Neutral Citation: [2014] IEHC 75

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1550 J.R.]

BETWEEN

L. H. C. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND S. M. S.)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE REFUGEE APPLICATIONS COMMISSIONER AND THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 20th day of February 2014

1. In these telescoped judicial review proceedings, the minor applicant's sole ground of complaint arises from the fact that the Refugee Appeals Tribunal declined an application for an adjournment on 23rd November 2010, at the beginning of an oral hearing of the applicant's appeal. The adjournment was said to be required to facilitate the submission of an expert language report in support of a claim that the minor applicant's mother ('the mother') was of Bajuni ethnicity and Somali nationality.

The Mother's Claim

2. The mother arrived in Ireland in August 2006. She applied for asylum in July 2007. The minor applicant was born on 14th February 2009. The applicant's mother claims to be of Bajuni ethnicity from the island of Chula in Somalia and to have been the victim of persecution and violence, including rape, culminating in her departure from Somalia by boat on 13th August 2006, and eventual arrival by plane in Ireland shortly thereafter. In the course of the mother's asylum application a language analysis was conducted (on the initiative of Refugee Applications Commissioner) which concluded, in August 2008, that the mother did not speak a Bajuni dialect of Swahili found in Somalia and that she used language typical of a variety of Swahili spoken in Kenya.

3. That language analysis report was not challenged by a competing language report at any stage during the mother's own asylum assessment, the result of which was that the Tribunal found "it difficult to believe that the applicant resided in Chula until 13th August 2006" and that the "account of the claim as provided stated to the Tribunal is difficult to believe". The decision of the Refugee Appeals Tribunal issued on 31st March 2009. It was not challenged by judicial review proceedings.

4. The minor applicant's asylum application commenced on 25th August 2009. An asylum questionnaire was completed on 3rd September 2009, and on 13th January 2010 an interview was conducted with the minor applicant's mother, on behalf of the minor. On 4th February 2010, the Office of the Refugee Applications Commissioner issued its s. 13 report which was negative. It noted that the minor applicant's claim was based upon her alleged membership of the Bajuni ethnic group which is targeted by majority clans in Somalia. The s. 13 conclusion is in the following form:

> "The applicant's claim that she is Bajuni from Somalia is not considered credible by this office. As it has been found in both the applicant's father and mother's case that they do not have a well-founded fear on the basis that they are Bajuni from Somalia, it is not accepted that the child will risk harm in Somalia as it has not been demonstrated to be her country of origin."

5. A notice of appeal was filed on 25th June 2010. The notice of appeal was extremely detailed, advancing 22 separate grounds of appeal. None of these grounds of appeal made complaint about the language analysis report used in the mother's failed asylum claim.

Application for Adjournment

6. The applicant's mother changed solicitors on 25th June 2010, and this was notified to the Refugee Appeals Tribunal on 4th August 2010. The oral hearing at the RAT was fixed for the 27th October 2010, but was postponed and by letter of 3rd November 2010, the Tribunal fixed the hearing for 23rd November 2010. On 19th November 2010, the applicant's solicitors wrote to the Tribunal indicating that an application for an adjournment would be made. The grounds of the adjournment were not specified.

7. The Tribunal Member records the adjournment application and the decision thereon in the following terms:

> "The applicant's legal representatives applied for an adjournment at the commencement of the appeal hearing as it was indicated that they were required to obtain a language analysis report in relation to the applicant's mother's dialect. This adjournment was refused as: 1.) The applicant's mother's claim has been heard and completed and the applicant's hearing was not a re-hearing of the mother's claim. Further language analysis reports only ever form part of any decision and such reports are generally considered in the overall context of the applicant's claim along with other matters and are never the sole determinative factor in any asylum appeal. Bajuni/Ki-Bajuni is a dialect of Swahili and as it is not exclusively spoken in Somalia, the fact of being able to speak Bajuni/Ki-Bajuni cannot be the only determinative factor when ascertaining one's stated Somali nationality. 2.) The applicant's solicitors have had ample opportunity to initiate the process of obtaining such a language report, if such a report was deemed necessary - see correspondence dated 4 August on file and the applicant's consent dated 25 June 2010."

8. The only ground of complaint pursued in these proceedings is that the decision to refuse an adjournment was a breach of fair procedures. No complaint is made that the decision to refuse the adjournment is irrational and this was confirmed twice during the course of the hearing by counsel for the applicant.

9. Counsel for the respondent submits that the minor applicant's claim to be a persecuted member of Bajuni ethnicity is based upon

the failed claim of the applicant's parents. Any attempt to establish the mother's ethnicity by language analysis during the minor applicant's claim is an impermissible collateral attack on the validity of the RAT's determination of the mother's asylum claim. Counsel also submits that the minor applicant's solicitors commenced acting for her on 25th June 2010, and made no effort to obtain a language report between that date and 23rd November 2010, when the application for the adjournment was made.

10. The court enquired as to what further applications the mother had made to the State in respect of her presence in Ireland following the negative outcome of her asylum claim. Counsel for the minor applicant informed the court that in June 2010, application for humanitarian leave to remain was made. On 23rd November 2010, application for subsidiary protection was made. On 10th October 2013, when the processing of subsidiary protection claims was transferred from the Minister's office to the Office of the Refugee Applications Commissioner under the new regime recently established by the European Union (Subsidiary Protection) Regulations 2013, a further opportunity arose to make fresh submissions in support of the application for protection. The applicant's mother thus had three opportunities to advance a claim that she was of Bajuni ethnicity based upon a new language analysis report, and yet no such evidence was submitted or sought to be submitted in support of her own claims for leave to remain and for subsidiary protection. The failure of the mother to submit a new language report on any of these occasions in support of her own case suggests a lack of seriousness about the adjournment application at issue.

11. Where it is alleged in judicial review proceedings that an asylum claimant has been unfairly denied the opportunity to submit evidence (whether by reason of refusal of an adjournment or by some other decision) it seems to me that the applicant must describe the substance of the excluded evidence and in addition must describe the prejudice caused by its exclusion. These essential elements are absent from the applicant's proceedings.

12. The applicant has failed to establish what new evidence would or could have been submitted and has failed to establish any prejudice that arose from the refusal of the adjournment. The point sought to be advanced on behalf of the applicant is entirely without merit and I refuse leave to seek judicial review. It is disturbing that these proceedings, which are so comprehensively lacking in merit, have been in the courts' lists for almost four years. It was or ought to have been apparent to the applicant's lawyers from as early as June 2010 that an expert language analysis in respect of the mother's language was not to be sought. It was or ought to have been equally apparent that any complaint in these proceedings relating to attempts to submit such report were redundant and ought not to have been pursued. I request to be addressed as to whether a wasted costs order ought to be made in this case.