Neutral Citation Number: [2009] IEHC 218

THE HIGH COURT

2007 1431 JR

BETWEEN/

N. X. Q.

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER

AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered on the 6th day of May, 2009

1. By an originating notice of motion dated 25th October, 2007 issued from the Central Office of the High Court on 1st November, 2007, the above first named applicant commenced the present application for leave to seek judicial review by way of, *inter alia*, orders of *certiorari* to quash the Report and Recommendation made under s. 13 of the Refugee Act 1996 by the first named respondent, (the "Commissioner"), on 29th October, 2004 and the decision of the second named respondent, (the "Tribunal") given on appeal against that report on 18th March, 2005.

2. The first named applicant is a national of Somalia who arrived in the State in September, 2003 and applied for asylum on the 14th of that month. She included in her application her daughter, I.C.A. and her nephew C.X.C.. For the sake of simplicity I will refer to the three applicant parties as, respectively, "the applicant", the "applicant's daughter" and the "applicant's nephew". In the section 13 Report of 29th October, 2004 the Commissioner found that; "*Due to the credibility issues outlined in this report the applicant has failed to demonstrate a well founded fear and forward looking fear of persecution in Somalia for herself and the minors named in this application*".

3. The applicant's nephew was born on 10th October, 1986 and thus attained the age of 18 years on 10th October 2004, that is, shortly before the date of the Commissioner's section 13 Report and after the two interviews held on 8th July, and 24th September 2004, on which the Report was based. The applicant's daughter was stated in the original asylum application to have been born on 11th March, 1988 and so would have reached 18 years on 11th March, 2006. However, following the rejection of the applicant's joint application for asylum in the State, the applicant's daughter went to the United Kingdom where she applied for asylum under a different name, giving her date of birth as 31st December, 1988. She was returned to this country by the United Kingdom authorities on 25th October, 2007, but if that is her correct date of birth, she attained the age of 18 on 31st December, 2006.

4. These dates of 18th birthdays are relevant to this application because on 5th March, 2009 the applicant brought a motion seeking an order "to be joined in the proceedings by her daughter and nephew" and for liberty to amend the statement

of grounds. In effect, these amendments sought to include, by way of proposed reliefs, orders of *certiorari* to quash the same decisions of the Commissioner and the Tribunal in so far as they related to the daughter and nephew and to add two new grounds as grounds numbers 26 and 27. These grounds are to the effect that the two decisions in question were unlawful because they purported to apply to the applicant's nephew as a dependant of the applicant when he was over 18 years at the time of the making of each of the decisions.

5. Having heard submissions on this initial motion the court expressed the view that the joinder of the additional parties was probably unnecessary in practical terms because, if the grounds originally advanced and which were to be adopted and relied upon by the two applicants were well founded, the contested decision of the Tribunal would be quashed with the result that there would be no basis upon which the Minister could refuse a declaration of refugee status or make a deportation order against any one of the three persons included in the asylum application, until a new decision by the Tribunal was made. Nevertheless, on the basis that all three had been parties to the asylum application and had been covered by the two contested decisions; and because no new case of any substance was proposed to be advanced which was not already raised in the original application, the Court decided to grant the application to join the additional parties in the present proceedings. In the sense of Order 15 of the Rules of the Superior Courts, the three applicants seek to assert the same rights to relief arising out of the same circumstances and as against the same contested decisions, such that the issues can be more effectively dealt with in the single proceeding already commenced and ready for hearing. The court considered that the two new grounds, numbers 26 and 27, were unlikely to constitute substantial grounds for the grant of relief in themselves given that the mere fact that the applicant's nephew had reached the age of 18 years did not mean that he was no longer "a dependant" particularly when, after his 18th birthday, he had taken no step before either the Commissioner or the Tribunal to so assert.

6. Having so ruled and having regard to the obvious substantial lapse of time between the adoption of the two contested decisions of October 2004, and March 2005, and the initiation of the present proceedings on 25th October, 2007, the Court invited the parties to make submissions on the issue as to whether there existed in this case good and sufficient reason to grant the necessary extensions of time to enable the present application for leave to be entertained pursuant to section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000.

7. Although, in the course of the submissions made on behalf of the applicants, the court enquired of counsel for the applicants as to whether any particular factors or arguments fell to be considered by it in respect of extending the time in favour of the applicant's daughter and the applicant's nephew, as opposed to those relevant to the applicant herself, counsel acknowledged that no such specific or distinct considerations arose other than the general consideration that the criteria for granting an extension were applied with leniency as against persons who are minors when time is running. It was argued that the daughter and nephew were entitled to rely on the fact that all the steps taken or attempts made by the applicant to seek a remedy for the wrong done in the decision of the Tribunal, were taken and made on their behalf also. This, in effect, reflects the affidavits which they themselves have sworn in which the delay in seeking to be joined in order to challenge the contested decisions in their own right is excused only by reference to the delay experienced by the applicant in recovering the necessary file from her former solicitor who ceased practice and by the need to obtain senior counsel's opinion.

8. The applicant's own explanation and excuse for the delay is given in paras. 38 to 47 of her affidavit of 25th October, 2007. This can be summarised as follows.

When she received the decision of the Tribunal she wished to have it reviewed judicially but could not provide the finance to do so and her then solicitor would not act for her otherwise. He did, however, agree to write a letter to the Tribunal on her behalf on 11th April, 2005 expressing dissatisfaction with the Tribunal's decision and asking for a rehearing.

- This was acknowledged by the Tribunal, which said that the file and the letter were to be forwarded to the Decisions Unit of the Department of Justice which in turn acknowledged it on 12th May, 2005 but nothing further was heard.

- In August, 2005 the applicant learned that her then solicitor had ceased practice and could no longer act for her as its practising certificate had been suspended.

- She says she then contacted various solicitors in Dublin and in Athlone and in its vicinity to get legal representation but without success.

- In March, 2006 she went back to the Refugee Legal Service but was informed that they could not expect to get legal aid for judicial review due to the lapse of time and the fact that the file held by her former solicitor was missing in part but on 17th August, 2006 they agreed to write on her behalf to the Minister.

- It was on 31st July, 2007 that she made contact with her present solicitor who agreed to act for her on a *pro bono* basis. That solicitor, in her own affidavit, explains that she had her first consultation with the applicant on 3rd August, 2007.

- It took some time to get consents and the file from the Refugee Legal Service, such that it was not until 27th September, 2007 that she was able to consult counsel for advice and for draft papers.

9. It is to those circumstances and those explanations that the criteria for assessing whether there is good and sufficient reason to extend time in this case fall to be applied.

10. These criteria are not themselves in controversy in this case and are well settled now in their application for the purposes of section 5(2)(a) of the 2000 Act. The relevant case law was outlined to the court in written submissions and was opened to the court in the course of legal argument.

11. There is no doubt but that in this case, judged in the context of most asylum cases in which extensions of time are required, the delay involved is exceptionally and, therefore, inordinately, long. Quite apart from the challenge to the Commissioner's decision, the delay which requires to be explained and excused is at least that from 14 days after notification to the applicant of the Tribunal's decision of 18th March, 2005 until the initiation in the present proceeding on 25th October, 2007, a period in excess of two and a half years.

12. Although there are a variety of factors capable of weighing in the balance over and above the length of the time lapse itself when considering whether good and sufficient reason is shown for an extension, amongst the most important considerations are the question as to whether, and if so when, an intention to

challenge the contested decision by judicial review was first formed and whether there are acceptable reasons for which the applicant cannot be blamed, which explain why that intention was not followed up and put into effect at the relevant time.

13. In this case there is little doubt that the applicant was upset by the Tribunal decision in March 2005 and it can reasonably be inferred that she would wished to have done whatever was necessary to set it aside if she could. She could not, she says, afford judicial review proceedings and the then solicitor would not act for her to take such proceedings for that reason. Instead he wrote on her behalf on 11th April, 2005 to the Refugee Appeals Tribunal.

14. This is a detailed and strongly worded letter which alleges a series of significant errors and inconsistencies in the Tribunal decision. In particular, it alleged that numerous matters are stated in the decision to have happened at the appeal which "simply did not take place". Certain replies are said to be attributed to the applicant in the Decision which it is alleged relate to questions never put to her. However, while expressing extreme dissatisfaction with the decision, the letter did not threaten to seek to quash it but requested the Tribunal "at the very least to arrange for a new hearing before a different Tribunal member". When nothing came of this, on 17th August, 2006 the Refugee Legal Service, having been contacted by the applicant in March 2006, wrote to the Minister making a formal request on her behalf pursuant to section 17(7) of the 1996 Act to have the applicant, as it is put, "readmitted to the asylum process".

15. This letter, after reciting the history of the application and of the previous solicitor's ceasing to act, reiterated the serious flaws identified in the Tribunal decision in the letter of 11th April, 2005 and again challenged the quality of that decision and the validity of its analysis. It is thus clear from the explicit references to six particular documents in that letter that the applicant and the Refugee Legal Service had available to them at that time, both the decision of the Tribunal and the solicitor's letter of 11th April, 2006 with its recital of the alleged flaws.

16. The significance of these two letters lies in the fact that immediately following the receipt of the Tribunal decision in March 2005 and again in August 2006 the applicant had the benefit of legal advice by lawyers with expertise in this field, who must clearly have been alive, having regard to the allegedly serious nature of the flaws identified in the Tribunal decision, to the possibility of proceeding by way of judicial review. Indeed, it is clear that this possibility was discussed with the solicitor in April 2005. It may well be that the first solicitor felt judicial review was not feasible because the applicant could not afford it and that the Refugee Legal Service felt that legal aid would not then be forthcoming because of the lapse of time but the result was that, for whatever reason, a decision was taken to opt for the alternative course of action and possible remedy, namely, the application for readmission to the asylum process under section 17(7), a choice which was perfectly understandable, reasonable and logical for the Refugee Legal Service to recommend and for the applicant to adopt in those circumstances.

17. Thus, although the applicant professes to having wished to pursue judicial review by way of remedy from the outset, the fact is that, on the basis of legal advice which cannot be said to have been in any sense mistaken or unwise, she chose to opt for the alternative course of an application under section 17(7). That is the reason why no application for judicial review was initiated at any time between August 2005, when her solicitor ceased to act and July 2007, when she contacted her present solicitor. The fact that upon a change of solicitor the new

legal representation is willing to act on a *pro bono* basis and obtained advice to the effect that a decision of the Refugee Appeals Tribunal might be open to challenge as flawed, cannot create, after a lapse of two years, a good and sufficient reason for extending time. To extend time the delay must be both explained and excused and the fact that the alternative courses of asking for a new hearing and then for readmission to the asylum process were considered, for whatever reason, more appropriate, does not, in the Court's judgment, constitute a legal excuse for delay.

18. Independently of those considerations a further observation must be made, namely, that while a change of solicitor is not in itself a good and sufficient reason for extending time, the need to find a new one may, in certain circumstances, serve to explain and excuse a lapse of time, provided it is limited to a matter of weeks and there is evidence of active steps being taken promptly to overcome the problem posed when a solicitor ceases to act. This is not the case in the present instance. As has been pointed out, the letter of 11th April, 2005 identified potential grounds of challenge to the Tribunal decision. Over three months elapsed before the applicant learned in August 2005 that the solicitor had ceased practice. No explanation was given as to why no step was taken to pursue the matter when there was no response to the letter of 11th April, 2005. Furthermore, apart from the references to making representations to various persons and approaching a Dublin solicitor, there is little evidence of the situation being treated with any degree of urgency between August 2005 and March 2006.

19. In the course of argument, counsel for the applicant placed considerable emphasis on the strength of the arguable case to be made against the Tribunal decision and especially on the fact that the distinct positions of the applicant's daughter and the applicant’s nephew were given no consideration and on the fact that although they spoke English and are well able to give evidence for themselves, they were not invited to and, indeed, “not allowed” to be interviewed by the Commissioner or to testify before the Tribunal. The inference from this argument appeared to be that the exceptional length of the delay could be considered compensated for by the alleged exceptional strength of the *prima facie* case to be made on the merits. It is true that the case *of G.K. v. Minister for Justice* [2002] 2 I.R. 418 for example, can be pointed to as authority for the proposition that even a very long delay can be overcome if it is necessary to do so in order to avoid a glaring and serious injustice (see in particular the judgment of Hardiman J.). Nevertheless, the Court does not consider that there is any necessary relationship of reciprocity between the length of delay to be excused and the strength or otherwise of the arguable case to be advanced. As has frequently been pointed out in the decided cases, the statutory limitation period of section 5 of the 2000 Act must necessarily apply to both cases that are arguable but by no means certain, and to cases which are manifestly sound, if the limitation period is not to be deprived of its legislative effect. (See for example the judgment of Peart J. on 27th July, 2007 in the *Asubugu* case.)

20. The Court therefore considers that no good and sufficient reason for extending time has been made out by the applicant in this case. The fact of the matter is that attackable flaws in the contested decision of the Tribunal had been identified very shortly after that decision became available. For the understandable reason of lack of finance it was decided, in effect, not to challenge it by way of judicial review either then or a year later in August of 2006 and, instead, to take two different approaches. The later change of circumstances and change of legal advice cannot cure the earlier omission so as to create a good and sufficient reason for the extension.

21. The above reasons for refusing to extend time in favour of the applicant effectively dispose also of any distinct application which might be considered to be made for an extension on behalf of the second and third named applicants, the daughter and nephew, in that they expressly align themselves to the reasons advanced on behalf of the first named applicant and advance no separate reasons of their own.

22. Indeed, their stance in this proceeding might be considered contradictory in this regard. As mentioned, one of the substantive complaints advanced both by them and by the first named applicant as to the illegality of the two contested decisions is that they were precluded from participation in the asylum process at both stages although they were both of an age when they could have testified in their own right and in order to corroborate the testimony of the first named applicant.

23. The applicant's nephew reached the age of 18 shortly before the Commissioner's decision on 29th October, 2004. The applicant's daughter did so, at the latest, by 31st December, 2006. Neither, however, took any step to assert their entitlement to consideration of the claim to refugee status, independent of that of the first named applicant. The applicant's nephew could have done so at any time after 10th October, 2004 and, indeed, prior to the delivery of the Commissioner's decision. He could have renounced his status as a dependant before the Tribunal and made a separate case. The applicant's daughter could have done so at least after 31st December 2006, (if not earlier,) and it is significant that it is at some time after 18th March 2005 apparently, she was able to apply in her own right and under a different name for asylum in the United Kingdom. However, no explanation or excuse is advanced by either of those applicants in their own right as to why they took no step to assert their professed claim to entitlement to separate consideration of their cases and to challenge the Tribunal decision until March, 2009, when they first moved to be joined in this proceeding. Thus, there is neither explanation nor excuse offered by them as parties to this application for leave, as to why neither took any step at any time throughout the entire of the years 2007 and 2008 and especially after October 2007, when they knew that the first named applicant had commenced proceedings.

24. For these reasons the Court finds that no basis exists in this case for the exercise of the discretion to extend time to enable leave to be granted to apply for an order of *certiorari* and other reliefs against the decision of the Tribunal.

25. It follows accordingly that there is even stronger reason to refuse the even longer extension required to permit a challenge to be raised to the Commissioner's report and recommendation of 29th October, 2009. Clearly, a decision had been taken deliberately and on legal advice not to seek judicial review of that decision in the autumn of 2004 and to take the alternative and appropriate course of the statutory appeal to the Tribunal. Having regard to the fact that the Commissioner's rejection of the claims to refugee status was based upon the lack of credibility in the claim made by the applicant, the statutory appeal was the obvious and correct remedy if a new view of her credibility was to be substituted. Thus, the question as to whether an intention to seek judicial review of the Commissioner's decision was formed but was prevented from being pursued for excusable reasons simply does not arise.

26. For all of these reasons the applications for extensions of time will not be granted and the application for leave must therefore fail as being out of time.