THE SUPREME COURT

390/03
Denham J.
Murray J.
McGuinness J.
Hardiman J.
Fennelly J.
Between:

S.

Applicant/Respondent

and

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Respondent/Appellant

JUDGMENT of Mr. Justice Hardiman delivered the 10th day of June, 2004 [Nem Diss].

This appeal raises a net point of statutory construction, which was dealt with by the learned trial judge (Finlay-Geoghegan J.) as a preliminary issue. Despite the very circumscribed nature of the argument possible on this net point, two enormous Books of Authorities were prepared, most of which were not referred to. All of the appellant's authorities are also to be found in the respondent's book: despite this, it did not prove possible to agree a single Book of Authorities. Preparing Books of unnecessary authorities is pointless. Duplicating, in a separate book, material which the other side has already placed before the Court is both wasteful and pointless. I mention these matters in the hope that, in future, some effort will be made to confine Books of Authorities to the points at issue and to reach agreement, wherever possible, with the other party as to which authorities are to be cited.

Factual background.

The factual background of this case is that the applicant is a South African who sought asylum in this State. Her application for asylum was refused: in statutory terms, the Minister, having considered the recommendation of the statutory tribunal, refused to give the applicant a declaration that she was a refugee. This occurred pursuant to s.17(1) of the Refugee Act, 1996.

The applicant subsequently decided that she wished to make a fresh application for a declaration that she was a refugee. In order to do this she required the consent of the Minister under s.17(7) of the same Act which provides as follows:-

"A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister".

The applicant sought the consent of the Minister in a series of letters of February, 2003. By letter dated the 2nd April, 2003, the Minister referred to this correspondence at some length and concluded "I have therefore decided to refuse the application under s.17(7) of the Refugee Act, 1996 as amended".

On the 27th May, 2000 counsel on behalf of the applicant applied *ex parte* for leave to seek judicial review, in the form of declarations and injunctions, attacking the Minister's refusal of his consent to the applicant's making a further application for a declaration that she was a refugee.

In view of the point now taken, the terms of the statement grounding the application for judicial review are of interest. The applicant, at paragraph 4(A) of her statement of grounds sought:-

"A declaration that the respondent has erred in law and acted *ultra vires* the Refugee Act, 1996 in refusing consent to the applicant to make a further application for a declaration of refugee status pursuant to s.17(7) Refugee Act, 1996".

The three following reliefs claimed also used the term "refusal" to describe the decision of the Minister which it is desired to impugn. Furthermore, in the statement of grounds at paragraph (e) the applicant recited that:-

"By letter of the 2nd April, 2003 the applicant was informed by the respondent that he had refused the said application pursuant to s.17(7) Refugee Act, 1996."

Significance of a "refusal".

Section 5(1)(k) of the Illegal Immigrants (Trafficking) Act, 2000 provides:-

"A person shall not question the validity of
(k) A refusal under s.17(as amended by s.11(1)(L) of the Immigration Act, 1999) of the Refugee Act, 1996,
otherwise than by way of an application for judicial review under order 84 of the Rules of the Superior Courts…".

Section 5(2) of the same Act lays down a number of requirements in relation to an application for judicial review to which the previous

subsection refers. Relevantly, it is provided that such an application must be made within fourteen days commencing on the date on which the person was notified of the "decision, determination, recommendation, *refusal* or making of the order concerned" unless the Court dispenses from this requirement. There is also provision in the following subsection restricting the right of appeal of the losing party to a relevant judicial review application to the Supreme Court, again unless the High Court permits such appeal to be taken in the circumstances set out in the subsection.

It will be observed that the applicant's application for judicial review has been made outside a fourteen day period

Net point.

The foregoing recitals were necessary in order to make comprehensible the single net point in this appeal. It is this:-

Is the Minister's decision communicated by letter of the 2nd April, 2003 a 'refusal' within the meaning of s.5(1) of the Act of 2000, and in particular subparagraph (k) of that subsection?

The subsection refers to "a refusal under s.17… of the Refugee Act, 1996". However, counsel for the applicant says that this form of words captures only a refusal to grant a declaration under s.17(1) of the Refugee Act, 1996 and does not extend to a refusal of consent under s.17(7).

This contention appears remarkable when it is recalled that the applicant herself described the rejection (to use a neutral term) of her request for consent under s.17(7) as a refusal in her statement of grounds for seeking judicial review, part of which is quoted above. Moreover, her documentation nowhere suggests (as it might have done, for example for the purpose of claiming that the fourteen day time limit did not apply) that the decision of the 2nd April, 2003 was not a "refusal" within the meaning of s.5(1)(k) of the Act of 2000. It appears that this line of argument first occurred to counsel in the course of his submissions to the learned trial judge, who then decided to treat it as a preliminary issue and directed that the respondents be placed on notice.

Refusal.

Is what the statement of grounds describes as the Minister's "refusal [to] give consent to the applicant herein to make a further application for a declaration of refugee status pursuant to s.17(7) Refugee Act, 1996" a "refusal" within the meaning of s.5(1)(k) of the Act of 2000? In approaching this question one must first have regard to the very basic canon of construction summarised in **Bennion** *Statutory Interpretation* at Section 285 as follows:-

"*Prima facie*, the meaning of an enactment which was intended by the legislature (in other words its legal meaning) is taken to be that which corresponds to the literal meaning".

The learned author notes that the literal meaning corresponds to the grammatical meaning unless that meaning, deduced in the relevant context, is ambiguous. In that event, then any of the possible grammatical meanings may be described as the literal meaning. Authorities from several different centuries are cited for those basic propositions.

What is the literal meaning of the term "refusal"? No-one, I think, will be surprised at the Oxford English Dictionary's definition of the word:

"The act of refusing; a denial or rejection of something demanded or offered".

If this is so, the decision communicated in the letter of the 2nd April, 2003 was certainly a refusal: furthermore it was described in that way in the letter itself and, as we have seen, in the applicant's proceedings. Accordingly, the decision (to use another neutral term) is within the dictionary definition of refusal and was so described by or on behalf of both the person who made the decision and the person to whom it related. Even if one makes allowance for the fact that the statement of grounds was drafted by a lawyer on behalf of the applicant, the point is thereby strengthened, rather than weakened. People, both legal and lay, and on both sides of this litigation, naturally used the term "refusal" to describe the decision now sought to be impugned.

In those circumstances it is unsurprising that in the course of argument Mr. Cush S.C. for the applicant fairly and properly conceded that the decision communicated by the letter of the 2nd April, 2003 was a "refusal" in the ordinary and natural meaning of that word. This concession, in my view, was absolutely necessary, unless one were to adopt the canon of construction condemned by Lord Atkin in **Liversidge v. Anderson** [1942] AC 206.

I think, however, that this necessary concession is fatal to the respondent's argument as a whole. The provisions of s.5(1) apply to anything which is a "refusal" under s.17 of the Act of 1996. The impugned decision is certainly a decision "under" s.17. Furthermore, it is a "refusal" in the ordinary and natural meaning of that word. Therefore, it is a "refusal under s.17" within the meaning of s.5(1)(k).

In **Zambra v. McNulty** [2002] 2 IR 351 I discussed in some detail the meaning of the word "under" as it is used in statutes and orders. It is not necessary to repeat that discussion here, but simply to refer to the case as ample authority for the proposition that a decision taken pursuant to a power or requirement in a statute is aptly described as taken "under" the relevant section.

A special meaning?

In those circumstances, Mr. Cush contended that, whatever the ordinary and natural meaning of the word, "refusal" bore a special meaning in the context in which it was

used in s.5(1)(k) of the 2000 Act. In that context, he said, a negative decision on an application (again to use a neutral term) should be considered a "refusal" only if it were *expressly* described as such in s.17. He pointed out that the word "refusal" or some variant of the verb "refuse" was used on seven occasions in s.17. Each such use was, as counsel put it, "linked" to a refusal of a declaration of refugee status, as opposed to the refusal of any other request or application. Therefore, the Act should be so construed as to restrict the meaning of the word "refusal" to a refusal of a declaration. Generalising, Mr. Cush submitted that whereas all refusals are decisions of a negative nature, not all decisions of a negative nature are refusals.

Mr. Cush agreed, however, that it was more consistent with the policy of the Act to regard a withholding of consent under s.17(7) as a refusal. This was on the obvious basis that if the legislature placed a two week time limit (subject to dispensation by the Court), on application to quash a refusal of a declaration, it would make no sense whatever, and would tend to the avoidance of the time limit, to provide no such abridged time for judicial review of a refusal of consent under s.17(7). This point arises with particular force in the present case. Although no attempt was made to remove by judicial review the original decision of a tribunal to recommend the refusal of the declaration, or that refusal itself, a good deal of the evidential material advanced in support of the present application consists of an attack on the previous decision. Thus, on the facts of the present case, to hold the time limit applied to a challenge to the first decision, but not to a decision to refuse consent to the making of a second application, would be in a very real way to permit the first decision to be attacked obliquely, after the time limited for a direct challenge had expired.

Mr. Cush placed great emphasis on the proposition that amongst the consequences of regarding a refusal under s.17(7) as a refusal within the meaning of subparagraph (k) s.5(1) of the 2000 Act would be that the applicant, if she were unsuccessful in the High Court, would require the leave of that Court to appeal the unfavourable decision to this Court. Mr. Cush submitted – and this is indisputable on the authorities – that statutory provisions affecting or removing the right of an aggrieved litigant to appeal to this Court must be "clear and unambiguous". Mr. Cush built upon it by saying that an absolutely unambiguous form of words should have been employed if it was intended to capture a refusal under s.17(7). He suggested that, for example, if subparagraph (5) had referred to "*any* refusal…under s.17" the ambiguity would be removed.

I am however unable to agree that there is any ambiguity. The use of the indefinite article is broad enough to capture the thing denoted by the noun which it introduces in any form in which it may arise, and even in an inchoate or hypothetical form. That, indeed, is one of the principal differences in connotation between the definite and the indefinite article. In the OED entry for the indefinite article, the meanings attached to it are "one, some, any". Considerable ingenuity was deployed by Mr. Cush in suggesting alternative forms of words but these all beg the question, is the form of words actually used ambiguous or such as leads to an absurd result? It is not disputed here that the relevant word, in its ordinary and natural meaning is clear and unambiguous. No basis has been advanced for giving the word anything other than its ordinary and natural meaning. In these circumstances it immaterial that another form of words might have more clearly expressed the same thought. In **Hannafin v. The Minister for Environment** [1996] 2 IR 321, which in part related to provisions alleged to restrict the right of appeal to this Court, it was said in the judgment of Hamilton C.J.:-

"The Attorney General has submitted that the Oireachtas, in enacting legislation, should not be restricted to the use of any particular formula or combination of words to give effect to its intention and that provided the intention is clearly and unambiguously expressed, the failure to use words contained in other Acts is of no significance, that was what of importance was the intention expressed in the use of such words.

I agree with the submission of the Attorney General in this regard".

I am far from holding that the form of words actually used in the respective Sections with which we are concerned here is in any way deficient, or even open to improvement. But even if that were the case, it would not avail the applicant having regard to the clarity and absence of ambiguity of the words actually used.

I would allow the appeal and find that the Minister's decision under s.17(7) of the Act of 1996 is a "refusal" within the meaning of s.5(1)(k) of the Act of 2000.