Neutral Citation Number: [2011] IEHC 473

THE HIGH COURT

2011 438 JR

BETWEEN

J. K.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 13th December, 2011

1. The applicant ("Ms. JK") in these judicial review proceedings is a thirty one year old Ugandan national who arrived in the State in 2006 whereupon she sought asylum. She contended that she feared persecution by reason of her alleged involvement with a Ugandan rebel group known as the Lord's Resistance Army.

2. That application was rejected on credibility grounds by both the Office of Refugee Applications Commissioner ("ORAC") and the Refugee Appeal Tribunal. Following the rejection of that application, Ms. JK then unsuccessfully applied for leave to remain in the State pursuant to s. 3 of the Immigration Act 1999 ("the 1999 Act") and for subsidiary protection. These applications were in turn rejected and the entire process culminated in the making of a deportation order which was notified to Ms. JK on 21st December, 2010.

3. On 1st April, 2011, the applicant's present solicitors applied to the Minister requesting him to exercise his discretion pursuant to s. 17(7) of the Refugee Act 1996 ("the 1996 Act") so as to permit her to make a fresh application to ORAC. She advanced the claim on two grounds. First, it was said that the applicant had discovered that her husband and child had been murdered in October 2009. Second, she maintained that she had recently formed two homosexual relationships with other women and she feared that she would be persecuted on that account if she were returned to Uganda. That application was refused by the Minister on 16th May 2011 and the present proceedings were commenced on 30th May, 2011. On 5th July, 2011, Birmingham J. granted the applicant an interlocutory injunction restraining her deportation pending the determination of the leave application. It is against this general background that the applicant now seeks leave to apply for judicial review.

The failure to exhaust the administrative asylum process

4. Following the promulgation of the European Communities (Asylum Procedures) Regulations 2011 (S.I. No. 51 of 2011)("the 2011 Regulations") which came into force on 1st March, 2011, the Minister introduced new administrative guidelines providing for administrative review of any decision to refuse permission to re-enter the asylum process pursuant to s. 17(7). It is important to stress that the application for re-admission pursuant to s. 17(7) post-dated the entry into force of the 2011 Regulations, so I would reject the applicant's argument that these Regulations were in some way applied with retrospective effect.

5. While s. 17(7) was significantly amended by the insertion of a new s. 17(7A) of the 1996 Act by Article 8 of the 2011 Regulations, it is important to stress that the new guidelines have no strict legal basis. They are, of course, in themselves none the worse for that and it is probably true that in some instances and under some circumstances the guidelines might give rise to an enforceable legitimate expectation: cf. the judgment of O'Hanlon J. in *Fakih v. Minister for Justice* [1993] 2 I.R. 406.

6. That, however, is not the same thing as saying that an applicant is *obliged* to avail of the appeal process, particularly in light of the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") which requires that any challenge to the Minister's (original) decision has to be made within a 14 day period. If an applicant were to avail of the appeal process, he or she might find themselves well outside the 14 day time period prescribed by s. 5 of the 2000 Act. It is, of course, true that the courts can - and regularly do - extend the time limit on discretionary grounds. But what lawyer faced with advising a client on this matter would be willing to forsake the certainty of the 14 day time period for the uncertainty of relying on the courts' discretion in relation to an extension of time? That question really answers itself. The guidelines are not in themselves law: they are at most elusive wisps hovering around at the outer extremities of the legal system. As such, guidelines of this sort cannot vary or alter or affect legal rights and obligations.

7. In this regard, the Minister cannot have it everyway. If it is desired to encourage applicants to avail of the administrative review regime, then legal certainty requires that the Oireachtas must be prepared to amend the provisions of s. 5(2) in order to provide that time does not run against an applicant during the currency of an administrative appeal. Absent such an amendment, then an applicant such as Ms. NK cannot be faulted for failing to avail of the administrative review procedure, even if that procedure might well have dealt with the substance of her complaints.

The test for re-entry in the asylum process

8. The test governing re-entry into the asylum process is now governed by s. 17(7) as amended by the 2011 Regulations. We can shortly consider the terms of these provisions, but up to this point, the test has been that applied by Sir Thomas Bingham M.R. in *R. v. Secretary of State for the Home Department, ex p. Onibiyo* [1996] Q.B. 768, 783-784:-

> "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."

9. This was the test which was endorsed by Clarke J. in *EMS v. Minister for Justice, Equality and Law Reform* [2004] IEHC 398. The statutory test now contained in s. 17(7E) is effectively identical, since it requires the Minister to consent to the re-admission of an applicant to the asylum process in circumstances where that applicant has already been declared to be ineligible for subsidiary protection where he is satisfied that:-

> "(a) …new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for protection in the State, 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) or, as the case may be, for the purposes of his or her application for subsidiary protection under Regulation 4 of the Regulations of 2006."

10. Proceeding from this basis, therefore, the first question is whether there are any new "elements or findings" within the meaning of this provision. There are plainly no new "findings" in this sense and so the question then becomes whether the applicant's alleged homosexuality is a new "element" for this purpose.

11. In this respect, the present case is very different from *COI v. Minister for Justice* [2007] IEHC 180, [2008] 1 I.R. 208. That was a case where the applicant's sister-in-law had subsequently been granted a declaration of asylum status based on facts and circumstances which were very similar to that of the applicant herself. This in itself was found by McGovern J. to be a new element for the reasons which he carefully explained ([2008] 1 I.R. 208 at 217):-

> "How can it confidently be said that the reasoning in the applicant's case was correct when his sister-in-law achieved a different result on the same facts and in circumstances where there were so many common features between the two applicants based on their relationship and family history? It cannot be conducive to the proper conduct of the asylum process if this should occur. How can the applicant in this case not feel a sense of injustice if his application has been refused when that of his sister-in-law on the same facts has been accepted? At the very least it gives rise to a legitimate cause for concern and would warrant a review of the case. Since the applicant has exhausted his appeal under the legislation he can only have the matter reviewed by means of a fresh application. It is, in one sense, true that the applicant has not produced new evidence in the sense of new information from the country of origin nor a difference in his own circumstances or fears of persecution. But in my view he does not need to produce new evidence in that sense if he can show a good arguable case that his case should be reconsidered on the basis that the new information admits of a reasonable prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached in the earlier claim.
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> …It seems to me to be quite unjust that the applicant cannot go back to the RAC and the RAT on the same facts and with the information that his sister-in-law's application has been granted so that a general review of his case can take place. I have already held that the Minister did not apply the correct test in stating that the new evidence submitted "…does not significantly add to the likelihood that the applicant qualifying for asylum on the totality of the evidence already available and considered". In my view, the correct test is to show that there is a reasonable prospect of a favourable view been taken of the new claim despite the unfavourable conclusions reached on the earlier claim having regard to the additional information available."

12. Critically, however, the new information at issue in *COI* was external to that applicant in the sense that it was brought about by reason of a different result in the asylum process in respect of a close family member with almost identical facts. Can the present case be regarded as being in the same category?

13. Here it is important to recall that the Minister refused to permit the applicant to re-enter the asylum process precisely because she failed to advance a case based on her homosexuality at an appropriate stage in the process despite numerous opportunities to do so:-

> "The applicant in this application now alleges that she is in a relationship with a woman she knew for five years. It is quite clear that the applicant was provided with numerous opportunities to put the case regarding her alleged homosexuality forward at an earlier stage, either to ORAC, RAT or in the course of her [subsidiary protection] application. The fact that she failed to do so is entirely the applicant's responsibility. Also, the applicant was in receipt of legal advice from the outset of her application and would have been made aware that she should include all reasons for claiming asylum in this country. It is clear that the applicant was aware that homosexuality was illegal in Uganda. No valid reason has been provided why the applicant failed to disclose her alleged homosexuality on this occasion. Therefore this application is rejected on the grounds that it is material that could and should have been provided at an earlier stage."

14. In the course of the present application to the Minister the applicant had stressed the extent to which homosexuality had been (and was being) suppressed in Ugandan society and culture. She emphasised further the fact that she herself had suppressed her own homosexual instincts which had been liberated only following her arrival in Ireland in February, 2006 and even then, perhaps, to a gradual extent. However, by April, 2008 she says that she had been in a relationship with one Sarah N., which relationship was to last for another 8 months. She further says that she subsequently formed another relationship with one Sarah P.N. in February, 2009.

15. If, however, she feared serious harm in Uganda by reason of her homosexual orientation, then it is very hard to understand how this case was not advanced in her application for subsidiary protection in March, 2009. This application had been submitted on her behalf by her then legal advisers. Just as pertinently, by this stage, by her own account one lesbian relationship had already come to an end and Ms. JK had just commenced another relationship with another woman. Yet the application for subsidiary protection focuses entirely on her concerns vis-à-vis the Ugandan security forces based on her supposed suspected involvement with the Lord's Resistance Army.

16. Nor is the decision of the English High Court in *SB (Uganda) v. Home Secretary* [2010] EWHC 338 (Admin) directly comparable. In that case the applicant at all times maintained that she was lesbian and that she faced persecution if returned to Uganda. While her claim was initially rejected, the immigration judge had found that she was lesbian and that she had been arrested twice in this regard by the Ugandan authorities prior to her departure from Uganda. She had furthermore failed to honour her bail in respect of these charges. The asylum claim was rejected on the basis that she could avoid persecution by living discreetly.

17. By the late Autumn of 2009 the conditions for homosexuals in Uganda had appreciably deteriorated. A Private Member's Bill had been introduced in the Ugandan Parliament in October, 2009 which contemplated draconian punishments for homosexuals, including the death penalty for repeat offenders. The Bill also contemplated onerous reporting obligations which, for example, required persons in authority to report suspected homosexual conduct. While it is important to stress that the Bill has not become law, Hickinbottom J. found that it contributed to a climate of hostility to homosexuals, so that it was unlikely on the facts that the applicant could life a discreet homosexual life were she to be returned to Uganda. It was on that basis that the English High Court quashed that decision,

since the deteriorating conditions for homosexuals in Uganda this was plainly a new element so far as the applicant's *existing and long-standing asylum claim* (*i.e.,* the risk of persecution in Uganda by reason of her homosexuality) was concerned.

18. While there may be some superficial similarities between the present two cases, the all important difference between them is that in *SB* the applicant had at all times asserted her sexual orientation, whereas the applicant's failure to do so on several relevant occasions in the course of the present series of applications for international protection is one which has never satisfactorily been explained by her.

19. In these circumstances, I find it impossible to say that the Minister could not properly have rejected the application by reference to s. 17(7E)(b).

The medical certificates

20. The applicant also furnished two medical certificates attesting to the deaths of her partner and daughter. These certificates are ostensibly from the Nsambya Hospital and are dated 10th September, 2009. If these certificates are authentic, they show that both her partner and her 10 year old daughter died as a result of gunshot wounds. Again, if these deaths came about in this fashion, then this might well amount to a new element for the purpose of s. 17(7E).

21. This account was, however, rejected on credibility grounds by the Minister in large part because he was not satisfied that these death certificates were, in fact, authentic:-

> "The applicant has submitted two medical certificates attesting to the deaths of her alleged partner (male) and daughter in Uganda. The authenticity of these documents cannot be verified. However, I have undertaken an internet search for this hospital and I know that the address provided on various websites, including the East African Yellow Pages and of the hospital itself all provide the address as P.O. Box 7146, not P.O. Box 7145 as stated in the documents provided by the applicant. Taking into account previous credibility findings provided on previous documents submitted by this applicant, these documents cannot be accepted as evidence of the alleged deaths. I also note that the date of death was given as September, 2009 with the death certificates issued from the date of death in both cases. No explanation has been provided as to why these certificates were not provided at an earlier date. No supporting evidence of these deaths has been provided. This evidence was rejected as insufficient to allow the applicant to be readmitted to the asylum process."

22. Yet, it has to be acknowledged that the death certificates exhibited in these proceedings also contain the stamp "Ministry of Health, Nsyamba Hospital, PO Box 7146". Inasmuch as the decision maker insisted that no such reference to PO Box No. 7146 could be found in the documents, it was in error.

23. As it happens, this issue was not raised by the parties during the course of the first hearing and, candidly, it was a matter which came to my attention only in the course of preparing this judgment. I then re-listed the matter so that the parties could comment on it. Mr. Buckley, counsel for the applicant, freely admitted that it had not been raised by him, either on the pleadings or in the course of argument. He submitted that O. 84, r. 20(3) RSC nonetheless enabled this Court to formulate a new ground of its own motion. This provides:-

> "The Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit."

24. Counsel for the Minister, Mr. Conlan Smyth, submitted that I had no jurisdiction pursuant to O. 84, r. 20(3) on the basis that the hearing was now concluded. While he made no submissions on the merits of this point, he contended that were I to accede to this ground, it would amount to a form of ultra-zealous scrutiny of the actions of administrators, going well beyond that which was permitted within the established parameters of judicial review.

25. In my view, Mr. Buckley is quite correct in suggesting that the case remains at "hearing" in the sense contemplated in O. 84, r. 20(3). That phrase must be understood as referring not only to the actual "hearing" in the sense of oral argument, but it also embraces the period right up to the actual delivery of the judgment. In any event, out of a sense of fairness to the parties, I decided to re-list the matter for further argument, so that it cannot even be said that the actual hearing has been disposed of. It is only when the judgment has finally been delivered that the High Court's jurisdiction to permit an amendment of pleadings is exhausted: see, *e.g.,* my own judgment in *U. v. Minister for Justice, Equality and Law Reform (No.2)* [2011] IEHC 95.

26. It follows, therefore, that I have a jurisdiction to formulate a fresh ground of leave pursuant to the provisions of r. 20(3). The question then arises as to whether I should exercise that jurisdiction.

27. I believe that I should. While the factual detail is, perhaps, easy to overlook, it nonetheless goes to the heart of the credibility assessment. If these death certificates are truly authentic, then it would cast a new and important perspective on Ms. K.'s application for re-admission to the asylum system. Yet the detail of whether the correct post office box number was used on the death certificates was critical to that assessment. If the Minister's assessment of that critical detail is itself incorrect or, at least, materially incomplete, then this error is reviewable by this Court for all the reasons set out by Cooke J. in his judgment in *R. v. Refugee Appeal Tribunal* [2009] IEHC 353.

Conclusions

28. For the reasons already stated, I propose to give the applicant leave to challenge the decision insofar as the credibility assessment was flawed in a material particular. Prior to formulating this ground pursuant to O. 84, r. 20(3) I will discuss the form of order with counsel.