Neutral Citation Number: [2009] IEHC 18

THE HIGH COURT

2008 114 JR

BETWEEN

S.Y. & R.Y. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND S.Y.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL & THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McMahon delivered on the 13th day of January, 2009

The applicant arrived in Ireland in or about 9th October, 2006. Her date of birth is 16th November, 1983. Although ethnically from Eritrea, she has lived all her life in Sudan, but was not entitled to citizenship in either Sudan or Eritrea. She was a stateless person. She first came to Europe through Italy where she was recognised as a refugee in July, 2005. She was lawfully admitted into Ireland on her Italian travel documents.

She applied for asylum in the State on her arrival on 9th October, 2006, and she duly completed the appropriate application forms. She was interviewed on the following day by an officer from the Refugee Applications Commissioner's office when she informed him that she had got asylum in Italy and that she had left Italy to come to Ireland because she could no longer live in Italy as the economic and social conditions were very difficult. She could find no work and had no proper home. She felt very vulnerable in the social circumstances in which she found herself, particularly since she was pregnant.

Initially, the Refugee Applications Commissioner (R.A.C.) refused her permission and attempted to transfer her claim to Italy pursuant to the provisions of Council Regulation E.C./343/2003 of 18 February, 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, O.J.L 050/1 25.2.2003 ("the Dublin Regulation"). It subsequently transpired, however, that this was an error and the Refugee Appeals Tribunal (R.A.T.) indicated then that they would not enforce the transfer order made against her under that Regulation.

On 14th June, 2007, she received a further communication from the office of the Refugee Applications Commissioner which conveyed the following decision to her. (The full letter is reproduced hereunder.)

> "Dear Ms. Y.,
> I refer to your applications for asylum to the Office of the Refugee Application Commissioner on 10/10.2006.

> From an examination of the documents which you have produced in relation to your status it is noted that you were granted asylum in Italy.
>
> As you have not claimed to have a fear of persecution in that state and in accordance with Section 17(4) of the Refugee Act, 1996, as amended, the Minister is precluded from giving a declaration that you are a refugee.
>
> No purpose would be served by investigating your claim, accordingly your application is not being admitted for processing."

Shortly thereafter on 19th June, 2007, she received another letter, this time from the office of the Minister for Justice, Equality and Law Reform which replied to her letter dated 18th May, 2007, wherein she had requested that the refugee status granted to her in Italy should be transferred to Ireland.

> "Dear Madam,
> I am directed by the Tánaiste and Minister for Justice, Equality and Law Reform to acknowledge receipt of your facsimile correspondence dated 18 May 2007 which has been forwarded to this Unit for attention.
>
> Please note that there is no provision in Irish law which allows for the transference of refugee status granted in another E.U. State to Ireland."

On 5th February, 2008, leave to apply by way of application for judicial review was granted by Charleton J. for orders of *certiorari* quashing the decision of the first named respondent (the R.A.C.) of 14th June, 2007 (reproduced above) and the decision of the Minister, the second respondent, dated 19th June, 2007 (also reproduced above). The applicant also sought on behalf of the second named applicant (her daughter was born while the first named applicant was living here) a declaration that the latter is a citizen of Ireland as she was born in Ireland on 4th January, 2007. It is as a result of this leave that the matter is now before this Court.

The main complaint of the applicant is that the R.A.C. cannot refuse to conduct an investigation mandated by the Refugee Act 1996 in a pre-emptive way by concluding that such an investigation would be futile because, as the applicant came to Ireland from Italy, the Minister at the end of the day did not have any statutory power to give her a declaration of recognition as a refugee.

The applicant relies on the provisions of the Refugee Act 1996, to support her application and in particular relies on s. 11 of that Act, subs. 1 of which provides that when an application is received by the Commissioner under the relevant section:-

> "It shall be the function of the Commissioner to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given."

And further, where subs. 1 applies, subs. 2 provides that the Commissioner shall direct an authorised officer to interview the applicant concerned and:-

> "The officer or officers shall comply with any such direction and furnish a report in writing in relation to the application concerned to the Commissioner."

In addition to the statutory basis of the applicant's claim she also relies on the principle of legitimate expectation.

Under the scheme of the Act it is envisaged that when the R.A.C. makes a report pursuant to s. 13 of the Act following the investigation, the claim then goes to the second named respondent under s. 17 of the Act whose function it is to make a declaration of status where appropriate. Section 17(4) provides:-

> "The Minister shall not give a declaration to a refugee who has been recognised as a refugee under the Geneva Convention by a state other than the State and who has been granted asylum in that state and whose reason for leaving or not returning to that state and for seeking a declaration in the State does not relate to a fear of persecution in that state."

The applicant maintains that such a conclusion can only be reached after a fair investigation of the claim by the appropriate authorities, in this case the first named respondents (i.e. the R.A.C.).

The respondent on the other hand claims that because of the mandatory provisions of s. 17(4) which prohibits the Minister from making a declaration in favour of a refugee where such a person has already been recognised as a refugee under the Geneva Convention by another state (i.e. Italy in this case), is a futile exercise and cannot result in any relief for the applicant.

The applicant maintains that before the Minister exercises his power under s. 17(4) the applicant should nevertheless be given an opportunity to make her case and to refuse her this opportunity is to deny her fair procedures.

It is quite clear from the affidavits and from the evidence before the court that the applicant has not made out the case that she has any fear of persecution if she is returned to Italy. On the contrary she has clearly stated in the documentation that she has left Italy largely for economic reasons and because she has no suitable accommodation. Moreover, notwithstanding the very clear indication from the Commissioner by letter on 14th June, 2007, which pointed out to the applicant that there was no claim of a risk of persecution in Italy, she has not since put forward any factual basis which would make s. 17(4) of the Act inapplicable in her case. This is an important point to bear in mind since such a finding removes any room for factual dispute in relation to the "fear of persecution" issue. If a "fear of persecution" was in issue then the applicant's case would be much stronger. Absent this, however, the issue in s. 17(4) is a purely legal one, bearing in mind again that it is common case that the applicant has been recognised as a refugee in Italy.

For this reason alone, and since the section is in no way ambiguous on the issue, the first named respondent is correct when he says to conduct an interview in those circumstances would be a futile exercise. It is important to note that s. 17(4) does not give the Minister a discretion in the matter and the Commissioner's decision is not one which usurps a Ministerial discretion. If s. 17(4) gave the Minister a discretion then of course the Commissioner could not pre-empt the Minister's decision. This, however, is not the case here as can be clearly seen from the wording of the subsection.

Furthermore, it has been established that there is no mandatory obligation on the Commissioner to conduct an interview in all cases: See Peart J. in *Nwole v.*

Minister for Justice, Equality and Law Reform (Unreported, High Court, 26th March, 2004) applying the decision of Smyth J. in *Emekobum & Ors v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 18th July, 2002). This latter decision of Smyth J. was also approved by Finlay Geoghegan J. when granting leave in the former proceedings: *Nwole v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 31st October, 2003). It is also worth noting that the Supreme Court, per Fennelly J., in the *L.N.* case also approved the principle that there could be an umbrella application on behalf of a number of persons which would not necessitate interviews in all cases: *A.N. v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 18th October, 2007). The obligation which the applicant relies on in s. 11, from these authorities, indicates that the obligation in that section does not impose an absolute duty in all cases. If the position were otherwise an application made under s. 8 to the Commissioner by, say a United States citizen for recognition as a refugee which was unaccompanied by a claim of persecution from his own State in any form would have to be entertained by the Commissioner even though he clearly does not meet the basic threshold requirements set down in the legislation. It is significant to note also that no argument is made on the legal interpretation advanced by the first named respondent in this connection. Were there a challenge to the interpretation of the subsection, different considerations would apply.

Legitimate Expectation

The second named respondent has refused to consider the application of the first named applicant for the transfer of her asylum status from Italy to Ireland.

The first named applicant herein asserts that she had a legitimate expectation that her case would be considered and relies on a document entitled:-

> "A study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of the uniform status, valid throughout the Union, for those granted asylum."

The report is compiled by several authors from the Danish Refugee Council, the Migration Policy Institute and the Institute for Migration and Ethnic Studies. It appears to be a study of various countries and it was prepared for the Commission of the European Communities. The relevant paragraph of the four paragraphs devoted to Ireland on which the applicant relies reads as follows, at p. 104:-

"There is no specific legislation or guidelines concerning the examination of an application for transferable responsibility. The responsible operational officers would therefore assess applications for transfer on a case by case basis. An application for transfer has to be lodged with the Immigration Division of the Department of Justice, Equality and Law Reform."

The previous paragraph reads:-

> "Convention status is the only refugee status granted in Ireland and so this would also apply when determining a transferred case, should one arise."

The report also notes that Ireland has no relevant experience in this matter or knowledge of any transfer of protection cases in the jurisdiction to date. Moreover, the document also makes clear that Ireland is not a party to the

European Agreement on Transfer of Responsibility for Refugees 1980 and had not concluded any bilateral agreements on this subject.

The origin and status of the report or the source of its information in Ireland is unspecified. The authors of the document appear to be non-governmental organisations and it cannot be taken to be a document emanating from an official State organ. It makes no reference to s. 17(4) of the Refugee Act 1996.

In *Glencar Exploration v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, Fennelly J. at pp. 162 to 163 sets out the essential elements involved in the concept of legitimate expectation:-

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters… Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

This statement was applied in *Power v. Minister for Social and Family Affairs* [2007] 1 I.R. 543 per MacMenamin J.

From the facts of this case it is my view that the representation relied upon by the applicant is not a promise or a representation as to how the respondents would act in an asylum transfer situation. A full reading of the four paragraphs dedicated to Ireland in the report would not lead a reasonable person to such a conclusion. Furthermore, it cannot be said that it is a statement or a promise or representation which was made by or on behalf of the respondents. The respondents in an affidavit have stated that they have failed to locate within the public service the person who is alleged to have provided the information to the authors. Moreover, it is quite clear from the affidavits that the applicant has not relied or acted on the face of any such representation when she first came to this country. All her earlier affidavits emphasised the fact that she came to Ireland because the economic and social conditions which she found herself in in Italy were unsatisfactory and made her feel "vulnerable". That was the basis of her application and nowhere has she averred that she relied on the statement contained in the report as providing her with encouragement to travel to Ireland. By no stretch of the imagination could it be suggested that anything in the report of third parties, unrelated to the State, created an expectation on the part of the applicant. In the circumstances there can be no question of doing an injustice to the applicant. The State cannot resile from something it never represented in the first place. Finally, since the Government did not ratify the 1980 agreement which appears to have been the focus of the Danish Refugee Council Report, the Minister could not be taken to have undertaken in any way to honour any of the provisions of that agreement. Additionally, without giving evidence of any steps taken in reliance on the so called representation in the report, the first named applicant could not argue that there was a specific reliance on her part to amount

to an injustice in the case (see *Power v. Minister for Social and Family Affairs* [2007] 1 I.R. 543).

Finally, it is clear from the jurisprudence that the doctrine of legitimate expectation may only secure a benefit for an applicant where it would not otherwise be unlawful to do so. (See *Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403, approved by MacMenamin J. in *Power supra*). In the present case s. 17(4) of the Refugee Act 1996 precludes the Minister from granting refugee status to the first named applicant since she already enjoys that status in Italy. The Minister has no discretion in the matter.

Citizenship of the Second Named Applicant

Section 6(3) of the Irish Nationality and Citizenship Act 1956, as amended by section 3(1) of the Irish Nationality and Citizenship Act 2001, provides:-

> "A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country."

Section 28 of the same Act provides that any person who claims to be an Irish citizen may apply for a certificate of nationality. This is clearly the procedure specified in the 1956 Act for a person who wishes to have a certificate of nationality. Because the second named applicant has not availed of this procedure her claim for a declaration in these proceedings is not appropriate in the circumstances. In any event the first named applicant has not shown in evidence the fact that she is not entitled to citizenship of any other country as required by s. 6(3) of the 1956 Act. For these reasons the relief sought by the second named applicant will not be granted in these judicial review proceedings.