given to relevant matters. It is true that no individual sub-headings relating to the matters set out in section 3(6)(a), (b), (c), (d), (e), (f), (j) and (k) were set out in the departmental analysis of the applicant's file that is before the Court. In my view, however, the departmental analysis contains a fair and reasonable consideration of humanitarian and other factors set out in section 3(6); each of the representations made on behalf of the applicant was more than adequately considered.

27. Moreover, it must be recalled that the facts and circumstances advanced in respect of the application for leave to remain were, in substance, the same as those advanced in support of the applications for leave to remain and for subsidiary protection; those facts and circumstances had, therefore, been adjudicated upon at three previous stages by ORAC, the RAT and the Minister. It is now well established that in the circumstances, the Minister was entitled to rely on the analysis carried out previously in respect of those facts and circumstances, and his role with respect to their analysis was, of necessity, limited (see, among others, *Kouaype* (cited above); *Dada v The Minister for Justice, Equality and Law Reform* [2006] IEHC 140; *P.I. & Ors v The Minister for Justice, Equality and Law Reform* [2008] IEHC 23; *Fr N & Ors v The Minister for Justice Equality and Law Reform* [2008] IEHC 107; *Olaitan v The Minister for Justice, Equality and Law Reform* [2008] IEHC 190).

(ii) Delay
28. There has, undoubtedly, been a period of delay on the part of the Minister in the present case. Having set out above the public policy considerations that underlie the efficient processing of applications such as the present, it is clear that any such period of delay is undesirable, whether incurred by an applicant or by a decision-maker. It is clearly preferable that decisions be reached within a shorter time-frame. That notwithstanding, the only frailty that can arise in a case such as the present with respect to a decision that is reached after such a period of delay is where the representations made in support of the application become outdated, such that the consideration given to those representations is not current and the applicant is prejudiced as a result. No such prejudice was pleaded in the present case, nor was it submitted that there had been any changes in the applicant's circumstances in the intervening period which may have had an impact on the analysis of his file or on the Minister's decision to make a deportation order. The applicant could have updated the representations made in support of his application for leave to remain after he was notified that he had been refused subsidiary protection and that the Minister was proposing to make a deportation order in respect of him, but he did not do so.

(iii) Assessment of Interference with Private Life
29. The applicant's complaint with respect to the adequacy of the assessment given to his right to respect for his private life is, in my view, manifestly ill-founded. In the House of Lords' judgment in *R (Razgar) v The Secretary of State for the Home Department* [2004] 2 AC 368, Lord Bingham (at p.389) identified five questions that should be addressed when considering Article 8 rights; those

questions were cited with approval by Feeney J. in *Agbonlahor (a minor) v The Minister for Justice, Equality and Law Reform* [2007] IEHC 166, at paragraph 3.5. The first two of those five questions are:-

> (1) Will the proposed removal be of an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

30. Lord Bingham stated (at p.389) as follows:-

> "Question (2) reflects the consistent case law of the Strasbourg Court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention."

31. Questions (1) and (2) were expressly addressed by the analysing officer in the present case; she concluded that question (2) was to be answered in the negative. In my view, it was perfectly open to her to reach that conclusion based on the evidence that was before her: the applicant made out no special case in his representations seeking leave to remain with respect to the potential interference with his private life in this State to which deportation would give rise. In the circumstances, it was unnecessary for the analysing officer to continue on to the third question, and her consideration of the applicant's right to respect for his private life was wholly sufficient.

Conclusion

32. In the light of the foregoing, I am not satisfied that substantial grounds have been established and I therefore refuse to grant leave.