

**THE HIGH COURT  
JUDICIAL REVIEW**

[2006 No. 1183 JR]

**BETWEEN****D. A. A.****APPLICANT****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENT****Judgment of Mr. Justice de Valera delivered on the 31st day of July 2007**

1. This is an application for leave to apply for judicial review pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000.

2. The reliefs sought by motion dated 4th October, 2006, are

(i) A declaration that the respondent has erred in law and/or acted *ultra vires* the Refugee Act, 1996 (as amended) and in excess of jurisdiction and/or in breach of the applicant's rights to fair procedures and natural and constitutional justice in refusing consent to the applicant to make a further application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996.

(ii) A declaration that the respondent has erred in law and/or acted *ultra vires* the Refugee Act, 1996 (as amended) and in excess of jurisdiction and/or in breach of the applicant's rights to fair procedures and natural and constitutional justice in failing to provide the applicant a reasonable opportunity to provide further information to the respondent prior to an adjudication being made on the applicant's application for consent to make a further application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996.

(iii) A declaration that the respondent was not entitled to delegate the decision making process in respect of the applicant's application for consent to make a further application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996 to a "deciding officer".

(iv) A declaration that the respondent herein has unlawfully fettered his discretion in his refusal to give consent to the applicant herein to make a further application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996.

(v) A declaration that the decision of the respondent to refuse the applicant pursuant to s. 17(7) of the Refugee Act, 1996 is unreasonable, irrational and flies in the face of common sense having regard to the material documents and information presented to and available to the respondent.

(vi) A declaration that the respondent herein was not entitled to decline to entertain a fresh application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996.

(vii) An order of certiorari quashing the decision of the respondent as notified by letter of 2nd October, 2006 refusing the applicant's application pursuant to s. 17(7) of the Refugee Act, 1996.

(viii) An order remitting the application of the applicant made pursuant to s. 17(7) of the Refugee Act, 1996 to the respondent in order that same may be considered in accordance with law.

(ix) If necessary, an injunction restraining the respondent from seeking to deport and/or deporting the applicant and/or from acting on foot of any proposal to make a deportation order in respect of the applicant pending the consideration and adjudication of the applicant's application for refugee status and/or without prejudice pending the outcome of these proceedings.

(x) Further and other relief including, if necessary, an extension of time of the making of this application or any part thereof.

(xi) Costs.

3. and

4. "The grounds upon which the relief is sought are:

i) The applicant's fear of persecution arises by reason of her fear of being subjected against her will to genital circumcision in the event of her being returned to her country of origin. On the 15th day of September 2006 an application was made to the respondent requesting his permission for a further application for a declaration of refugee status to be made by the applicant the said consent being required pursuant to section 17(7) of the Refugee Act, 1996 (as amended). The Application was primarily based on the perceived lack of fair procedures, breaches of natural and constitutional justice, breaches of statute, breaches of the State's obligations pursuant to various international instruments in the processing of the applicant's claim for refugee status, which application (for asylum) was made and completed during a period in which the applicant was a child.

ii) It was specified in the said application dated the 15th September, 2006, that the basis of the said application was 'not exhaustive given the pressures of time'. Nevertheless, and without allowing a reasonable period for the furnishing of further information, or being in receipt of same, a decision refusing the applicant's application was made by the respondent. The decision was made prematurely and did not take into account relevant information and was made *ultra vires* and is invalid.

iii) By letter of 2nd October, 2006, to the applicant's solicitors the applicant was informed by the respondent that he had refused the said application pursuant to section 17. This application was rejected on the basis that the information set out in the letter of the 15th September, 2006, and enclosures did not 'significantly add to the likelihood of the applicant

qualifying for asylum on the totality of the evidence already available and considered’.

iv) The information submitted by the applicant in support of her application pursuant to section 17, (coupled with the further information that the applicant had intended to furnish to the respondent if she had been allowed) had and would have had a significant and material bearing on the assessment of persecutory risk and whether the applicant has a current well founded fear of persecution if returned. The information presented and intended to be presented in support of the section 17 application should have had an impact on the adjudication conducted and on the assessment of two core elements of the applicant's application; i) the asserted illegality in the manner of processing of the applicant's asylum claim during a period when she was a child; and, ii) the real risk of the applicant being subjected to female genital circumcision against her will if she were to be returned to her country of origin.

v) The respondent has erred in law and breached the principles of natural and constitutional justice and fair procedures by adjudicating on the applicant's application prior to receipt of the whole of the said application.

vi) The respondent has erred in considering the information and evidence that was before him by reference to whether the said information/evidence would ‘significantly add’ to the likelihood of the applicant qualifying for asylum.

vii) In circumstances where the information contained in the application under section 17 went to the heart of the issues of substance and procedure in the asylum claim and was directly material to the earlier decisions to refuse this application, no reasonable decision maker could have formed the view that the new information was such that did not warrant further investigation by the Refugee Applications Commissioner (RAC) and without prejudice, was not capable of producing a different outcome to the asylum claim notwithstanding the previous negative decision.

viii) No reasonable decision maker could have formed the view that the matters, fresh information and material referred to and submitted and intended to be submitted in support of the application pursuant to section 17(7) had been fully considered during the course of the applicant's previous claim since all of the said information was not before the respondent at the time of making the decision to refuse the applicant's application. The appropriate test to be applied in a refugee determination adjudication is a forward looking test. Such a test was not applied and the decision is invalid.

ix) The respondent has erred in law, acted *ultra vires* and/or in breach of the applicant's rights to fair procedures and natural and constitutional justice in failing to consider relevant material, information and submissions before him and intended to be put before him in deciding to refuse the applicant's application pursuant to section 17 of the Refugee Act, 1996.

x) The evidence tendered to the respondent pursuant to the said application is such that it warrants further investigation by the statutory body charged with adjudicating asylum claims and moreover was credible, cogent and capable of producing a different outcome and in the consequences the decision of the respondent amounted to an unlawful fettering of a discretion pursuant to section 17.

xi) The decision of the respondent to refuse the applicant consent to make a further application for refugee status is unreasonable, irrational and flies in the face of fundamental reason and common sense.

xii) The respondent has erred in law, acted *ultra vires* and/or unlawfully fettered his discretion in concluding that the new evidence some of which was not yet before the respondent does not significantly add to the likelihood of the applicant qualifying for asylum.

xiii) This matter of the applicant's asylum application was inappropriately and improperly considered by those independent statutory bodies appointed by the respondent to receive, assess, investigate and consider applications for refugee status at first instance and if necessary on appeal and it is not within the competence of the respondent to decide on the ‘likelihood of the applicant qualifying for asylum’.

xiv) The respondent acted in breach of duty and illegally in delegating the decision making process to a ‘deciding officer’ in circumstances where there was a duty on the respondent to decide on the applicant's application pursuant to statute. If, (which is denied), the respondent was entitled to delegate the decision making process in accordance with the ‘Carltona Principle’ to an authorised officer then, in questions relating to core fundamental human rights of an individual (and in accordance with already established principles adopted by the respondent relating to the making of deportation orders in asylum matters) the decision making process should not have been delegated to an individual below the rank of ‘higher executive officer’. This was not done and the decision is invalid.

xv) Without prejudice to all of the foregoing, the conclusions of the respondent that the matters set out in the applicant's incomplete application did not significantly add to the likelihood of the applicant qualifying for asylum on the totality of the evidence already available and considered is unreasonable, irrational and perverse, in particular having regard to the neglect of the rights of a child to have certain protections in place prior to and during having her asylum application processed properly. In particular and without prejudice to the generality of the foregoing reference is made to the specific breaches of the applicant's entitlements as a child and as an asylum applicant as set out in the letter of the 15th September, 2006 and the disregard of same throughout the applicant's application.

xvi) The respondent in refusing the section 17 application has acted in breach of the applicant's right to fair procedures and natural and constitutional justice and his rights as warranted on the European Convention on Human Rights and in particular Articles 2, 3, 6 and 13 thereof in the decision making process.

xvii) The respondents failed to exercise a necessary and appropriate level of vigilance in examining the application under section 17(7) having regard to the very significant fundamental human rights issues at stake for the applicant and/or having regard to the known and internationally condemned human rights abuse and persecutory record of the ruling regime in her country of origin particularly in reference to the question of toleration of the practise of female genital circumcision.

xviii) There is an overriding obligation on the respondents pursuant to section 2 and section 5 of the Refugee Act, 1996 and Article 1(A)(2) and Article 33 of the Convention of 1951 Relating To The Status Of Refugees (Third Schedule Refugee Act, 1996) to substantively consider the merits of an application by persons seeking refugee status having regard to all relevant information and circumstances as they pertain and not to take steps to expel or remove such persons in

circumstances where the matter of a well founded fear of persecution has not been considered having regard to all the circumstances pertaining at the time.

xix) Failing to provide reasons or adequate reasons for the refusal of the applicant's application.

xx) Inadequate or no consideration of the applicant's application.

5. A further notice of motion dated 10th October, 2006, sought the following reliefs:-

"An interlocutory injunction restraining the deportation of the applicant herein until the determination of the within proceedings."

6. There are also plenary proceedings brought by the applicant dated 15th September, 2006.

7. The following is an outline chronology which will assist in considering this application.

|                      |   |
|----------------------|---|
| 5th January, 2001    | The applicant illegally entered the State   |
| 5th January, 2001    | The applicant made an asylum application  |
| 12th March, 2002     | The applicant took part in a interview with the Refugee Appeals Commissioner                    |
| 21st May, 2002       | The Refugee Appeals Commissioner refused the application by letter                              |
| 15th November, 2002  | The applicant was refused by the Refugee Appeals Tribunal (Neither refusal has been challenged) |
| 17th April, 2003     | Representations to avoid deportation were made to the Minister                                  |
| 22nd February, 2005  | A deportation order was issued (this order remains in force).                                   |
| 15th September, 2006 | An application pursuant to s.17(7) of the Refugee Act 1996, was made.                           |

8. The relevant parts of that section provide as follows:-

"(7) A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister.

(8) (a) Subject to section 5 and paragraphs (b), (c) and (d), the Minister shall make an order (in this Act referred to as, a deportation order) requiring a person to whom the Minister has refused to give a declaration or a person who has withdrawn his or her application to leave the State and the order shall specify the measures to be taken for the purpose of the removal of the person from the State including where necessary the temporary detention or restraint of the person.

(b) A person with respect to whom a deportation order is made shall not be required to leave the State before the expiry of 30 days from the date of the making of the order.

(c) Paragraph (a) shall apply only to a person who, but for the provisions of section 9, would not be entitled to enter or remain in the State.

(d) The Minister shall not make an order under paragraph (a) in respect of a person who has been granted permission to remain in the State under subsection (6) while that permission is in force.

(9) The Minister may by order amend or revoke an order under this section including an order under this subsection.

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| 15th September, 2006 | Plenary proceedings instituted by the applicant.               |
| 21st November, 2006  | Hearing of this application for leave to seek judicial review. |

9. This is an application for leave to seek judicial review as already stated.

10. Order 84 Rule 20(1) of the Rules of the Superior Courts states:-

"No application for judicial review shall be made unless leave of the Court has been obtained ...".

11. This provision has been described by Hilary Delaney and Declan McGrath *Civil Procedure in the Superior Courts 2nd Ed.*, (Dublin, 2005) at p. 697 as providing a "filtering process to weed out, at an early stage, frivolous and unmeritorious cases". Other descriptions include "misguided or trivial complaints" and "cases which are frivolous, vexatious or of no substance".

12. I should emphasise that I do not consider the instant application to be misguided, frivolous, trivial, or vexatious but the applicant must, to succeed in obtaining leave, establish that she has "an arguable case" and I am not satisfied that she has done so.

13. This present application may be summarised as seeking to set aside.

(a) the refusal of the respondent to consent to the making of a further application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996.

(b) An injunction to prevent the deportation of the applicant pursuant to the deportation order of 22nd February , 2005

14. I have had the benefit of oral arguments and submissions at the hearing of this application, and also written submissions on behalf of both the applicant and the respondent.

15. In respect of the application to set aside the refusal of consent to the making of further asylum application the respondent submissions at para. 39 of the written submissions comprehensively sums up the situation in this matter. It reads as follows:-

"It is submitted that the respondent his servants or agents properly and lawfully considered the applicant's asylum history and the applicant's submissions contained in the letter dated 15th September, 2006 from her solicitors. All relevant considerations were taken into account and all legislative requirements were followed. The respondent properly exercised his discretion in refusing the applicant's application. The decision is reasoned and rational. The respondent was entitled to reach the decision he did on the basis of the information before him. The applicant was informed of the reasons for the decision."

16. In particular I am satisfied that the "Carltona Principle" does apply in respect of the Minister's consideration of the application and his delegation of the decision making process and there is nothing in the procedure adopted, or the manner in which the decisions were arrived at which would justify them being judicially reviewed. In other words she has not established an arguable case.

17. The applicant has also sought an injunction to prevent her deportation. In the endorsement of claim in the plenary summons the applicant herein (the plaintiff in the plenary action) seeks:-

(i) A declaration that the deportation of the plaintiff prior to the consideration by the defendant of the application of the plaintiff to make a new application for asylum in the State pursuant to section 17(7) of the Refugee Act, 1996 (as amended) would be unlawful and in breach of the plaintiff's constitutional rights to fair procedures and access to this Court.

(ii) An injunction (including interim and interlocutory) restraining the defendant from deporting the plaintiff from the State pending the consideration by the defendant of the application of the plaintiff to make a new application for asylum in the State pursuant to section 17(7) of the Refugee Act, 1996 (as amended).

(iii) Such further or other order as to this Court may seem meet.

(iv) Costs.

18. In respect of the instant proceedings the respondent has given a continuing undertaking not to deport the applicant until the conclusion of this application and, as a result of my decision herein, this matter is now concluded. No question of an injunction in respect of the application remains.

19. It appears that the plenary proceedings may now also be moot, although it is not clear if a further application pursuant to s. 17(7) has been made. In any event any further application for an injunction could only be made in the plenary proceedings already referred to and would require a separate application.