Neutral Citation [2012] IEHC 72

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 630 J.R.]

BETWEEN

A.M.S. (SOMALIA)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

rESPONDENT

AND

[2011 No. 904 J.R.]

between

A.K.(AFGHANISTAN)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Cross delivered on the 14th day of February, 2012

1. General

1.1 The above two cases were heard together as they relate essentially to the same issues.

1.2 The applicant, Mr. S., is a Somali born national who came to Ireland as an asylum seeker in May 2007 and was granted a refugee declaration on 8th January, 2009. On 11th May, 2009, the applicant applied to the respondent pursuant to the provisions of ss. 18(3) and (4) of the Refugee Act 1996 (as amended) for refugee family reunification with his wife, daughter, mother and four minor siblings. All the family members had been living together in a refugee camp outside Mogadishu at the time and they are now in Addis Ababa in Ethiopia. The applicant's daughter and one of his brothers died in January 2010, in a bomb attack in Somalia while attempting to escape to Ethiopia.

1.3 The application for the applicant's spouse was granted two years later in May 2011.

1.4 The applications of the applicant's mother and his surviving siblings (two of whom are no longer minors) was refused by an executive officer in the Irish Naturalisation and Immigration Service (INIS) in a single decision. This decision was issued to the applicant on 6th July, 2011 and is the subject of the first judicial review.

1.5 The applicant, K. is a citizen of Afghanistan who came to Ireland as an asylum seeker in 2005. He was granted a refugee declaration by the respondent on 15th August, 2007 and has lived in the State as a recognised refugee since then. He is apparently severely disabled by polio.

1.6 On 14th January, 2010, the applicant applied for refugee family reunification with his father pursuant to the provisions of s. 18(4) of the Refugee Act 1996. The reason for the application was that his father was suffering from Parkinson's disease and was living in difficult circumstances in Pakistan. An application for the applicant's spouse was granted in May 2011.

1.7 The application in respect of the applicant's father was refused by the executive officer in the INIS and the decision issued on 30th August, 2011.

1.8 That is the second decision, the subject matter of the review.

1.9 Leave to apply for judicial review was given to the applicant, Mr. S. by Cooke J. on 25th July, 2011, and leave to the applicant, Mr. K. was given by Cooke J. on 10th October, 2011.

2. The Act

2.1 Section 18(I) of the Refugee Act 1996, provides as follows:-

> "(1) Subject to *section 17(2),* a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner."

2.2 A distinction is drawn between immediate members of a refugee's family and dependent family members under s. 18, in that s.

18(3)(a) provides:-

> "... if. after consideration of a report of the [refugee applications] Commissioner submitted to the Minister under *subsection (2),* the Minister is satisfied that the person the subject of the application is a member of the family of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in *section 3* for such period as the refugee is entitled to remain in the State."
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> (Emphasis added)

2.3 Family members as covered by s. 18(3) are the spouse or a child under the age of 18.

2.4 Section 18(4) affords the Minister a discretion to grant permission to other dependent members of the family of a refugee to enter and reside in the State and states as follows:-

> "(a) The Minister may. at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in *section 3* for such period as the refugee is entitled to remain in the State.
>
> (b) In paragraph (a), 'dependent member of the family', in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully."

2.5 Under s. 18(4), the Minister must first decide whether the persons are members of the refugee's family within the meaning of the section. Secondly, there must be a determination whether these persons are dependent upon the refugee and finally, the Minister must exercise his discretion under Section 18(4).

2.6 In each case, the Minister through his delegate held that the persons claimed were members of the refugee's family as alleged, without prejudice to the requirements that this be verified by DNA evidence if the Minister should consider it appropriate.

2.7 In each case it was also agreed that the applicants had provided sufficient documentation to establish that the persons were dependent upon each applicant by way of money receipts and in a relevant case by way of a medical report.

2.8 In each case having considered and agreed that the persons applied for were members of the applicant's family and were dependent the decision maker went under the headings of "Minister's Discretion" to analyse the potential earning capacity of each of the dependents for whom the relief was sought and in the case of each of them including Mr. S's mother who had significant health difficulties and his fourteen year old sister as well as Mr. K's father who also had significant health difficulties (parkinsonism associated with a depressive illness which required continuous drug treatment), the conclusion was the same in respect of each applicant i.e. that the applicant would be unable to support the subject of the application should he be granted permission to enter and reside in the State and the subject of the application would not be in a position to contribute to his own support should he be granted permission and that he would become an unreasonable burden on the social welfare system of the State.

2.9 Mr. Gareth Simmons, S.C., sought to challenge the decisions in each of the cases on a number of grounds:-

> (a) That either or both Article 8 of the European Convention on Human Rights in relation to family life and private life and/or Article 41 of the Constitution were engaged and there was simply no evidence that the decision maker carried out the necessary balancing exercise and/or applied a test of proportionality.
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> (b) That the inference from the decision was indicative that the Minister had adopted a fixed policy and had fettered his discretion adopting the bald statement that the dependents would "become an unreasonable burden on the social welfare system of the State" without any consideration of the particular circumstances of the family and that if a policy had been adopted it should be published and be reasonable and rational.
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> (c) That the Minister had wrongfully adopted the criteria of a test of sponsorship which not a statutory requirement.
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> (d) That the exercise of the Minister's discretion by an executive officer was a breach or inappropriate use of the carltona principle.

2.10 Mr. Simon Boyle, S.C., on behalf of the respondents joined issue with the applicant on all the matters.

3. The Engagement of Article 8/Article 41 and the Reasonableness of the Decision

3.1 It matters not whether Article 41 of the Constitution or Article 8 of the European Convention on Human Rights is engaged. As Cooke J. in *Isfof v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457:-

> "In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with 'qualified rights' (as in the present case) and 'absolute rights' (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection."

3.2 In this case, the respondents accept that Article 8 of the European Convention has been engaged.

3.3 It is therefore unnecessary to me to comment upon the fascinating legal and historical discussion of Hogan J. in *R.X & Ors. v Minister for Justice, Equality and Law Reform* [2010] IEHC 446, dealing with the fact that the "principal political architect of the Constitution" was himself raised for most of his formative years by his grandmother, uncles and aunt and suggesting that this may be indicative that the drafters could not have intended that close knit relatives by blood and marriage looking after children in the absence of their married parents would never come within the scope of the constitutional definition of family.

3.4 In any event Hogan J. did not decide the *P.X* case on that point and I would believe whatever the architect of the Constitution regarded as being his family from a persona l point of view, the law is to date clear that the constitutional protection of the family is

confined to married parents and children. This has been established since the *State (Nicolaou) v. An Bord Uchtala* [1966] I.R. 567 and has been repeated in a large number of cases since then including cases of very recent vintage.

3.5 Be that as it may, as far as these cases are concerned, it is clear that the persons in respect or whom an order i s sought qualify under Article 8 and this is conceded by the respondents.

3.6 The fact that the decision has no reference to the Convention rights of the refugee applicant is not of itself important. What is or may be important is whether there is any indication of proportionality in the refusal of family reunification on the sole grounds of inability of the applicant to financially support the subjects of the application in this State and their likely inability to support them selves without reliance on the social welfare system of the State.

3.7 Under s. 18(2) it is the function of the Commissioner to investigate the application and to submit a report in writing to the Minister, and this report must "set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person". It is clear that for the purposes of s. 18(2) it is the domestic circum stances of the person (not the refugee, the person who the refugee seeks permission), that is relevant.

3.8 The Minister is then obliged to consider t he report of the Commissioner and if the person is a close member of the family the Minister must grant permission, save for one irrelevant security based consideration, and if the person comes under the provisions of s. 18(4) (as in these cases), the Minister may at this discretion grant permission.

3.9 It is clear that the Minister has a wide discretion in this regard. Cooke J., in *Ali v. Minister for Justice. Equality and Law Reform* [2011] IEHC 115, quashed a decision to refuse relief under s. 18(4) (which was made on the basis that the refugee was in receipt of social welfare and therefore the persons could not be dependent on him) on the obvious basis that a person in receipt of Irish social welfare may well be able to support family members in the third world out of his Irish social welfare payments, but Cooke J. indicated that had the issue being whether the refugee had "sufficient income and resources to support and maintain the subjects of his application in the State been a factor considered in the exercise of the discretion to refuse" no problem would a rise.

3.10 The respondent concedes that the family reunification application in respect of the grandmother and aunt in that case impacted on their Article 8 rights. The Minister's decision should in the words of Murray C.J. in *Meadows* "at least disclose the essential rationale on foot of which the decision is taken", but Mr. Boyle submitted that the decisions in these case clearly did set out the rationale of the Minister's decision, *i.e*. that the applicants would be unable to support their family members in the State and that they would become a burden on the State.

3.11 In my view what was decided by the Minister is not sufficient. For example. there has been no separate consideration or indication that any separate consideration would or might apply to any of the different dependents, some of whom are elderly, one of whom is below the legal age permitting them to work, others are suffering from disease and there has accordingly been no indication of any proportionate analysis of the impact of the Minister's decision upon the ECHR rights of the refugee.

3.12 When one examines the decisions it is quite clear that a number of documents, including the medical status of some of the dependents are considered, but these matters are considered when the decision maker is dealing with the issues of identity and relationship and, indeed, dependency. These are the first two matters that must be established under s. 18(4)(b) before the Minister then proceeds to exercise his discretion. Under the heading of "Minister's Discretion" only one matter is addressed, i.e. that each of the dependents would become a burden on the State.

3.13 It is very difficult to conceive in the real world of very many family member dependents of refugees not being a burden on the State, at least in their initial period of residence.

3.14 It is noted that the applicant, Mr. K., is at least part-time self employed in the taxi business. However, hi s earnings are not very significant and i n the present economic climate that undoubtedly would be the case for most refugees. In the affidavit of Mr. John Ryan on behalf of the respondent, Mr. Ryan swears that "the family reunification section also seek to clarify whether or not the subject of the application may and /or will become dependent on social welfare on entry to the State. I say that these matters are treated with the utmost seriousness by the respondent". Mr. Ryan goes on to indicate that it always remains open to the applicant to reapply for family reunification "should his financial circumstances alter and/or improve".

3.15 Whereas undoubtedly it would open to the respondent to take it as a matter of "utmost seriousness" the fact that the dependents would not be able to support themselves or indeed be supported in this State by the applicant, it is clear from the above that the only circumstances in which the respondent foresees the applicants being able to reopen the matter is when they would become in a position to support their dependents within the State without being a burden on the social welfare system, "should his financial circumstances alter and/or improve".

3.16 In my view that averment is in support of Mr. Simons submissions that the respondent has failed to take into account the circumstances of the applicant and of the dependents in the making of his decision. Certainly if the respondent did take into account their circumstances in the exercise of hi s discretion, he did not give any indication thereof.

3.17 Accordingly. I believe that there is therefore a failure to meet the test as set out by Murray C.J. in *Meadows*:-

> "What I had in mind there was that a purely formulaic decision of the Minister may not in particular circumstances be a sufficient statement of the rationale or reasons underlying the decision.
>
> I am of the view that the principle of proportionality is a principle that may be applied for the purposes of determining whether, in the circumstances of a particular case, and an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with a fundamental reason and common sense. In applying the principle of proportionality in this context I believe the Court may have regard to the degree of discretion conferred on the decision maker. In having regard to the degree of discretion a margin of appreciation should be al lowed to the decision maker in choosing an effective means of fulfilling any legitimate policy objectives."

3.18 Indeed, the decision maker has a wide discretion. Indeed, the economic circumstances of the State are a relevant consideration, however, it is clear from the exercise of the Minister's discretion only one factor was taken into account and in my view that is not fair or any indication that the balancing of rights was in any way proportional.

4. The Other Issues

4.1 Having found above, the other issues do not greatly concern me, however, though one would be suspicious that the Minister has indeed adopted a fixed policy without stating it in relation to asylum applications, I am not at this stage disposed to holding that as a fact in the face of a denial on behalf of the Minister that that was done.

4.2 Mr. Simons indicated that what the respondent was saying was that they had not a fixed policy but in the alternative if they did have a fixed policy it was not an unreasonable one. This, Mr. Simons argued was indicative of the fact of a fixed policy.

4.3 The averments of Mr. Ryan as discussed above, especially when he states that the applicant may apply when his financial circumstances alter or improve, are worrying in relation to the existence of a fixed policy in relation to asylum and should the Minister have a fixed policy then he should state what the policy is so that it can be examined and assessed as being reasonable. In these proceedings I am not disposed to hold that the Minister was adopting a fixed policy and in any event it is unnecessary for me to do so.

4.4 Mr. Boyle queried the benefit of the Minister being in effect obliged to reel off in parrot fashion a list of matters that he had "considered" before coming to the same conclusion. Of course, if that were done it would run foul of Murray C.J's strictures in *Meadows* as being a "formulaic decision". The discretion given to the Minister is wide but the exercise of this discretion must not develop into what the "principle political architect of the Constitution" famously described in another context as a "empty formula".

4.5 Similarly, I believe that while it is possible that the Minister's decision may have in effect been to adopt a "sponsorship" requirement for a s. 18(4) which is not contemplated in the Act and would require a statutory amendment. I do not hold in these proceedings that such a policy has in fact been adopted and in any event it is not necessary for me to do so.

4.6 Finally, the applicant challenges the ministerial decision being delegated to a decision maker, Mr. Michael Rooney, who is a E.O. in the department as being unacceptable in view of the Carltrona principle.

4.7 The fact that the decision maker was of a relatively junior status is, it is suggested by Mr. Simons, indicative of the fact that this was a rubber stamping exercise only. I do not accept that submission.

4.8 There is some English authority as quoted by Mr. Simons (De Smith "Judicial Review" (6th Ed.) (5.162- 5. 167)) to the effect that the court could scrutinise the status of the decision maker under the Carltrona but I believe that such cases probably spring from the English 'anxious scrutiny" approach to judicial review and are not appropriate here.

4.9 In my view the Minister was correct in hi s delegation of the decision to Mr. Rooney.

4.10 Finally, I accept Mr. Simons contention that in strictness the "decision" is contained in letter reference 69/1041/07, which merely states "following consideration of your application the Minister has decided not to exercise his discretion pursuant to s.18(4) to grant the application" and states that a "copy of the submission carried out pursuant to s. 18(4) is enclosed for your information", and that it is this "'submission'' under s. 18(4) undertaken by Mr. Rooney that has in this judgment and in the submissions been referred to as the "decision". Mr. Rooney is in fact making a "submission'' to himself so that he can make the "decision" of the Minister.

4.11 In strictness, therefore. Mr. Simons submits that what you have is a one line decision by the person who made the submission and that this is objectionable.

4.12 I do see some strength in Mr. Simon's contention in this regard, however, I will assume for the purposes of this judgment that the decision is in fact a combination of the above letter from Mr. Rooney together with the document headed "Family Reunification Consideration''.

5. Conclusion

5.1 For the reasons as outlined above, I will grant an order of *certiorari* in each of the cases. It would follow that the respondent is then obliged to consider the application afresh.

APPROVED: Cross, J