THE SUPREME COURT

Murray CJ
Hardiman J
McCracken J

376/03

Between:

S. M.
Applicant/ Appellant

AND

The Minister for Justice, Equality and Law Reform
The Refugee Appeals Tribunal
The Refugee Applications Commissioner
Ireland and the Attorney General

Judgment of Mr Justice McCracken delivered the 3rd day of May 2005

On 12th January 2000 the Appellant applied for asylum in the State. On 24th January 2001 her application was rejected by the Refugee Application's Commissioner, which decision she duly appealed. On 7th August 2001 the Refugee Appeals Tribunal dismissed her appeal. On 30th October 2001 the Appellant was notified by the Minister of his decision to refuse her a declaration of refugee status, and was further informed that the Minister proposed to make a deportation order in respect of her. In that letter she was notified of her entitlement to make representations to the Minister as to why she should be entitled to remain in the State.

Representations were made on the Appellant's behalf on three occasions, but notwithstanding these representations the Minister made a deportation

order which was sent to the Appellant and to her solicitors on 20th September 2002. While this letter was sent to the wrong address for the Appellant, it was undoubtedly received by her solicitor. As a result, on 15th October 2002 the Appellant sought leave to apply for judicial review seeking four orders, namely:-

> *"A. An order of certiorari quashing the decision to refuse the applicant refugee status.*
>
> *B. An order of certiorari quashing the deportation order made in respect of the applicant.*
>
> *C. A declaration that the provisions of section 12(3) and 12(4)(a), (c) and (j) and/ or each of them are invalid with respect to the provisions of the Constitution of Ireland 1937.*
>
> *D. An order if necessary extending the time for the making of this application."*

This notice of motion was grounded on two affidavits, one sworn by the Appellant and the other by her solicitor.

On 9th October 2002 the Appellant's solicitor submitted a request pursuant to s.17(7) of the Refugee Act 1996 to re-admit the Appellant to the asylum process, which request was rejected by letter dated 27th November 2002. On the same date, a replying affidavit of Sandra Smith on behalf of the Respondents was filed.

On 3rd December 2002 the motion appeared in a list to fix dates, on which occasion it was indicated on behalf of the Appellant that she intended to bring a motion to amend the existing application. The Court directed that such motion must be issued and served by 20th December 2002 and the motion was listed for hearing on 31st January 2003. It appears that on 13th December 2002 an affidavit was sworn by the Appellant's solicitor exhibiting a proposed amended notice of motion and statement of grounds. It is not clear whether this affidavit was ever filed, but in any event it was not ultimately relied upon.

At the hearing on 31st January 2003 an amended notice of motion and amended statement of grounds dated 30th January 2003 were filed in Court. This sought, as far as was necessary, an extension of time for bringing the application and claimed, inter alia, the following reliefs:-

> *"D1. An order of certiorari removing for the purpose of being quashed, the purported decision of the third named respondent refusing the applicant's asylum application dated the 24th January 2001.*

D2. Without prejudice as whether the decision of the third named respondent herein was valid an order of certiorari removing for the purpose of being quashed, the purported decision refusing the appeal of the applicant against the first mentioned decision purportedly made on behalf of the second named respondent on the 7th August 2001.

F1. An order of certiorari removing for the purpose of being quashed, the purported notification under section 3(3)(b)(ii) of the Immigration Act 1999 purportedly made on behalf of the first named respondent on Friday 20th September 2002 including a purported decision that section 5 of the Refugee Act1996 is satisfied in the case of the applicant.

F2. An order of certiorari removing for the purpose of being quashed, the purported deportation order under section 3(1) of the Immigration Act 1999 purportedly made by the first named respondent on 9th September 2002."

Section 5 of the Illegal Immigrants (Trafficking) Act 2000 provides that claims that certain reliefs, including those sought in the present case, must be brought by an application for judicial review pursuant to Order 84 of the Rules of the Superior Courts. Section 5(2) provides:-

"(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall:-

(a) be made within the period of 14 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 High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and

(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."

Order 84 Rule 20 requires that an application for leave shall be grounded upon a notice containing, inter alia, a statement of the relief sought and the grounds upon which it is sought, and that it shall also be grounded on an affidavit verifying the facts relied on. Order 84 Rule 20(3) provides that:-

> *"The Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit."*

The first issue to be decided is how far section 5 of the Act of 2000 applies to an application to amend either the relief sought or the statement of grounds in the original notice of motion. The Respondent relies on the judgment of Kelly J in *Orla Ni Eili v. Environmental Protection Agency & Ors* [1997] 2 ILRM 458. That case was not on all fours with the present case, in that it concerned the time limits imposed by s.88(5) of the Environmental Protection Agency Act 1992, which imposed an absolute two-month limit on the institution of proceedings to question the validity of a decision of the Environmental Protection Agency. In that Act there was no provision for an extension of time under any circumstances. The applicant in that case had instituted her proceedings within the prescribed time, and then sought to amend those proceedings. At page 464 Kelly J said:-

> *"It cannot be denied but that the amendment sought by the applicant amounts to an additional and entirely new case. The new grounds are very different to those already advanced. They raise in effect a new cause of action. Can the applicant be permitted to do this by way of an amendment to her existing proceedings?*
>
> *In my view she cannot. To allow such a course would, in my opinion, run counter to the will of Parliament as expressed in section 85(8) of the Act. All statutory construction has as its object the discernment of the intention of the legislature. What is the object of section 85(8)? It seems to me that it is (a) to require that proceedings which question the validity of a decision of the respondent be instituted at an early date to ensure that uncertainty about the decision be disposed of one way or the other in a timeous fashion; and (b) to make the beneficiary of such a decision and the respondent aware that the validity of such a decision is being questioned and aware of the basis for such questioning so that they may prepare their response to such proceedings expeditiously. To permit of the amendment sought here would run counter to the legislature's intent in this regard."*

In my view this is a correct statement of the basis upon which the legislature imposes short time limits. While under s.5(2) there is a discretion in the Court to allow an extension of time, these principles are applicable to the

exercise of that discretion by the Court.

The next point to be considered is whether either the amendments to the reliefs sought or the amendments to the grounds amount to the making of an additional and entirely new case. The reliefs sought at paragraphs D2 and F1 were in essence sought in the original notice of motion and therefore do not constitute a new case. The remaining two reliefs sought were held by the learned trial Judge to constitute new causes of action. This finding was clearly correct. The relief sought at Clause D2 related to the decision of the second named Respondent refusing the Appellant's appeal in relation to her asylum application, which is clearly quite different from seeking to set aside the initial refusal made by the third named Respondent. The relief claimed at F1, relates to a purported decision of the Minister which is part of the making of the deportation order, which was itself challenged in the original notice of motion. However the grounds set out in the original notice of motion make no reference whatever to challenging the deportation order on the basis that the Minister's decision under s.5 of the Act was being challenged. I am quite satisfied that, as found by the learned trial Judge, these two reliefs were not included in the original application.

Similarly, the grounds as set out in the amendment sought are quite different from those set out in the original notice of motion and clearly constitute new grounds. Order 84 of the Rules of the Superior Courts provides that the original application must contain a statement of the grounds upon which the relief is sought, and exactly the same principles would apply to an amendment of the grounds as applies to an amendment of the reliefs sought. The amendment sought at D2 and F1 and the amendments to the grounds, therefore, as they are in fact making a new case or new cases, they are prima facie out of time under s.5 and the Court will have to be satisfied that there is good and sufficient reason for extending the periods in which such claims may be made.

The question of whether to extend the time provided for in s.5 in relation to these new claims is one of discretion for the learned High Court Judge. The reasons for her exercise of her discretion in refusing to extend the time are set out clearly in her judgment. While there may be circumstances in which this Court will interfere with the discretion of a High Court Judge, it is very reluctant to do so. As set out in the judgment, there were ample grounds upon which the learned High Court Judge could exercise her discretion in the way which she did, and I would not interfere with the exercise of that discretion.

I should comment on one aspect of the learned High Court Judge's decision in that respect, as it was strenuously argued by Dr Forde SC on behalf of the Appellant. The fact that there had been a change of Counsel was put forward

by the Appellant as a reason for the delay. It was argued that the effect of a change of Counsel depends on the circumstances, and if a new Counsel spots a points which had not previously been put forward, the litigant ought to be entitled to rely on it. There may indeed be circumstances in which this is so. However, such occasions will only arise when it can be shown that there was a serious error made by the original Counsel in the case which would of itself lead to a serious miscarriage of justice. No such serious error has been shown in the present case. In any event, in exercising the discretion under s.5(2), a change of Counsel under almost any circumstances would simply be one factor to be taken into account in the exercise of that discretion. In the present circumstances the learned High Court Judge was quite correct in finding that the change of Counsel was not of itself a good a sufficient reason to extend the time.

In relation to the reliefs claimed in the original notice of motion, and indeed those claimed at Clauses D1 and F2, the question remains whether the time should be extended up to the date of that original motion, namely 15th October 2002. In relation to the claim setting aside the refusal to declare refugee status, this decision was communicated to the Appellant on 30th October 2001. No reason has been put forward which could possible explain the delay of almost 12 months in seeking to set aside that decision. The Application to quash the deportation order was communicated to the Appellant's solicitor by letter of 20th September 2002, and apparently it was also communicated to the Appellant by letter of the same date, but that letter was in fact sent to the wrong address. These is no suggestion that the Appellant was not aware within the 14 day period of the making of the deportation order, and there is no evidence of when she was informed of the making of such order by her solicitor. However, it is quite possible that there was at least a delay of several days involved, and I would agree with the learned High Court Judge that this would justify the extension under s.5(2). However, as the Appellant is not entitled to rely upon the grounds set out in the amended notice of motion, it appears that there was no evidence before the Court which would justify the relief claimed, and therefore the learned High Court Judge was perfectly correct in refusing an extension of time on that basis also.

Accordingly, I would dismiss the appeal in this case and affirm the order of the learned High Court Judge.