Neutral Citation: [2015] IEHC 278

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 367 J.R.]

BETWEEN

N. M. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND, N. N.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM, FERGUS O'CONNOR SITTING AS THE REFUGEE APPEALS TRIBUNAL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 14th day of April 2015

1. This is a telescoped application for an order of *certiorari* in respect of a decision of the Refugee Appeals Tribunal dated 16th March 2011 refusing the applicant a declaration of refugee status.

Background:
2. The applicant is a minor and has pursued her claim for asylum through her mother and next friend. The applicant was born on 12th March 2003 and is the second youngest of five children. She claims to have arrived in Ireland on 20th September 2010 on which date she made her application for asylum at the office of the Refugee Applications Commissioner. The applicant's mother was already present in the State at that point and had previously claimed asylum on her own behalf prior to her daughter's arrival here. The applicant presented as a national of Zimbabwe and her fear stems from her claim that she was beaten by a neighbour owing to the fact that Zanu PF supporters were beating children if they were considered to be associated with the rival MDC party. It is claimed that the applicant's father was a member of the MDC and that she was targeted as a result of this connection. The applicant claims that she stopped going to school because of the difficulties she was having and further claimed that her mother could not go to the police to seek their protection as they are Zanu PF supporters and would not do anything for her.

3. In giving evidence as to how the minor applicant travelled to the State, her mother claimed that she had no knowledge that her daughter was even coming to Ireland in September 2010. She states that a man in her village, whom she had been calling to check on the welfare of her children, arranged for her daughter to leave the country. It is claimed that a local shop owner then accompanied her daughter while travelling to the State but another unknown man actually delivered the applicant to her mother in Dublin.

4. Counsel for the applicant, Paul O'Shea B.L., made three broad complaints in respect of the Tribunal decision. In the first instance, it is said that the Tribunal member erred in making a finding that the applicant's "claimed nationality is not considered to have been established". In this regard, it is said that the Refugee Applications Commissioner had dealt with the application on the basis that the minor applicant was from Zimbabwe and that the matter did not appear to be in issue on appeal. It is submitted that the question of the nationality of an applicant is a threshold enquiry and that it is impossible for the Tribunal Member to apply the definition of a refugee to the circumstances of a case without the applicant's nationality being established. Counsel cites the decision of *Dhoumo v. Board of Immigration Appeals* 416 F.3d 172 (2d Cir. 2005) from the U.S. Court of Appeals for the Second Circuit in support of this proposition. It is said that the decision should be quashed on the basis of the failure of the Tribunal Member to comply with this requirement alone. In this context, counsel makes the assertion that if the issue of nationality was uncertain, it was incumbent on the Tribunal Member to remit the matter for further investigation by the Commissioner pursuant to s. 16(6) of the Refugee Act 1996, particularly in circumstances where the Commissioner had not expressed any concerns in his s. 13 report.

5. The applicant refers to the provisions of Reg. 5(1) of the EC (Eligibility for Protection) Regulations 2006 which describes the relevant matters to be taken into account by the Tribunal for the purposes of making a protection decision. It is claimed that the Tribunal Member failed to apply these minimum standards to the decision making process. In the context of the applicant not having established her nationality, it is said that the Tribunal could not have complied with the requirement to take into account "(a) all relevant facts as they relate to the country of origin…including laws and regulations of the country of origin and the manner in which they are applied".

6. The second complaint raised by the applicant is that she has been denied an effective remedy owing to the making of a finding by the Tribunal Member that she has not established her nationality. It is said that the applicant has been denied an opportunity to appeal this finding as would have been open to her if it had been made at first instance by the Refugee Applications Commissioner. Counsel refers to the decision of Cooke J. in *H.I.D. & Anor. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 146 and of Barr J. in *N.M. v. Minister for Justice* [2014] IEHC 638 and submits that this applicant's case can also be distinguished from the approach taken in *H.I.D.* as judicial review will not provide her with an effective remedy. Counsel relies on the following dicta to that effect:-

> "89. The applicant maintains that the review provided for in the statutory instrument does not constitute an effective remedy before a court or tribunal. The respondent agrees in part with this contention. The respondent accepts that the review decision taken by the more senior official in the MDU does not constitute an effective remedy before a court or tribunal. However, the respondent states that the remedy of judicial review before the High Court constitutes the effective remedy for the purpose of Article 39 of the Directive.
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> 90. The applicant has stated that the remedy of judicial review cannot be seen as an "effective remedy" due to the limitations on the jurisdiction of the court when considering a judicial review application. The jurisdiction of the court is limited in a number of ways. The court cannot reverse the earlier decision and substitute its own findings of fact on the substantive issues. The court can only annul the earlier decision and remit the matter back to a different decision maker for further consideration. The court cannot look at more up to date country information. It is confined to a consideration

of the information that was before the decision maker at the time he made the decision under review.

91. There is no doubt that the court in exercising its judicial review jurisdiction is limited in the role that it plays. It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision maker.

92. Under the system put forward by the respondent, the applicant, if dissatisfied with the decision made by the higher official, can only apply to the court if she can point to some fault in the decision making process on the part of the decision maker. She cannot simply appeal to the High Court. She is only permitted to seek annulment of the decision on one of the grounds on which certiorari is granted by the court.

93. The present case can be distinguished from the decision in *H.I.D. & B.A. v. Refugee Appeals Tribunal* (Case C-175/11) where it was held that the initial asylum procedure under the Refugee Act 1996 (as amended), whereby the decision of ORAC could be appealed to the RAT, which is an independent Tribunal whose members are protected from interference due to the existence of the remedy of judicial review, is an effective remedy. In its judgment, the Court of Justice rejected the argument that this right of appeal did not constitute an effective remedy. The court held at paras. 103 – 105, as follows:-

> "103. In the present case, under section 5 of the Illegal Immigrants (Trafficking) Act 2000, applicants for asylum may also question the validity of recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court, the decisions of which may be appealed to the Supreme Court. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.
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> 104. In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy.
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> 105. Consequently, the answer to the second question is that Article 39 of Directive 2005/85 does not preclude national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal, and to bring an appeal against the decision of that tribunal before a higher court such as the High Court, or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court."

94. Cooke J. subsequently explained the effect the judgment of the CJEU in his decision in *H.I.D. & Anor. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 146, where he held as follows at paras. 14-15:

> "14. In the concluding paras. 102 – 105, the Court of Justice deals with the question as to whether the independence of the Tribunal, which is otherwise clear, could be said to be jeopardised by the absence of statutory definition of removal grounds by pointing out that the effectiveness of the remedy required by Article 39 "depends on the administrative and judicial system of each Member State considered as a whole". That system includes the availability of judicial review before the High Court both in respect of the recommendations of the ORAC and the decisions of the RAT together with the fact that the decisions may also be susceptible of being appealed to the Supreme Court. The Court finds, at para 103: "The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members". It then rules in the following paragraph: "In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy". Contrary to the submission made on behalf of the applicants to this Court, the Court of Justice is not therefore treating the availability of an application for judicial review before the High Court as an integral part of the asylum process as if it were a further appeal against the decision of the Tribunal and therefore a part of the "effective remedy" for the purpose of Article 39. Quite clearly, what the Court is addressing in those paragraphs is the argument that the Tribunal could not be considered to be "independent" so long as the Minister had an entitlement to remove individual members thereby exposing the membership to the threat of external interference or influence.
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> 15. In the judgment of the Court, the intention and effect of the ruling of the Court of Justice is that it is the nature and extent of the jurisdiction available in the judicial system as a whole, including the availability of remedies by way of administrative law review, that renders the remedy "effective" because members of the Tribunal are protected against external interference (including improper influence on the part of the Minister or the State) by the availability of judicial review of any removal decision. Equally, the availability of judicial review of individual asylum decisions of the RAT rejecting appeals operates as an assurance that such decisions can, if necessary, be protected from external interference."

95. It seems to me, therefore, that the central point of the judgment of the CJEU in *H.I.D.* is that it was the combination of the power of the High Court by way of judicial review, together with the particular characteristics of the Refugee Appeals Tribunal, that led the court to find that the RAT was an independent court or tribunal for the purposes of Article 39 of the Procedures Directive, and that therefore the right of appeal to the RAT constituted an effective remedy, when looked at in the context of the administrative and judicial system as a whole.

96. I am of the view that the present case may be distinguished from the circumstances pertaining in *H.I.D.* In that case,

having applied the relevant test, the CJEU found that the RAT was a court or tribunal for the purposes of Article 39 of the Procedures Directive and that its independence was safeguarded by the availability of judicial review. In other words, it was the combination of the right to an appeal to the RAT, and the availability of judicial review to quash the Tribunal's decision, that meant that the Tribunal was an effective remedy. In the present case, however, in the context of a s. 17(7) refusal, whether at first instance or on internal review, neither the first instance decision maker nor the internal review decision maker is a court or tribunal. Accordingly, I am of the view that the combination of remedies, even taken as a whole in respect of s. 17(7), do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal.

97. In the circumstances, the court is satisfied that the review procedure under the statutory instrument and the supervisory role of the High Court in exercising its judicial review jurisdiction does not constitute an "effective remedy" before a court or tribunal as required by Article 39 of the Directive."

7. Despite appearing in written submissions, when questioned by the court, counsel for the applicant stated that he was abandoning a claim of bias in respect of the Tribunal Member owing to the fact that he had also adjudicated on the applicant's mother's application for asylum. Rather, counsel re-classifies the submission as a complaint that the Tribunal Member failed to apply the minimum standards required by breaching the applicant's right to an independent assessment of her appeal. In this regard, it is submitted that the Tribunal failed to comply with Reg. 5(1)(c) of the 2006 Regulations by not taking into account "(c) the individual position and personal circumstances of the protection applicant including factors such as background, gender and age, so as to assess whether on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm".

8. Dermot Manning B.L., counsel for the respondent, submits that an applicant for refugee status in the State bears the onus of proof of demonstrating "a reasonable degree of likelihood that he or she would be persecuted for a convention reason if returned to his or her own country". He notes that s. 11B of the Refugee Act 1996 obliges the Tribunal Member to assess the credibility of an applicant's claims. Counsel points to the fact that the Tribunal Member expressly noted that the birth certificate submitted by the applicant recorded the person who registered the birth in Zimbabwe as being the next friend in these proceedings. The relevant information in respect of the birth certificate was stated to have been given to the registrar in Zimbabwe on 13th August 2010, this despite the fact that the applicant's mother had been in the State since April 2009 and had attended her own oral hearing in November of that year. In this regard it is submitted that the Tribunal Member decided the applicant's appeal primarily on the basis of a lack of credibility on the finding that the information contained on the applicant's birth certificate contradicted fundamentally the account that had been given by the next friend in these proceedings.

9. The court finds that this was a matter which the Tribunal member was perfectly entitled to take into account and he was entitled to resolve the conflict of facts in the manner in which he did. As the Tribunal member lawfully ruled that the evidence did not establish that the applicant was a national of Zimbabwe, he was not obliged to consider whether the applicant has a real fear of persecution in that country. In this regard the respondent refers to the dicta of Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 in support of the view that the Tribunal Member was entitled to assess the birth certificate in the manner which he did:-

> "27. In my view, the assessment of whether a particular piece of evidence is of probative value, or the extent to which it is of probative value, is quintessentially a matter for the Tribunal Member. In this instance, there were a number of factors present which could have led the Tribunal Member to the conclusion that she reached."

10. In circumstances where the Commissioner made findings regarding the next friend's account of how and when the birth certificate was obtained and where the Tribunal made unambiguous findings in relation to the documentation supplied by the next friend, there was no obligation on the Tribunal to remit any matter back to ORAC pursuant to s. 16(6) of the Refugee Act 1996. The Commissioner's office had already investigated circumstances connected to the birth certificate. The Tribunal conducts a *de novo* hearing of the issues and is entitled to make findings based on the information submitted. My view is that that the credibility findings, made by the Tribunal, fully comply with the standards set down by Cooke J. in *S.B.E. v. Refugee Appeals Tribunal* [2010] IEHC 133 and *I.R. v. Minister for Justice* [2009] IEHC 353.

11. I cannot identify any legal error in the decision regarding the birth certificate. Clear reasons were provided by the Tribunal for the view it took in respect of the failure of the applicant to establish her nationality.

12. I reject the contention that judicial review does not provide the applicant with an "effective remedy" in this case. The decision of Barr J. in *N.M. v. Minister for Justice* [2014] IEHC 638 is not applicable in this regard as it refers to a different administrative scheme in respect of an application to re-enter the asylum process under s. 17(7) of the Refugee Act 1996 which, unlike the asylum system involving two tier decision making and judicial review, is a single tier decision making process. The decision of Cooke J. in *H.I.D. & Anor. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 146 is clear in expressing that the system whereby an applicant can make an asylum application and has the options of an appeal to the Tribunal and judicial review by the High Court, constitutes an effective remedy for the purposes of EU law.

13. The issue of the birth certificate and in particular the date it was issued was the subject of express negative findings by ORAC. The applicant's notice of appeal pleads that negative findings based on the birth certificate issue be reversed by the RAT. The RAT had the power to do as asked if it accepted the complaint made thus ensuring the existence of access to an effective remedy.

14. At the RAT it was expressly put to the applicant's mother that the birth certificate identified her as the person who registered the birth but this happened on a day when she was in Ireland and not in Zimbabwe. An unsatisfactory answer having been given to this conflict on the evidence, the authenticity of the document was in doubt; properly so, in my view. No illegality attaches to the consequential finding that the nationality of the applicant has not been established, when taken with other negativity credibility issues.

15. The applicant has sought in these proceedings to demonstrate that the failure of the Tribunal to make independent enquiry as to the authenticity of the birth certificate rendered the consequential decision as to the applicant's nationality unlawful. Contrary to what has been alleged, the applicant has had every opportunity in these proceedings to seek a remedy based on this complaint and thus the complaint that Ireland has not provided an opportunity to seek a remedy in relation to this alleged error is misconceived. That the complaint made to this court has not succeeded does not establish the absence of an effective remedy.

16. I refuse this application for judicial review.