Neutral Citation Number: [2009] IEHC 219

THE HIGH COURT

2007 1192 JR

BETWEEN

S.M.O.

APPLICANTS

AND

REFUGEE APPLICATIONS COMMISSIONER, THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

RESERVED JUDGMENT of Mr. Justice Cooke delivered on the 7th day of May, 2009.

1. This proceeding, in which the applicant seeks leave to apply for judicial review of a Report and Recommendation of the Refugee Applications Commissioner under s. 13 of the Refugee Act 1996 and the subsequent decision of the Refugee Appeals Tribunal, was listed for hearing with a similar application in the case of *NXQ v. Refugee Applications Commissioner & Anor.* because of a certain number of overlapping factors in the two cases. Both parties were represented by the same junior counsel; both involved recently brought motions to add relatives of each applicant and for amendment of the statement of grounds; and both required substantial extensions of time under s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 if the applications for leave were to be entertained. Immediately prior to the hearing of the submissions in the present case, judgment had been given on the issue of the extension of time in the NXQ case. The Court refused the extensions.

2. The first named applicant is a native of Somalia who arrived in the State at the end of December 2003 accompanied by four children who were then minors as follows:

- a son Ah.M.A., born on 1st January 1989;

- a son M.M.A., born on 1st January 1990;

- a daughter S.M.A., born on 1st January 1991 and

- a son A.M.A., born on 1st January 1996.

Three other children and the applicant's husband remain in Somalia.

3. She applied for asylum here on 6th January, 2004 and included the four children in that application. She claimed that she and her family were members of the Rer Hamar minority ethnic group and claimed to fear persecution at the hands of militia if returned to that country. 4. Her claim as made to the Commissioner

was that she feared that she and her children would be killed by the militia if returned because her father was killed by them in an attack in 1999 when she herself was also struck which a bayonet. Her home had been attacked many times and her husband kidnapped. In an attack in October 2003, immediately before her flight from Somalia, her eldest daughter was killed, her husband abducted for ransom and her son Ah. hit. Since she left Somalia she claims that another of her sons had been killed in a further abduction.

5. In the report of 30th November, 2004 the Commissioner recommended that the applicant be not declared a refugee on this basis:

"The applicant's claims of her travel and whereabouts and personal circumstances before she applied for asylum in the State lack credibility and seriously bring into question the former habitual residences/nationalities of the applicant and the four minors considered under her application. This in turn serves to undermine the applicant's claims of persecution."

6. A decision of the Refugee Appeals Tribunal, on appeal from that decision on 30th June 2005, found that the applicant had failed to discharge the burden of proof in establishing a well founded fear of persecution, largely, in effect, upon credibility grounds based on a series of inconsistencies in her story identified by the Tribunal member, the absence of documents and on her failure to explain adequately why she had not claimed asylum in Ethiopia. The decision notes that she had four children with her in Ireland and that the eldest son, Ahmed, had died since the date of the Commissioner's report.

7. The applicant initiated the present judicial review application by originating notice of motion filed on 18th September, 2007, some 26 months following the decision of the Tribunal on 30th June, 2005. In the applicant's statement of grounds as originally formulated for the application, some 24 substantive grounds were put forward to be advanced as the basis to seeking leave to challenge both the decision of the Commissioner and that of the Tribunal. Prominent among those grounds at numbers 3, 4 and 8 are grounds directed respectively at the report of the Commissioner and the decision of the Tribunal which allege errors of law and breach of natural and constitutional justice requirements, based upon the proposition that the children were not afforded separate interviews before the Commissioner, although they were of ages which made them competent to be interviewed and they were willing, able and available to do so. Further, the Tribunal decision failed to make any assessment of their respective claims in their own right, although they were purported to be covered by the decision.

8. Having heard the parties on the preliminary application to join the three children as applicants in the proceeding and without prejudice to the issue of extending time, the Court decided to grant the application upon the grounds that these applicants had been included in the proceedings both before the Commissioner and the Tribunal; they had a common interest with their mother in the legality of those decisions and they did not appear to propose to advance any substantive new ground which would alter the effective scope of the application as originally formulated. The amended grounds proposed to be added as grounds 28, 29 and 30 appear to be variations or extensions of the existing grounds mentioned in the preceding paragraph of this judgment, namely those directed to the absence of distinct participation by and consideration of the children in the two contested decisions.

9. The Court then heard the submissions of the parties on the issue as to whether there was good and sufficient reason in this case for the grant of the extensions of time that would be required if leave was to be given under section 5(2) of the 2000 Act against (a) the decision of the Tribunal of 30th June, 2005 and (b) the report of the Commissioner of 30th November, 2004. The Court invited the parties, in particular, to address the issue as to whether distinct criteria or considerations fell to be taken into account in deciding whether to extend time in favour of the three newly joined children as applicants, as compared with the position of their mother.

10. In the written legal submissions and in the course of oral arguments the Court's attention was drawn to the relevant case law on this issue including, in particular, the following:

In the matter of Article 26 of the Constitution/Illegal Immigrants (Trafficking) Bill (1999) [2000] 2.I.R. 360;

G.K. v. Minister for Justice, Equality & Law Reform [2002] I.R. 418;

Azubugu v. R.A.T. (Unreported, Peart J., 27th July, 2007);

O'Donnell v. Dun Laoghaire Corporation [1991] I.L.R.M. 301;

O.S.T. v. Minister for Justice, Equality & Law Reform (Unreported, Hedigan J. 12th December, 2008);

De Róiste v. Minister for Defence;

Golan v. D.P.P. [1989] I.L.R.M. 491;

Ojuade v. Minister for Justice, Equality & Law Reform v. RAC & Ors. (Unreported Peart J., 2nd May, 2008);

J.A. & D.A. v. RAC, RAT & Ors. (Unreported, Irvine J., 3rd December, 2008)

11. The 14 day period fixed by s. 5 of the 2000 Act is undoubtedly strict even when compared with the six month period fixed for an application for an order of *certiorari* under O. 84 of the Rules of the Superior Courts. Nevertheless, it has been judged by the Supreme Court to answer a legitimate legislative objective and is consistent with the requirements of constitutional law (see the judgments in the Article 26 case on the Bill). The discretion to extend time for good and sufficient reason which the Act allows is considered to be a power which was wide enough to avoid the 14 day limit operating to cause injustice.

12. It follows from the case law above that there are a variety of factors which fall to be taken into account in considering whether good and sufficient reason is established for the exercise of the Court's discretion to extend time in any given case. These include, obviously, whether the applicant had formed an intention to challenge the contested decision by judicial review and if so at what point in time by reference to the 14 day limit; whether reasonable diligence is shown to have been exercised in seeking to pursue that remedy; the *prima facie* strength of the case proposed to be made, whether legal advice and/or representation was available to the applicant and so on.

13. It is clear, however, that of primary consideration is the length of time elapsed since the expiry of the statutory period of 14 days and the explanation and excuse offered for that delay. Unless evidence is provided on affidavit as to why the application was not made within that 14 day period or very promptly thereafter such as to satisfy the Court that the interests of justice require or justify extending time, the discretion cannot be exercised. As Costello J. said in the case of *O'Donnell v. Dun Laoghaire Corporation* [1991] in a passage cited with approval in the *De Róiste* case;

"What the plaintiff has to show, (and I think the onus under Order 84 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for that delay."

14. So far as concerns the first named applicant (and, indeed, the newly joined applicants in as much as they rely entirely on the case which she makes), the only explanation for the failure to seek judicial review between the receipt of the decision of the Refugee Appeals Tribunal at the beginning of July, 2005 and the initiation of the present proceedings on 18th September, 2007, is that contained in her grounding affidavit at paras. 31 to 35, taken together with the account given by her present solicitor, Sarah Ryan, in her affidavit where she describes the steps which she took when first consulted by the applicant on 23rd July, 2007.

15. The first named applicant, at paragraph 31 of her affidavit says;

"I say that when I received my negative recommendation from the first named respondent my solicitors in the Refugee Legal Service did not have it judicially reviewed or inform me of any grounds that I could have it judicially reviewed on and if they did I would have wished to have had it judicially reviewed or if they were not willing to do so I would have attempted to find a private solicitor to do so on my behalf, which would have been difficult for me as I did not have any Legal Aid to do so."

16. This paragraph gives the impression the applicant was told nothing about the possibility of a judicial review application in July, 2005, by the Refugee Legal Service. However, in para. 32 she says:

"I say that when I received my decision from the second named respondent I wished to have it judicially reviewed but the Refugee Legal Service would not do so on my behalf, informing me that I would be going on to humanitarian leave to remain instead."

17. That paragraph seems to suggest that the Refugee Legal Service did, in fact, mention judicial review but declined to act for her and suggested applying for humanitarian leave to remain instead. In para. 33 she mentions that she was suffering from depression following her son's death. In para. 34 she says her financial position, combined with her health problem, made it very difficult for her to get a private solicitor familiar with asylum law who would take up her case. She says that she had almost given up hope of "having my case judicially reviewed" as she puts it, when she heard of her present solicitor and contacted her in July, 2007.

18. In para. 14 of a supplemental affidavit of 27th February, 2009 grounding the motion to join the three children in the present proceeding, she again says that

the delay in bringing that motion was due to the fact that she was suffering from "anxiety/depression" since the death of her son. This is the same health problem invoked to excuse the delay up to 2007 but it did not prevent the first named applicant contacting her present solicitor and travelling to Cork in 2007 to instruct her. It is questionable, therefore, whether it could constitute a justification for the absence of any steps taken in, say, 2006.

19. The Court considers that having regard to the inordinate length of the delay in this case, which is itself exceptional, this scant evidence is wholly inadequate as a basis for the exercise of the Court's discretion to extend time in this case. It is by no means clear exactly what happened when the applicant and her then legal advisers received the Tribunal decision in July 2005 and whether the feasibility of seeking judicial review was mentioned, discussed or rejected at that time. The Court notes that the applicant had been represented at the Tribunal by counsel instructed by the Refugee Legal Service. In a letter of 13th April, 2005, which is amongst the papers apparently received by her present solicitor from the Refugee Legal Service, counsel returned her brief papers and asked; "If he would forward the decision to me when received".

20. What is remarkable in this regard is the obvious gap in information of even a negative kind. Clearly, the file was taken over from the Refugee Legal Service because certain documents from it are exhibited but the Court is not told whether that represents the entire content of the file. Did it, for example, contain a copy of any letter to the applicant following receipt by the Refugee Legal Service of their copy of the decision of the Tribunal explaining the significance of that decision and outlining the options open to the applicant?

21. The names of both the solicitor and counsel who acted for her before the Tribunal are known. Was any contact made with them to ascertain their recollection of what was done or advised at the time? Even if it was necessary to move quickly in August and September of 2007 to commence these proceedings, it is surprising that the further lapse of time throughout 2007 and 2008 did not afford an opportunity to follow up such possibilities of supporting the applicant's case for an extension.

22. To point to this is not in anyway to criticise the approach of the applicant's legal representatives since August, 2007 but merely to underline the difficulty posed for this Court by the obvious gap in information in respect of the years 2005/2007 when it is requested to exercise its discretion. The necessary evidential basis is not provided to it.

23. Furthermore, there is no evidence of the Refugee Legal Service actually ceasing to act for the applicant at any point in time, nor of the applicant taking any steps to seek alternative legal advice or of attempting to contact or approach other solicitors. Her present solicitor, contacted in July, 2007, appears to be the only solicitor she approached. Thus, notwithstanding the claims to have suffered from depression, the Court finds that there is no evidence of any reasonable diligence on the applicant's part for over two years and thus no evidential basis upon which the Court could conclude that there was good and sufficient reason to extend the time.

24. In his judgment in the *De Róiste* case in the Supreme Court, Fennelly J. commented in relation to the obligation of an applicant to act promptly as follows:

"Furthermore he was bound, at least *prima facie*, to apply for an order of

certiorari of the decision within six months of its making and otherwise, to explain his delay and show that the delay was justified. In the nature of things a short delay might require only slight explanation. A judicial review time limit is not a limitation period. The prompt pursuit of the remedy is, however, a requirement of the judicial review application. A longer delay will require a more cogent explanation …. extremely long delay without cogent explanation or justification may itself constitute a ground for refusing relief."

25. The delay in the present case is undoubtedly long in the context of section 5 of the 2000 Act. The Court is satisfied that no such cogent explanation has been given for it, at least for the period of two years until the present solicitor was engaged. In the absence of any indication of steps being taken during that period, the mere mention of ill health does not constitute a justification or excuse. There is thus no basis upon which the Court's discretion could be exercised in favour of the first named applicant.

26. The only remaining issue is whether any different decision should be made in respect of the applications now made on behalf of the three children who have been joined.

27. In that regard it should be recalled that at the date of the decision of the Refugee Appeals Tribunal the three children were aged respectively, 15 and a half, 14 and a half and nine and a half. The eldest son, M., reached 18 years of age on 1st January, 2008, some three and a half months after the present proceeding was commenced. The daughter reached that age on 1st January, 2009 and, of course, the youngest applicant is now 13.

28. No evidence has been offered by or on behalf of any of the children as to why, notwithstanding the claim in the statement of grounds of their competence to be interviewed and to give evidence in support of their own distinct claims to refugee status, they delayed until February of this year to seek to challenge two contested decisions in their own right. Neither of the children who are already 18 years of age at that point has provided any evidence in this application.

29. In the course of submissions the Court raised the question as to why, for example, when the applicant's present solicitor had been available to him in September, 2007 the eldest son, Mustaf, had delayed throughout the entire of 2008 after he had reached the age of 18 years without taking any step in his own right to initiate challenge to the decision of the Tribunal. The Court was informed that counsel had no instructions on the point. In those circumstances, independently of the unexplained and unjustified delay on the part of the first named applicant already indicated in this judgment, there is then the wholly unexplained delay on the part of the second named applicant throughout the period from 1st January, 2008 until the bringing of the motion to join them in the present application.

30. This is all the more surprising when regard is had to the fact, as already mentioned, that in the statement of grounds as formulated for the proceeding in September, 2007 prominence was given in the grounds to be advanced, to the argument that the Tribunal decision makes no substantive reference to any assessment of the entitlement to refugee status of any of the children applicants and that they were never interviewed by the Commissioner nor invited to give evidence before the Tribunal, either in corroboration of their mother's evidence or in support of their own claims, notwithstanding their competence and availability to do so. If these issues were to be advanced by the first named applicant in September, 2007 there is no reason why all three children might not have been

joined in the proceeding from the outset and it is all the more remarkable that no steps were taken by the eldest son, the second named applicant, in his own right on or after 1st January, 2008. Perhaps it was considered unnecessary to do so on the ground that if the first named applicant succeeded in her application the decision of the Tribunal would have been quashed as against all four but, if that is so, there is even less reason for extending the time.

31. In the submissions made on behalf of the second, third and fourth named applicants heavy reliance was placed by counsel on the judgments of the Supreme Court in the case of *A.N. and L.N. and Others v. The Minister and Another* in order to invoke the proposition that the principle of so-called "family unity" can apply in favour of family members but cannot be invoked against them. In other words, minor children not included in an asylum application made by a parent can claim the benefit of that application where it is successful; but if it is unsuccessful the Minister cannot treat them also as having been refused asylum status if they have a distinct claim to refugee status in their own right. The Court is satisfied that those judgments do not have any application to the circumstances of the present case. Here all the children of the first named applicant were, in fact, included in the asylum procedures at all stages and the first named applicant expressly claimed before the Commissioner to speak on their behalf.

32. Moreover, this is not a case in which the second, third and fourth named applicants have at any stage sought to assert any claim for refugee status other than, or different from, the one made by the first named applicant on behalf of them all. Her fear of persecution was explicitly that, if returned to Somalia, she and her children would be killed or harmed by the militia who had attacked the family previously. The source and basis of the children's fear of persecution was precisely the same as that of their mother, namely, the attacks suffered when their home was attacked while they were in it, the kidnapping of their father and the deaths of a brother and sister (see paragraph 4 above).

33. In these circumstances the Court is satisfied that all applicants are fixed with the same absence of explanation and justification for the delay in failing to apply promptly for an inordinate and inexcusable length of time to seek the relief for which leave is now applied.

34. It follows that the Court cannot in these circumstances exercise its discretion to extend time to allow leave to be sought to quash the report of the Refugee Applications Commissioner either. Quite apart from the absence of the evidential base as to the existence of good and sufficient reason, in November 2004 the applicants with legal advice chose not to seek judicial review of that decision but took the entirely appropriate course of pursuing their statutory remedy of appeal to the Refugee Appeals Tribunal. No argument has been advanced to the Court as to why that course was not wholly appropriate and adequate to remedy the complaints that were made against the Commissioner's report at the time.

35. For all of these reasons the Court must decline to exercise its discretion to extend the time as sought and the application for leave must therefore fail as being out of time.