Supreme Court

Olga Anisimova v Minister For Justice

28 November 1997

MURPHY J (Hamilton CJ and Lynch J concurring):

The Applicant is a Russian national who resided in Moldova. It is common case that she arrived in London on 21 February 1996 carrying a passport and a visa for the United Kingdom for herself and her daughter which had been granted at the British Embassy in Kiev. The passport was endorsed with leave to enter the United Kingdom for six months provided that the passport holder did not enter employment or engage in any business or profession. On her arrival at Heathrow Airport London the Applicant immediately proceeded to the ferry terminal at Holyhead where she took a boat to Dublin. She had spent less than 24 hours on United Kingdom soil while she was in transit to Ireland. On arrival in Dublin she made contact with the Irish Refugee Council who provided her and her daughter with bed and breakfast accommodation. On 27 February 1996 she attended at the offices of the Department of Justice and made application for political asylum. She was in personal contact again on 28 February with officials of the Department of Justice and she or Mr Mcphillips, the solicitor with whom she had been put in contact by the Irish Refugee Council, engaged in correspondence with the officials of the department during the months of February and March of 1996.

It is contended that the minister declined to examine the Applicant's claim for refugee status on the ground that the appropriate place to make that application was in the United Kingdom which was the 'first safe country' in which the Applicant had arrived. The minister informed the Applicant that unless she returned voluntarily to the United Kingdom that a deportation order would be made in respect of her. The witnesses on behalf of the Respondent have sworn -- and the matter is not in dispute -- that contact had been made by them, first, with the United Kingdom immigration authorities from whom an undertaking had been received to accept the return of the Applicant and to process in the United Kingdom her application for asylum and secondly, that the same officials had contacted the United Nations High Commissioner for Refugees who approved the decision of the minister to return the Applicant to the United Kingdom in those circumstances.

It was against that background that the Applicant applied -- pursuant to the liberty given in that behalf -- for orders by way of judicial review in the following terms:

1. An interlocutory injunction restraining the Respondent from making a deportation order (from) removing the Applicant from the jurisdiction pending the determination of these proceedings.

2. An order of mandamus directing the Respondent to consider the Applicant's application for refugee status in accordance with the United Nations Convention on the Status of Refugees of 1951 and the 1968 [sic] Protocol thereto.

3. A declaration that the Applicant is entitled to have her application for refugee status determined in accordance with the agreement and procedures agreed between the Respondent and the United Nations High Commissioner for Refugees as set out in a letter of 13 December 1985 from the assistant secretary of the Department of Justice to the representative of the United Nations Commission for Refugees.

That application was refused by Morris J for the reasons set out in his judgment of 18 February 1997 and it is from that judgment and the order made thereon that the Applicant appeals to this Court.

The depth and scale of the problems relating to refugees in the aftermath of the Second World War and the appalling hardship endured by so many of them inspired the United Nations Convention on the Status of Refugees of 1951 (the Geneva Convention) and the Protocol thereto in 1967. These were international agreements to which the State was a signatory. However the obligations thereunder did not form part of our domestic law. The Refugee Act 1996 was enacted on 26 June 1996. The 1951 Convention, the 1967 Protocol and the Dublin Convention are all scheduled to the 1996 Act. The Dublin Convention, in particular, was an agreement between the member states of what was then described as the European Economic Community dealing with procedures to determine the state responsible for examining applications for asylum lodged in one of the member states of the European Communities. However neither the Refugee Act 1996 nor any of the conventions scheduled thereto formed part of the domestic law of the State at the time when the events occurred giving rise to the proceedings herein. The procedure to which the Minister for Justice had committed herself in relation to applications for asylum was set out in a letter to Mr R von Arnim, the representative of the United Nations High Commission for Refugees, dated 13 December 1985. Although recorded in previous decisions of this Court it is appropriate to set out once more and in full the contents of that letter as follows:

13 December, 1985

Dear Mr von Arnim,

I am directed by the Minister for Justice to refer to your meeting with him on 5 February 1985, following which the UNHCR made a proposal for a procedure for the determination of refugee status in Ireland.

Your submission has been examined. As a preliminary matter I can confirm that at

present the very limited number of asylum applications received in this country does not warrant legislative action incorporating the procedures suggested in your letter of 24 April 1985. However, I am glad to be able to inform you that these procedures are in themselves quite acceptable. Accordingly, arrangements have been made for applications for refugee status and asylum to be considered in Ireland according to the following procedure which the department believes to be in line with Ireland's international obligations and humanitarian traditions:

1. Application for refugee status and asylum may be made by the individual to the immigration officer on arrival or directly to the Department of Justice if the individual is already in the country.

2. Immigration officers have been provided with written guidelines which indicate clearly that a person should not be returned to a country to which he is unable or unwilling to go owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a social group or political opinion, nor should he be returned to a country where his personal safety might be seriously threatened as a result of the political situation prevailing there.

3. Whenever it appears to an immigration officer as a result of a claim or information given by an individual that he might be an asylum-seeker, his case will be referred immediately to the Department of Justice, Dublin, for decision. Immigration officers have been instructed that it is not necessary for an individual to use the term 'refugee' or 'asylum' in order to be an asylum-seeker. Whether or not an individual is an asylum-seeker is a matter of fact to be decided in the light of all circumstances of the particular case as well as guidelines which may be issued from time to time by the department. In case of doubt, the immigration officer shall refer to the Department of Justice.

4. Such an individual will not be refused entry or removed until he has been given an opportunity to present his case fully, his application has been properly examined, and a decision reached on it.

5. The asylum application will be examined by the department in accordance with the 1951 Convention and 1967 Protocol on the Status of Refugees. This shall not preclude the taking into account of humanitarian considerations which might justify the grant of leave to remain in the State.

6. The Applicant will be given the necessary facilities for submitting his case to the department. If he is not proficient in English, the services of a competent interpreter will be made available when he is interviewed. He will be informed of the procedure to be followed, and will be given the opportunity, of which he will be informed, to contact the UNHCR representative or a local representative of his choice. An Applicant will be given this information in a language which he understands.

7. All Applicants will be interviewed in person. Interviews will be conducted, as far as possible, by officials of the department who understand asylum procedures and the

application of refugee criteria, and are informed on human rights situations in the countries of origin. Where interviews cannot be undertaken by the department, for example, because the asylum-seeker is outside Dublin, adequate guidance will be provided by the department to the local immigration officials to ensure that all relevant information has been obtained and forwarded to the department.

8. In line with the supervisory role of UNHCR under the 1951 UN Convention and the 1967 Protocol on the Status of Refugees, the department may seek the views of UNHCR on any case prior to reaching a decision, or the UNHCR may make representations on the situation of a specific individual case or group of asylum-seekers.

9. In any case where refusal of the application is proposed or an immediate positive decision is not possible, the Department of Justice will consult with the UNHCR representative accredited to the Republic of Ireland, before reaching a final decision and before taking steps to remove the Applicant from Ireland, provided that the representative is available at the time.

10. If the Applicant is recognised as a refugee, he will be informed accordingly and issued in due course with documentation certifying his refugee status and with a travel document if he needs one. If the Applicant is not recognised, he will be informed, in writing, of the negative decision and the reasons for refusal.

The procedure outlined above does not envisage a formal right of appeal as suggested in your proposal, but there is an element of appeal inherent in the procedure in view of the number of agencies brought into the examination, and the present practice by which each application is submitted to the minister personally.

When the arrangements have been in practice for some time the procedure can be reviewed in the light of the experience gained.

Yours sincerely,

Cathal Crowley,

Assistant Secretary

Mr R von Arnim,

Representative,

UNHCR,

36 Westminster Palace Gardens,

London SWIP IRR,

England.

In Fakih v Minister for Justice [1993] 2 IR 406; [1993] ILRM 274 O'Hanlon J, having reviewed the evolution of the law or principle known as 'legitimate expectations' and though expressing some concern with the application and operation of that principle concluded that it operated in the context of applications for asylum with the effect which he described in the following terms:

In the present case I am of opinion that the same obligation to follow fair procedures in dealing with the question of the removal of the Applicants from the jurisdiction arises in their favour and that the mode of procedure to be adopted should have regard to the assurances given by the Minister for Justice to the UNHCR representative in the letter of 13 December 1985.

In Gutrani v Minister for Justice [1993] 2 IR 427 this Court in a judgment delivered by McCarthy J likewise concluded or accepted that the minister was bound to consider applications for asylum within the framework of the von Arnim letter. It is interesting to note, however, that McCarthy J did not rest his judgment on the principle or doctrine of legitimate expectations. He rested his judgment on the more conventional grounds set out at p 435 in the following terms:

Having established such a scheme, however informally so, he [the minister] would appear to be bound to apply it to appropriate cases, and his decision would be subject to judicial review. It does not appear to me to depend upon any principle of legitimate or reasonable expectation; it is, simply, the procedure which the minister has undertaken to enforce.

Though not expressly referred to I would infer that McCarthy J was relying on the principle usually identified with the decision of this Court in Latchford v Minister for Industry and Commerce [1950] IR 33. However it is unnecessary to resolve any difference which may exist between the views expressed in either of the cases referred to. The fact is that the minister accepts that she was bound by the procedures described in the letter to Mr von Arnim. The acceptance by the minister of those obligations is, however, subject to one qualification. She maintains in this case, as had been argued in the earlier reported cases, that there is an international understanding that a person seeking asylum is under an obligation to seek it in the 'first safe country' -- where he has an opportunity to do so and that the von Arnim procedures must be qualified by the existence of such an understanding and its operation in appropriate cases. Again it is unnecessary for this Court to investigate the existence of such an understanding or its relevance to the von Arnim procedures. Counsel for the Applicant/appellant in the present case expressly informed this Court that the Applicant did not dispute that the terms of the von Arnim letter were required to be read in the light of such an understanding and were qualified pro tanto. The Applicant does not contend that it would be impermissible for the minister to secure the return of the Applicant to London to enable the substantive application for refugee status to be dealt with in that jurisdiction. What is claimed on her behalf is that even a decision in that regard required the conduct of an inquiry of a preliminary nature or to an appropriate stage so to enable such a decision to be reached. It is contended that

such preliminary investigation or inquiry itself must be carried out in accordance with the rules of natural and constitutional justice and the provisions of the von Arnim letter in so far as they would be relevant to that inquiry. Whilst I accept (as did O'Hanlon J in the Fakih case) that this argument is well founded, I reject the contention that an adequate and appropriate inquiry was not held and conducted in the present case in accordance with the required standards.

Counsel on behalf of Mrs Anisimova compressed the essential argument into the contention that -- at the very least -- the minister having made such inquiries and investigations as she thought fit and proper and having formed a preliminary view on the material facts which would lead her to the conclusion that the appropriate forum in which to investigate the substantive issue as to the Applicant's claim for refugee status was the United Kingdom that she should have informed the Applicant of her provisional or tentative decision and the facts or alleged facts on which it was based. The minister was then required -- or so the argument goes -- to invite the observations of the Applicant or her advisor on such decision and facts and to give her a reasonable opportunity of making such observations before any final decision was made.

Having interviewed the Applicant on two occasions, examined the material documentation produced by her, engaged in telephone communications with the immigration authorities in London and the United Nations High Commissioner for Refugees, Mr O'Dwyer, an officer in the minister's department wrote a letter to the Applicant which included the following paragraphs:

You have already been informed that your application for asylum will not be processed in this State as you have obtained an entry visa for the United Kingdom a signatory of the 1951 UN Convention relating to the status of refugees as amended by the 1967 New York Protocol and the United Kingdom authorities are willing to accept you back there to examine your asylum claim. The United Kingdom is considered to be your first country of safe haven and it is an internationally accepted practice that asylum-seekers apply for asylum in their first safe country.

Your case will be submitted to the minister within 21 days of the date on which you are served with this letter, with a recommendation that she should make a deportation order in respect of you. You may, if you wish, make written representations to the minister as to why she should not make such an order. These representations must be lodged with the minister within 21 days of the date on which you are served with this letter. I am to stress that your representations, if made, should not be based on any claim to political asylum as this is a matter for another jurisdiction.

In a reply addressed to Mr O'Dwyer and dated 19 March 1996 Mr McPhillips, the solicitor on behalf of the Applicant, made the following representations:

1. I would submit that the UK could not in any circumstances be considered to be my client's first country of safe haven as she had the intention of coming to Ireland at all times and spent only about 12 hours in the UK which she had to travel through for transit

purposes while en route to this jurisdiction.

2. Notwithstanding point 1 above I would further submit there is no obligation in either Irish or international law on my client to apply for asylum in the first country of safe haven. My client is perfectly entitled to apply for refugee status in Ireland.

3. While you have said that this submission should not be based on any claim to political asylum, I would point out that my client is an ethnic Russian. This ethnic group forms a minority of about 13% in Moldova. Following the breakup of the Soviet Union, ethnic Russians have been and are severely discriminated against in Moldova. In my client's case this has included, inter alia, physical assault on her by ethnic Moldovans.

4. As you are no doubt aware there are cases presently before the High Court concerning the minister's refusal to accept applications for refugee status in Ireland. I would submit that no deportation order should be made in respect of my client pending the determination of the High Court in this regard. Indeed in all the circumstances I would submit that it would be unfair to my client and premature for the minister to do otherwise.

At least superficially this correspondence would appear to indicate that the minister carried out an appropriate inquiry and afforded the Applicant an adequate opportunity of being heard in relation to the decision affecting her rights. However counsel on behalf of the Applicant drew attention to the first paragraph of Mr O'Dwyer's letter to the Applicant in which it is expressly stated that:

I am directed by the Minister for Justice to inform you that after consideration of your case it has been decided to refuse you permission to remain here.

In a further letter dated 28 February 1996 Mr Barry O'Hara, another official in the minister's department, having set out the material facts went on to say:

In the circumstances, and in accordance with customary international practice in this area, I am advising you that a claim for asylum in this country will not be entertained.

What was urged forcefully on behalf of the Applicant was that the minister had expressly and unequivocally declined to entertain the Applicant's application for asylum or to hear the Applicant in relation to such application or any aspect of it. It was pointed out that in seeking the observations of the Applicant the minister had already rejected the application for asylum and was merely seeking the comments of the Applicant in relation to the minister's intention to make a deportation order against her.

The four letters constituting the correspondence between the parties do admit of the foregoing analysis. This analysis, however, is based on an over refined and somewhat artificial interpretation of the relevant events and the terminology used to describe them. Arguments have been based upon the use of the words 'entertain', 'considered', 'process' and 'deal with' in relation to the Applicant's claim for asylum and how far those words or any of them might be appropriate to indicate the minister's willingness or unwillingness

to investigate the Applicant's claim or any aspect of it. The facts do not support the contention that the minister failed to investigate what is described as the 'preliminary issue' or that there was any confusion in relation to the procedure which she adopted. What was made patently clear on the minister's behalf was that no investigation was taking place on the substantive issue of the right to asylum. What was investigated in person, in correspondence and by relevant inquiries in other jurisdictions was the fact that the Applicant had arrived in Heathrow London on 21 February 1996 having obtained a visa for the United Kingdom at the British Embassy in Kiev. It was emphasised by the Applicant and known to the minister that the duration of the Applicant's stay in the United Kingdom was less than 24 hours while she travelled -- presumably by public transport -- from London to Dublin via Holyhead. These and the other facts ascertained and established were put to the Applicant formally in the context of a possible deportation order being made against her. She was invited to make whatever observations she thought fit -- other than comments based on the substantive right to asylum -- and did avail of that opportunity. It was indicated that the minister would take such submissions into account and in the subsequent letter of 22 March 1996 from Mr Ingolsby to Mr McPhillips it is clear that she did so. Whilst it is certain that the minister did not at any time undertake a substantive inquiry into the Applicant's status as a refugee what she did do is conduct a full and fair inquiry as to how the Applicant had travelled from her country of origin to Ireland via the United Kingdom. These inquiries were fundamental to what is described as the 'preliminary issue' on an application for asylum. It is unreal to treat the threat of deportation of the Applicant as a procedure separate from the preliminary issue and as if it were based on different facts.

With hindsight the proceedings of any and every tribunal however formal or exalted may well admit of improvement but it is of the utmost importance, particularly in the context of natural and constitutional justice, to test the attainment of the basic standards by reference to substance and reality rather than technicalities or ingenious argument. If the position were otherwise administrators, people of business affairs and those engaged in domestic or social tribunals of every description called upon to apply this important principle would be forced to abdicate their functions to lawyers who could select more appropriate terminology and invoke forms and formulae which might defy criticism but not necessarily achieve justice.

I am satisfied that the minister through her officials carried out a proper inquiry as to whether the United Kingdom was the 'first safe country' for the purpose of a substantive inquiry into the Applicant's claim for refugee status and that such inquiry was held in accordance with the provisions of the von Arnim letter in so far as they are material to such an inquiry and the requirements of natural and constitutional justice. Accordingly I would dismiss the appeal.