Neutral Citation Number [2006] IEHC 388

THE HIGH COURT
DUBLIN

[2004 No. 895 J.R.]

BETWEEN

RICHARD NYEMBO

APPLICANT

AND
THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND
JAMES NICHOLSON

MOVING PARTY

Judgment of Mr. Justice Feeney delivered on 6th day of October 2006

1. Now I propose to give judgment in the Nyembo case issue which has been argued in front of me as it was accepted by the parties that that would be the one which would be argued to conclusion.

2. This is an application to have a preliminary issue of law determined prior to the full hearing. It is made within a judicial review proceeding. The purpose behind a court order permitting of the trial of a preliminary issue of law is primarily to save time and costs and the authorities have highlighted the possible use of such order where it has the capacity to result in the dismissal and/or significant truncating of the plaintiff applicant's claim.

3. The Court in considering an application such as this must have particular regard to the obligation to weigh up the likelihood of achieving savings in costs and time.

4. Particular regard must be had to whether, in the Court's judgment, there will be a saving or a duplication. In this case there are a number of factors which are of importance in that weighing exercise. Firstly, this is a judicial review case where the legal issues and grounds have been clearly defined and limited by the order granting leave. That order was granted after a contested hearing.

5. Secondly, this does not appear to be a case where the proposed preliminary issue would cause any duplication of evidence.

6. Thirdly, the legal issue sought is one that will require to be fully argued involving the same time at either a preliminary stage or at the full hearing.

7. Fourthly, and most importantly, the determination of the preliminary issue in favour of the respondent would be likely to result in the applicant's claim being either concluded or very significantly curtailed.

8. Fifthly, the hearing of the preliminary issue would be likely to bring order and direction to any full hearing and reduce its duration and define the scope and extent of discovery.

9. The authorities and in particular the case of *Tara Exploration and Development Limited v. The Minister for Industry and Commerce* [1975] I.R. 242 have identified the circumstances in which it is appropriate to permit the trial of a preliminary issue. Both sides have identified the *Tara* case as the central authority. The Tara case, which was a Supreme Court decision, establishes that an order pursuant to Order 34 for the preliminary determination of certain questions of law should not be granted if the proposed question or questions could not be answered without reference to the relevant facts where such facts have not been determined. In the words of O'Higgins C.J. at p. 257:

> "Order 34, Rule 2 can only apply to questions of pure law where no evidence is needed and no further information is required."

10. It follows that where the question or questions are dependent on facts that have not been ascertained, that the procedure or rule should not be utilised.

11. This required approach is succinctly summed up in the words of O'Flaherty J. in *Duffy v. News Group Newspapers Ltd*. (No. 2) [1994] 3 I.R. 63 at p. 76 where he stated:

> "... is only appropriate where words can be placed before the Judge without the necessity of calling evidence."

12. It is the lack of the requirement for evidence which is central. It is clear from the authorities that this can be achieved by the facts being agreed or there being no facts in dispute. It is also the case that a defendant can agree facts for the purposes of a preliminary issue of law only without prejudice to the entitlement to contest the facts if the actual determination of the preliminary issue would not result in the disposal of the case.

13. This capacity of the defendant/respondent to accept facts alleged by the moving party for the purposes of the trial of a preliminary issue of law was reconfirmed by the Supreme Court in the case of *McCabe v. Ireland* [1999] 4 I.R. at p. 151.

14. It follows from the above authorities that the use of the procedure is of limited application and it is also a discretionary one. The Court must be careful to try and avoid creating an unfair situation of duplication or delay when the very purpose of the rule is the opposite.

15. In this case the facts agreed or more accurately accepted by the moving party are set out in the respondent solicitor's letter of 28th June 2006. During the course of the application, counsel for the respondents extended the scope of the accepted facts to add the words "and during that period he heard hundreds of appeals" after the word "Commissioner" in line 4 of the third paragraph of that letter.

16. It is in the light of those agreed or accepted facts that this Court must consider this application. It is clear that such facts are facts contended for by the claimant in the grounding affidavits. There are other matters claimed which remain in dispute as to the belief of certain practitioners but there can be no doubt that the accepted facts give rise to a real and substantial issue as to what

are the legal consequences and conclusions to be drawn from such accepted facts and as to the status and admissibility of evidence.

17. Such legal consequences and the status in evidence will be required to be addressed within these proceedings at an early stage in the proceedings to allow for the efficient disposal of the claim. This consideration will be vital to the conduct of the case and the accepted facts crystallise the factual matters necessary for the Court to consider the legal issues.

18. The Court is satisfied that no additional facts are necessary for these matters to be addressed and that this is not a case where extra evidence would be required on this issue or where it could be said that the legal issues were being tried in vacuo.

19. The Court has concluded that it is appropriate on the facts of this application to exercise its discretion to order the trial of two preliminary issues of law on the basis of the extended accepted facts as set out above.

20. Those two issues are:

> 1. Whether as a matter of law statistical evidence on the outcome of decisions of the second respondent as a member of the Refugee Appeals Tribunal is admissible in evidence.
>
> 2. Whether as a matter of law statistics and/or evidence relating to the outcomes or results of decisions made by the Refugee Appeals Tribunal can without more constitute a basis for a finding of actual and/or apparent bias.

21. The second of those two issues is the issue set out in the letter of 28th June 2006.

22. In exercising the Court's discretion, I have had regard to the limited nature of the matters in issue in this case. Those issues are defined by the order of Butler J. with the resulting consequence that the trial of the proposed preliminary issues will have a real likelihood of reducing the costs and time of this case.

23. I have also had regard to the fact that if the respondent was to be successful on the preliminary issues as argued for by the respondent that the applicant's case would be potentially determined or at least significantly reduced in scope.

24. I have also had regard to the matter propounded by the applicant's counsel that an issue remains as to the great variance of the second respondent's outcomes from other members of the Appeal Tribunal. This matter, however, is to some considerable extent dependent upon the approach that the Court takes or can take to statistical evidence and its impact, if any, on bias. This would be required to be addressed in any event.

25. I have also had regard to the fact that these issues can be tried at an early stage and in advance of any potential discovery which would have the effect of reducing or eliminating the requirement for discovery. Also the type of discovery sought herein is already the subject of a Supreme Court appeal in another case, the *Popovici* case record number [2004] No. 483 J.R. The progress of this case can benefit by the preliminary issues being considered in advance of an issue for discovery being considered. This will ensure that this case is not delayed by the progress of the *Popovici* appeal.

26. The Court is satisfied that it is just and equitable to grant the order sought and that in considering fairness it must have regard to the limited nature of the relief and grounds permitted by the order of Butler J. The issues in respect of which the Court proposes to grant leave for trial as preliminary issues must be addressed and this is a case in which the counterbalancing risk of duplication is not significantly present.

27. I, therefore, propose to permit the trial of two preliminary issues of law as set out on this judgment on the extended agreed facts as referred to in the judgment.