Neutral Citation Number: [2010] IEHC 126

THE HIGH COURT

JUDICIAL REVIEW

2009 739 JR

BETWEEN

K. A.

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER

AND THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered on the 28th day of April, 2010.

The applicant in this application filed a Motion on Notice seeking leave to apply for judicial review, 23 days outside the 14 day time limit imposed by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. No affidavit seeking to explain and excuse this delay has been filed by the applicant.

In delivering the judgment of the Supreme Court in *G.K. and Others v. The Minister for Equality, Justice and Law Reform and Ors* [2002] 2 I.R. 418, Hardiman J. for the court, described the requirement in s. 5(2)(a), that this Court must consider that there is good and sufficient reason for extending the time, as a *sui generis* special statutory jurisdiction. At p. 423 of the report in that case, the learned judge continued as follows:-

> "I believe that the use of the phrase 'good and sufficient reason for extending the period' still more, clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable it may be in the particular circumstances. The statute does not say that the time may be extended if there were 'good and sufficient reason for the failure to make the application within the period of fourteen days'. A provision in that form would indeed have focused exclusively on the reason for the delay, and not on the underlying merits. The phrase actually used 'good and sufficient reason for extending the period' does not appear to me to limit the factors to be considered in any way and thus in principle to include the merits of the case.
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> On the hearing of an application such as this, it is, of course, impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

Having regard to what was held by Clarke J. in *Moyosola v. The Refugee Applications Commissioner and Ors.* [2005] I.E.H.C. 218, even if what was there held was perhaps obiter, in an appropriate case there would seem to be substantial grounds for contending that the exercise of the powers contained in s. 13(5) and s. 13(6) of the Refugee Act 1996, (as amended), would be inconsistent with the principles of constitutional justice where a negative recommendation of the Refugee Applications Commissioner is based solely upon a finding of lack of credibility as respects the applicant.

In *Moyosola v. The Refugee Applications Commissioner and Ors* (above cited) Clarke J. (at p. 12) held as follows:-

> ". . . . I therefore express no view on the question as to whether the procedures now mandated by s. 13 (as amended) would be inconsistent with the principles of constitutional justice in a case where the report of the RAC made no finding in respect of any of the matters specified in s. 13(6) so that the applicant concerned would have the opportunity to have a full oral hearing before the RAT at a time subsequent to the receipt by them of all of relevant materials which were likely to be relied on at such a hearing. Nor does it necessarily follow from the view which I have expressed above that the relevant procedures would be inconsistent with the principles of constitutional justice in cases where the view taken by the RAC so as to bring the application within the ambit of s. 13(6) was not one based upon the credibility of the applicant but rather was based on, for example, a finding under s. 13(6)(d) that the applicant had lodged a prior application in a Geneva Convention country or that the factual grounds put forward by the applicant concerned were not such that even if accepted same would give rise to a finding consistent with the granting of refugee status. In many such cases the applicant might not be said to be at any impermissibly distinct disadvantage in not having the opportunity to have an oral hearing. Neither might, in all such cases, all of the materials before the RAC be relevant to its determination.
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> For the purposes of this case it is only necessary for me to find, as I do, that where a report of the RAC contains a finding in relation to one of the matters specified in s. 13(6) so as to deprive the applicant concerned of an oral appeal in circumstances where that finding is at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned, it is necessary, in accordance with the principles of constitutional justice, that prior to the making of any such recommendation including any such finding the RAC will have afforded the applicant concerned the opportunity to deal with any matters which might influence such adverse credibility finding."

At para. 4 of the s. 13(1) Report in the instant case the first named respondent concluded as follows:-

> "Having regard to the above, s. 13(6)(c) of the Refugee Act 1996, (as amended) applies to this application . . . . The

> applicant without reasonable cause, failed to make application as soon as reasonably practicable after arrival in the State."

However, Counsel for the respondents submitted that in the instant case a finding of lack of credibility did not form the basis of the negative recommendation to the third named respondent by the first named respondent.

Despite the lack of any documentation, the first named respondent accepted, for the purpose of the s. 13(1) Report, that the applicant was a Bangladeshi national. The first named respondent further considered that the applicant's subjective fear of persecution could satisfy the test of "persecution" for the purpose of s. 2 of the Refugee Act 1996, (as amended). However, the first named respondent concluded that this fear was not well-founded for the following stated reasons:-

> "(a)The applicant, in his testimony, did not provide any sufficient evidence or adequate knowledge which would indicate that he was a political activist in the BNP party or had been attacked for such involvement.
>
> (b) The applicant did not attempt to seek any support or assistance in Ireland prior to his arrest or while working in Ireland and it was plausible to believe that safety and protection were outranked in importance by other considerations.
>
> (c) The applicant did not produce any supporting documentation or objective evidence to support his claim that he was targeted by the Awami League or would be targeted by them should he return to Bangladesh."

The first named respondent found, on the information offered by the applicant, that he had not adequately explored the availability of governmental and non-governmental forms of protection before leaving Bangladesh. The first named defendant further held, correctly in my judgment, that there cannot be said to be a failure of State protection where a government had not been given an opportunity of responding, in circumstances where such protection might reasonably have been forthcoming. The first named respondent further found that there was no evidence to support the applicant's claim that he would not be able to access state protection in Bangladesh.

The first named respondent concluded for all the above reasons that the applicant had not demonstrated that he had a well-founded fear of persecution due to imputed political opinion.

At para. 4 of the s. 13(1) Report, the first named respondent concluded as follows:-

> "Having regard to the above, s. 13(6)(c) of the Refugee Act 1996, (as amended), applies to this application . . . . The applicant without reasonable cause, failed to make application as soon as reasonably practicable after arrival in the State."

This finding is clearly based on the following facts found by the first named respondent:-

> "When asked when he actually arrived in Ireland the applicant stated 'On the 3rd February 2009'. Section 11 Interview, Q. 50, P. 16.
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> In the applicant's original questionnaire, it was revealed that his application for asylum was on March 16th 2009 in Cloverhill prison, which was up to 6 weeks after his initial entry to the State.
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> When asked how long was he in Ireland before being arrested, the applicant responded 'I waited for 1 month and for 10 days I was sick'. Section 11 Interview, Q. 52, Pgs. 18 and 19.
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> When asked why was he arrested, the applicant stated 'I was arrested in Baldoyle inside the restaurant for not having documentation and working illegally'. Section 11 Interview, Q. 53, P. 18.
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> As the applicant made his asylum claim in a place of detention, it was put to him would he have done this if he had not been arrested, to which he responded 'I don't know anything about the refugee system and I was almost captive in their hands'. Section 11 Interview, Q. 54, P. 18.
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> The applicant also did not attempt to seek any support or assistance in Ireland prior to his arrest or while working in Ireland. Section 11 Interview, Q. 55 and 59, Pgs. 18 and 20."

The first named respondent in the s. 13(1) Report makes reference to the fact that this is also a matter to which, by virtue of the provisions of s. 11B of the Refugee Act 1996, (as amended), the Refugee Applications Commissioner or the Refugee Appeals Tribunal, as the case may be, shall have regard in assessing the credibility of an applicant. However, in my judgment, the first named respondent did not go on to find that the applicant in the present case was not personally believable and lacked credibility. The decision of the first named respondent was based on factual grounds and, was a decision which I am satisfied was both reasonably and rationally open to the first named respondent to make. As was held by Birmingham J. in *Konadu v. The Minister for Justice, Equality and Law Reform and Anor.,* (substantive hearing), there is a clear distinction to be drawn between a decision based on the manner in which evidence was given and a decision based upon an assessment of the recorded contents of the s. 11 Interview.

In these circumstances the question posited as to whether it was a denial of constitutional justice for the Refugee Applications Commissioner to make a finding, pursuant to the provisions of s. 13(5) of the Refugee Act 1996, (as amended), thereby denying the applicant an oral hearing of an appeal to the Refugee Appeals Tribunal, in circumstances where his recommendation to the third named respondent that the applicant should not be declared a refugee was based upon a conclusion that the applicant lacked credibility, simply does not arise as an arguable ground in the instant case. To hold otherwise would be to sanction a moot. Such a claim may be arguable in other circumstances, but in my judgment it is not arguable on the facts of the instant case.

In addition, this Court cannot address the issue of whether there are understandable reasons for the delay of 23 days in this case, as no evidence is put before the court on affidavit offering any explanation or excuse for that delay. I wish to adopt and endorse what was held by Peart J. in *F.A. and Anor. v. The Refugee Appeals Tribunal and Ors.* [2007] I.E.H.C. 290, where he stated:-

> "The period of fourteen days is a very short time and this must be taken as indicating an intention on the part of the Oireachtás that applicants must act with great dispatch when considering whether or not to challenge a decision by way of judicial review, this being part of the legislative objective for a democratic state to effectively control and regulate the entry to the State by nationals of other countries."

In other areas of litigation a delay of 23 days might not be regarded as very significant, but in my judgment this cannot be the case in the context of the provisions of s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, where a delay of this nature must be regarded as anything but slight. Delay of this nature also prejudices the State as interfering adversely with the legislative objective identified by Peart J. in the passage above cited.

From the documents filed for the purpose of this application and, from the documents admitted into evidence during the course of argument, the court may infer that the Solicitors of the Refugee Legal Service of the Legal Aid Board and the Solicitors subsequently instructed by them to act for the applicant under the terms of the Private Practitioner Scheme, both took the view that the correct way for the applicant to challenge the decision of the Refugee Applications Commissioner was by taking an appeal to the Refugee Appeals Tribunal. In the course of argument counsel for the applicant accepted that this would indeed be an adequate and effective remedy in the instant case, but only in the context of an oral hearing, to which he claimed the applicant was entitled.

> It is not necessary for the court to determine whether or not a finding by the Refugee Applications Commissioner that an applicant lacked credibility was sufficient, as a matter of constitutional justice to entitle that applicant to an oral hearing of his or her appeal to the Refugee Appeals Tribunal because, as I have already determined, the impugned decision and recommendation of the first named respondent in the instant case was not based upon such a finding.

By a letter dated 29th May, 2009, (Friday) notification of the negative recommendation of the first named respondent was sent in the appropriate manner to the applicant and to the Refugee Legal Service, who had represented the applicant since in or about the 23rd April, 2009. Since there was no evidence before the court as to when these letters were actually received, though it was admitted that they were received, Counsel for the applicant and for the respondents accepted that the court should assume that these letters were received on the 1st June, 2009, and that the period within which a notice of appeal to the Refugee Appeals Tribunal could be lodged or leave sought to apply for judicial review commenced on the 1st June, 2009.

By a letter dated the 5th June, 2009, the Refugee Legal Service wrote to the applicant, who was then residing in Kilkenny City, advising him that they were sending the case to a named firm of private Solicitors in Carrick-on-Suir. *Inter alia* this letter stated:-"We note that you wish to appeal" and warned the applicant of the very short and strict time limit allowed for such an appeal. A letter of even date was sent to the Private Practitioner Solicitors. This was produced in evidence and was seen to be stamped "Received" on the 8th June, 2009 (Monday). On Thursday, 11th June, 2009, the applicant travelled from Kilkenny City to Carrick-on-Suir where a consultation took place between the applicant and a member of that firm of solicitors. On the basis that the notification of the negative recommendation of the first named respondent was received on the 1st June, 2009 (Monday), the time limited by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, within which to seek leave to apply for judicial review expired on the 14th June, 2009, (within the period of fourteen days commencing on the date of notification). On the 15th June, 2009, a notice of appeal was lodged by the Private Practitioner Solicitors with the Refugee Appeals Tribunal.

On the 6th July, 2009, the Private Practitioner Solicitors wrote to the Refugee Appeals Tribunal advising it that they intended to issue judicial review proceedings and requesting, under threat of injunction, that the Refugee Appeals Tribunal should not proceed with the determination of the Appeal. On 8th July, 2009, the Motion on Notice seeking leave to apply for judicial review was issued. On the 8th July, 2009, a medical report from Dr. Colm Costello, Kilkenny City, (carrying the notation, "cc To Legal Aid Board"), which it was claimed corroborated the applicant's claim that he had been beaten in Bangladesh, was stamped "Received" by the Private Practitioner Solicitors.

It was stated, during the course of argument at the hearing of this application, though no evidence of any sort was proffered in support of these suggestions and, especially no evidence, - as distinct from mere assertions, - on affidavit, that papers were sent by the Private Practitioner Solicitors on Friday, 12th June, 2009, by Telefax, to Junior Counsel and, that Junior Counsel had advised these Solicitors on Tuesday the 16th June, 2009, that he considered that there were possible grounds for instituting judicial review proceedings.

The letter from the Refugee Legal Service to the Private Practitioner Solicitors, dated the 5th June, 2009, contains the following instruction:-

> "As per the Scheme agreed between the Refugee Legal Service and solicitors participating in the Refugee Legal Service Private Practitioners Scheme":-
>
> "JUDICIAL REVIEW
>
> Your general advice to the applicant should include whether there any possible grounds for the institution of judicial review proceedings. If you are of the opinion that judicial review issues do arise either in relation to the RAC or the RAT decision you should notify us in writing immediately."

I am satisfied that this letter was a standard form letter from the Refugee Legal Service to participant solicitors in the Private Practitioner Scheme. No such notification was referred to or produced in evidence.

In the affidavit dated the 7th July, 2009, sworn by the applicant, (with the assistance of an interpreter), to ground this application, he avers as follows:-

> "11. I say that any delay in instituting these proceedings is attributable to the geographical dispersion between this Deponent and my Solicitor's office. I say that prior to the expiration of the time period to institute these proceedings as provided for in Section 5 of the Immigration Act 2000, as amended, this Deponent had formed the requisite intention to challenge the recommendation of the first named Respondent by way of judicial review.
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> 12. I say and am advised that the decision was forwarded to Counsel by Fax dated the 12th June, 2009, and on receiving certain advices, the papers were sent to Counsel by letter dated the 16th June, 2009.
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> 13. I beg to refer to the Statement of Grounds when produced. As appears therefrom, there are good and substantive grounds for the quashing of the decision of the second-named Respondent.
>
> 14. I say that these proceedings had to be translated on my behalf and this further delayed the issuing of these proceedings.
>
> 15. I say that there are good and sufficient reasons for extending the time to challenge the findings and determination of

> the first named Respondent within the meaning of Section 5(2)(a) of the Illegal Immigrant (Trafficking) Act 2000."

This Court is not and could not be satisfied on the state of the evidence that the applicant had formed an intention to challenge the recommendation of the first named respondent, by way of judicial review, within the fourteen day period allowed by the provisions of s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. The court finds on the evidence before it, on the balance of probabilities, that the decision to seek leave to apply for judicial review was taken on Monday 6th July, 2009, probably on the recommendation of Junior Counsel. It will be recalled that a Notice of Appeal had been lodged with the Refugee Appeals Tribunal on the 15th June, 2009 and Medical Evidence sought in support of this Appeal. The Medical Report of Dr. Costello, stamped "Received" on the 8th July, 2009, has annexed a Radiology Report referring to X-rays of the applicant's chest, elbows and right forearm carried out at the request of Dr. Costello on the 26th June, 2009.

An affidavit of Syed Rahman, businessman, of Poyntz Lane, Kilkenny, sworn on 7th July, 2009, states that he has been in this State for twenty years and is fluent in Bengali and English and, on that date he translated the affidavit of the applicant and the Statement to Ground the Application for Judicial Review and, that the applicant fully understood the contents. I do not accept that the "geographical dispersion" between Kilkenny City and Carrick-on-Suir or, the necessity to have the grounding documents for these proceedings translated for the applicant, are, on the evidence before the court understandable reasons for the delay or, good and sufficient reasons for extending the time to challenge the decision and recommendation of the first named respondent dated the 8th May, 2009.

In *J.A and Anor. v. The Refugee Applications Commissioner and Ors.* [2008] I.E.H.C., 440, Irvine J., adopting and applying the judgment of Finlay Geoghegan J. in *Muresan v. The Minister for Justice, Equality and Law Reform* [2004] 2 I.L.R.M. 364 held:-

> ". . . that it would not be good law to permit an extension of time which is effectively based upon a fresh legal view of decisions which were considered by the applicant's previous legal advisors. To do so would lead to an open ended right to maintain judicial review proceedings."

In my judgment this very sound principle applies not only in circumstances where one lawyer or team of lawyers is actually replaced by another, but also where successive lawyers are retained in succession for the first time, as in the instant case. I find on the evidence, on the balance of probabilities, that it was only after the expiry of the fourteen day period permitted by s. 5(2)(a) of the Act of 2000, when counsel had come into the case, that the view was taken that there were possible judicial review grounds upon which to challenge the validity of the s. 13(1) Report of the first named respondent. This involved the identification of new and distinct grounds and the calling in aid of totally different procedures.

For all the foregoing reasons the court declines to extend the time to seek leave to apply for judicial review and will dismiss the application.