Neutral Citation Number: [2011] IEHC 436

THE HIGH COURT

JUDICIAL REVIEW

2011 405 JR

BETWEEN

SIKHUMBUZO NCUBE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 22nd day of November, 2011

1. This is the ruling of the Court upon an application brought by notice of motion dated 26th July, 2011, by the respondent seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts, or, alternatively, the inherent jurisdiction of the Court, striking out this judicial review proceeding as frivolous, vexatious, as bound to fail or as disclosing no cause of action.

2. The substantive proceeding in respect of which the motion is brought seeks judicial review of a decision made by the respondent refusing the applicant's application for re-entry to the asylum process pursuant to s. 17(7) of the Refugee Act 1996 (as amended). The application for leave to seek that review has not yet been heard.

3. The substantive decision ("the contested decision") of the respondent which is the subject of the application for judicial review was communicated to the applicant's solicitors by letter dated 29th April, 2011, which enclosed a Memorandum entitled 'Examination of Application for Re-admission to the Asylum Process under s. 17(7) of the Refugee Act 1996' and headed 'Name: Martha Kenny AKA Annastacia Robertson AKA Sikhumbuzo Ncube' and giving the country of origin of that applicant as being South Africa and Zimbabwe.

4. In the affidavit sworn by the above-named applicant in verification of the statement of grounds in the judicial review proceeding, she says:-

> "I say that I previously unsuccessfully applied for asylum in the State using the false name of Martha Kenny. I further say that I have also used the false name of Anastasia Robertson in my dealings with the State and in previous court proceedings. I say that I previously pretended to be a national of South Africa which I am not. I say that I am a national of Zimbabwe . . ."

There is then exhibited what are purported to be copies of a Zimbabwe Identity Card and Birth Certificate. By direction of the Court, the applicant subsequently swore and filed a supplemental affidavit exhibiting what are claimed to be the originals of those two items.

5. While the events, claims, asylum procedures and litigation which lie behind the present proceeding are characterised by a high level of uncertainty due to the admitted history of lies, falsehoods, forgeries and even perjury, the following basic elements appear to be now undisputed. In May 2000, a person using the name "Martha Kenny" made an application for asylum in the State on the basis that she had been born in South Africa but was a Zimbabwean national who feared persecution because of her father's involvement in the opposition MDC party in that country. The application was refused and a Deportation Order was made in respect of Martha Kenny on 23rd September, 2002. The person using the name Martha Kenny disappeared and the Deportation Order was not implemented at that time.

6. In August 2004, a woman using the name "Annastacia Robertson" entered the State using a South African Passport and was granted permission to remain for the purpose of study between 2005 and 2009. On 9th December, 2009, the person using the name Annastacia Robertson applied for a Residence Card to the EU Treaty Rights section of the Department of Justice, Equality and Law Reform on the basis of marriage to a Latvian national which had been solemnised in the State in November 2009. That application was apparently refused because the marriage did not last and the whereabouts of the Latvian national were unknown. The investigation of the application, and particularly the fingerprints, led to the conclusion that the person claiming to be Annastacia Robertson was the same person as had claimed to be Martha Kenny. In consequence, Annastacia Robertson was arrested on foot of the Deportation Order still outstanding from September 2002.

7. Following the arrest, there were then two successive applications for inquiries under Article 40.4.2 of the Constitution into the legality of the detention. Annastacia Robertson at first denied that she was the same person as Martha Kenny. In an affidavit grounding the first application for inquiry (2011 No.135SS) sworn on 19th January 2011 by Mary Trayers, the applicant's then solicitor, it was maintained that her true identity was Annastacia Robertson and that she was, indeed, a South African national. A copy of the South African Passport was exhibited in the proceeding as proof of that identity. Furthermore, the applicant in that proceeding gave a sworn testimony to that effect. It appears that a second application for asylum (2011 No.330SS) was then made in the name of Annastacia Robertson and, on the basis that this person was then in the asylum process, a second application for inquiry into the legality of the detention was brought. By a judgment of Hogan J. delivered on 1st March, 2011, the detention was held to be lawful upon the ground that the applicant was a failed asylum seeker who had not obtained any consent from the respondent for readmission to the asylum process pursuant to s. 17(7) of the Act of 1996, so that there was no valid application for asylum in place which would have rendered the detention unlawful. It appears, however, that immediately before that judgment was delivered, counsel for that applicant informed the court that on the previous evening the applicant had claimed to her legal representatives that she had a different name and that she was a national of Zimbabwe and not of South Africa. It was on the basis of this new identity and nationality that the present applicant's current solicitors made an application on 4th March, 2011, for readmission to the asylum system under s. 17 of the Act, supplemented by revised submissions in a letter dated 21st March, 2011. It is against that background that the present motion is brought to dismiss the proceeding for judicial review peremptorily and even before the application for leave

has been heard.

8. It is clear that the court has jurisdiction to make the form of order sought on this motion. It is, however, a jurisdiction which is to be exercised cautiously and only in clear and compelling cases. In *Barry v. Buckley* [1981] I.R. 306, Costello J. (as he then was) described the jurisdiction in the following terms:-

> "This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the court is satisfied that the plaintiff's case must fail, then, it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant."

9. The exercise of the jurisdiction is not confined to cases where it is obvious that a claim is without foundation and cannot succeed. It is also available where the initiation of the proceeding amounts to an abuse of process because the claim is frivolous, vexatious or brought for an improper purpose. (See, for example, *Re: Majory* [1955] Ch. 600, and *Quinn Group Limited v. An Bord Pleanála* [2001] 1 I.R. 505). It is also clear that the jurisdiction can be exercised in favour of a respondent in judicial review proceedings. (See the judgment of Herbert J. in *Lowes v. Coillte Teoranta* (Unreported), 5th March, 2003, and the judgment of this Court in *FAKC & Anor v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 14th February, 2011).

10. In considering whether the present case is one in which the jurisdiction to dismiss should be exercised at this stage, it is important to bear in mind that what is immediately at issue is not the applicant's claim to have an arguable case to be declared a refugee on the basis of a fear of persecution if returned to Zimbabwe. The issue before the Court in the substantive application for judicial review will concern the legality of the respondent's refusal of consent to the making of a further asylum application. That issue will fall to be determined on the basis of the application made to the respondent under s. 17(7) and the information or evidence put to the Minister at that point in time. This point is relevant because at the hearing of the present motion, the applicant filed a new affidavit by way of supplement to the very short grounding affidavit. This was designed, in part, to acknowledge and apologise for the previous dishonesty, but also to introduce new information and evidence. She admits using the name, "Martha Kenny" and says she was afraid she would be deported to Zimbabwe and it would be better for her to have been deported to South Africa. She also says that it was prior to coming to Ireland as Martha Kenny she had obtained false identity papers in South Africa in the name of Annastacia Robertson on the black market and used these to obtain a South African Passport. (It is to be noted that on the basis of this information the latter document itself was an authentic South African Passport, although obtained by the applicant fraudulently using forged identity papers).

11. She explains that following the making of the Deportation Order in respect of Martha Kenny in 2002, she returned to South Africa and then decided to come back to Ireland, this time as Annastacia Robertson in 2004. She also admits that she returned voluntarily to South Africa in August/September 2009, using the Robertson Passport. Clearly, the use of the Passport on that occasion encountered no difficulties with the South African Border authorities. She confirms that, back in Ireland, she married a Latvian national in November 2009, but that this marriage broke down in April 2010.

12. In the supplemental affidavit, she further explains that in December 2010, she decided to destroy the Robertson Passport after being told that her connection to the Martha Kenny identity had been discovered. She also admits that her instructions to her legal representatives for the two applications under Article 40 were based upon a lie as to her true identity and a false denial of her previous use of the Kenny identity. Finally, the affidavit exhibits a letter addressed to her solicitors from the South African Embassy in Dublin. The material paragraph of that letter reads:-

> "The Department of Home Affairs in South Africa has confirmed that Anastacia Robertson fraudulently obtained ID documents in South Africa and is an illegal immigrant. Therefore, the South African Embassy will not be issuing travel documents for Ms. Robertson."

13. As already indicated, this evidence is irrelevant to the issue arising on the present motion and to the substantive judicial review application, to the extent that it purports to adduce new evidence of facts not before the respondent when the contested decision was made in April 2011. It is noted here because it illustrates the depth of the dilemma which the applicant has created for herself by her dishonesty up to this point. Having gone to considerable and deliberate lengths, including perjury, in order to maintain the Robertson identity and South African nationality, she now asks to be believed when asserting the third identity used for the present proceedings and the nationality of Zimbabwe. Although this proposition is sought to be substantiated by reference to the letter from the South African Embassy, it is significant that the Embassy carefully refrains from saying anything as to where the applicant migrated to South Africa from. The letter stating that the applicant "is an illegal immigrant" was written in response to a letter from the applicant's solicitor dated 3rd March 2011, giving the applicant's current name and asserting that she is Zimbabwean national who entered South Africa in 1991. Nor is it obvious how the writer of the letter would have known that "Anastacia Robertson" fraudulently obtained ID documents in South Africa. The reply affords no confirmation that the applicant is who she now claims to be or that she has that nationality. The Court also notes that in a further letter from the applicant's solicitor on 9th March 2011, the Embassy was sent a photocopy of the identity page of the Robertson Passport. The pages which might show Border control entry and departure stamps were not copied, and the applicant claims she had destroyed this Passport in December 2010. The affidavit of Gwen McCool, the applicant's solicitor, exhibiting the correspondence with the Embassy does not explain these circumstances.

14. In the further affidavit filed following the hearing of the motion, the applicant exhibits the original of a credit card-sized Identity Card purportedly issued in Zimbabwe, together with what is stated to be an original "Certified copy of an entry of birth registered in the district of Nyamandlolvu in Zimbabwe" in respect of Sikhumbuzo Ncube. The latter document is certified as having been issued by the Registrar –General of the Registry of Births and Deaths on 16th August, 2007. No explanation is given as to how or when the applicant obtained this document or had it issued on her behalf. In August 2007, the applicant was living in the State on foot of the student visa under the Robertson identity which was valid from 2005 to 2009. No explanation is given, accordingly, as to why, at that point, the applicant thought it necessary or useful to obtain that Birth Certificate when it was irrelevant to the identity she was seeking to maintain at that time. The Identity Card bears the photo of the cardholder and what appears to be the date of issue of the card – 1.12.96. No explanation is given as to how this came to be issued to the applicant in Zimbabwe if she left that country in 1991.

15. It is against that background that it is necessary to return to the issue now before the Court on the motion, namely, whether the proposed application for leave to seek judicial review of the contested refusal under s. 17(7) is bound to fail such that to allow the substantive application for leave to proceed would be unjustified and oppressive of the respondent.

16. In the Memorandum of examination of the application for readmission, the test to be applied in determining such an application is

quoted, namely, the test adopted by Clarke J. in *EMS v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 21st December, 2004) from the judgment of Bingham M.R. (as he then was) in *R. v. The Secretary of State for the Home Department ex parte Onibiyo* [1996] 2 A.E.R. 901:

> "The acid test must always be whether comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

17. The Memorandum sets out in some detail the background history of the applicant under her two previous identities, and particularly, the basis upon which a claim to refugee status was made under the Kenny identity in 2000 and then rejected. Her subsequent history under the Robertson identity up to and including the Article 40 applications is also recorded. The basis of the proposed new asylum claim is then examined. The observation is made:-

> "The applicant's original asylum application was based on events she claimed happened to her while living in Zimbabwe. This application had previously been examined and rejected by both ORAC and the tribunal. Credibility was found to be a major factor in these decisions."

18. The Memorandum also observes:-

> "I note that the applicant attempted to apply for asylum on 8th February, 2011, using the name Annastacia Robertson, a South African national. No reason has been provided as to why the applicant maintained this identity and did not apply under her current claimed identity . . . I also note that in the passport issued under the name of Annastacia Robertson, that the applicant returned to South Africa on 17th August, 2009, and left again on 19th September, 2009. The fact that the applicant returned to South Africa after the events she alleged happened to her prior to her returning to Ireland in 2004 further undermines her credibility. I also note that no mention of this return to South Africa was mentioned in the course of the Section 17(7) application. No explanation for this return has been provided to date."

19. The Memorandum then gives the conclusion upon which the refusal decision was based:-

> "Apart from the credibility issues already examined, the 'new' information regarding her now claimed identity as Sikhumbuzo Ncube is rejected on the basis that it is information that could have reasonably been expected to be provided at an earlier date. No new convincing or credible evidence has been supplied to indicate that a favourable view might be taken if the applicant was re-admitted to the process. No credible evidence has been provided to confirm the applicant's actual identity. Therefore, I recommend that her application for re-admission under s. 17(7) of the Refugee Act 1996, be refused."

20. When the applicant applied under the identity of Martha Kenny for asylum in 2000, it was on the basis of a South African nationality, but the fear of persecution related to the political activities of her father who was claimed to have been a Zanu PF supporter who switched to the MDC opposition party and not to any source of persecution in South Africa. She claimed to have been born in South Africa but to have moved with her parents to Zimbabwe when she was three months old. It was pointed out that she had a son born to her in South Africa in 1992.

21. In her application for readmission to the asylum process, she claimed to have been born in Zimbabwe and to have lived there until 1991, when she fled to South Africa where the son was born in 1992. She claims now to fear persecution if returned to Zimbabwe on the basis that (a) she would return as a failed asylum seeker and (b) because of political opinion which would be imputed to her both on the basis of the opposition activities of her family and on the basis of her long stay outside Zimbabwe.

22. If it is true that the applicant came to Ireland in 2000 from South Africa, having left Zimbabwe nine years earlier, it is clear that this proposed new claim is one that could have been made in 2000. Indeed, if the applicant is who she now claims to be and if the oppression attributed to her family did genuinely occur, it is difficult to understand why this far more obvious claim to refugee status was not made in 2000. In the judgment of the Court, the conclusions reached in the Memorandum quoted above were amply justified and inevitable. Even if, notwithstanding the immense difficulties of personal credibility which the applicant had created for herself, the Minister had been inclined to accept that she might be in a position to establish Zimbabwean nationality, the position remained that having regard to the basis upon which the original asylum application had been made, new material was not being put forward in relation to the claim to a fear of persecution in that country which could not have been put forward and relied upon in 2000.

23. It is submitted that the test applied by the respondent based upon the *Onibiyo* and *EMS* cases (see para 16 above) is not the correct one and that the law was more correctly stated by Clark J. in her judgment of 14th October 2009, in A (A) v MJELR [2009] IEHC 436. The Court cannot agree. The "acid test" of the *Onibiyo* case has two elements, namely, (a) that there is a new claim sufficiently different from the earlier claim to admit to a realistic prospect that a favourable view could be taken, and (b) that is it not based upon material which might reasonably have been relied upon in the earlier claim.

24. It is argued that in the A.(A.) case, a different test was applied by Clark J. under which the Minister is concerned only to assess whether the request is based on genuinely new facts not previously fully considered. It is submitted that the second limb of the *Onibiyo* test has therefore been abandoned.

25. While the Court has some doubt as to whether this is a correct reading of the judgment of Clark J. the argument is, in the view of the Court, in any event now redundant.

26. The request for readmission to the asylum process under s. 17(7) was made in this case to the Minister on 4th March, 2011, and the refusal of the request was given in a letter dated 29th April, 2011. With effect from 1st March, 2011, s. 17(7) of the Act of 1996, was amended by, *inter alia*, the insertion of additional sub-paragraphs 7A to 7H. These amendments were made by the European Communities (Asylum Procedures) Regulations 2011 (S.I. No. 51/2011) the purpose of which was to give effect to certain corresponding provisions of Council Directive 2005/85/EC of 1st December, 2005 ("the Procedures Directive")

27. These changes have the effect of introducing a statutory criterion for the exercise by the Minister of his power to permit a subsequent application for asylum to be made under section 17(7). The new subs. 7D provides:

> "Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that:

(a) Since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and

(b) The person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16)."

28. Accordingly, the Minister is compellable to consent to a subsequent application only when he is satisfied that those two conditions are met. It is immediately apparent that these two conditions correspond closely to the two limbs of the Onibiyo test. There must be new elements or findings which make a successful application for asylum significantly more likely; and the non-presentation of those new elements in the previous application must not be attributable to any fault on the part of the applicant.

29. In the present case, the new elements relied upon are the applicant's new identity and her alleged nationality as a Zimbabwean. She explicitly confesses, however, that it was due entirely to her own fault and deliberate decision that both of these elements were concealed in the previous application. It cannot be said, accordingly, that it was through no fault of this applicant that the claim now proposed to be made could not have been the basis of the previous application. It is to be noted that even when, under name Martha Kenny, she claimed asylum as a South African national, it was on the basis she would have been exposed to persecution because her father was a national of Zimbabwe who had been involved in the opposition MDC party in that country.

30. It is true that this new statutory test is not referred to as such in the Minister's refusal decision although the conclusions on which the decision is based correspond very closely to its two conditions. However, no purpose would be served by quashing the present refusal because in the new decision on the existing request for consent under s. 17(7) this is the statutory test will have to be applied so that the result must inevitably be the same.

31. In these circumstances, the Court is satisfied that the present judicial review proceeding is bound to fail and, having regard to the history of the applicant's abuse of both the asylum system and the judicial process in the State, this is a compelling case for the exercise of the Court's jurisdiction to dismiss this proceeding at this point.