Neutral Citation Number: [2006] IEHC 28

THE HIGH COURT

[2005 No. 114 J.R.]

BETWEEN

AMINAT SHOLA ODUNBAKU (A MINOR SUING BY HER NEXT FRIEND) PETER O'MAHONY

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 1st February, 2006.

1. Introduction

1.1 In this case the applicant ("Ms. Odunbaku") seeks to challenge a number of decisions made prior to and in the course of her application by asylum. This case is somewhat unusual in that issues have arisen concerning the status of Ms. Odunbaku as a possible minor. As is clear from the title of these proceedings Ms. Odunbaku maintains that she remains, at this stage, under 18 and, therefore, sues by a next friend. In circumstances which I will outline more fully it was determined by the Refugee Applications Commissioner ("RAC") on 30th January, 2004 that Ms. Odunbaku was not to be treated as a minor on the basis of a view taken by the RAC that she was, even at that stage, already beyond 18 years of age.

1.2 While there is also a challenge to the subsequent determinations made, in the ordinary way in the course of the asylum process, by each of the RAC, the Refugee Appeals Tribunal ("RAT") and ultimately by the Minister for Justice, Equality and Law Reform ("the Minister") in the course of the consideration of the refugee status of Ms. Odunbaku, for reasons which will become clear in the course of this judgment, the central thrust of the challenge in this case is to the original decision to treat Ms. Odunbaku as not being a minor. The subsequent decisions are challenged not on the basis of any contended for independent failing in the process but because, it is said, those decisions are effected in a material way by the fact that in the course of the consideration of each of the persons or bodies concerned, Ms. Odunbaku was, wrongly it is said, treated as being of full age.

1.3 Finally it should be noted that this is a leave application. In those circumstances it is, in accordance with the established jurisprudence, necessary for me to consider whether substantial grounds have been established. In that context I propose applying the approach which I adopted in the analogous area of an application challenging a decision in the environmental law area as set out in my judgment in *Arklow Holidays Ltd v. An Bord Pleanála and Others* (Unreported, High Court, Clarke J., 18th January, 2006). For the reasons set out in that judgment I have come to the view that where leave is granted in an application on notice requiring that substantial grounds be established the court should set out the reasons for the grant of leave in a manner sufficient to explain why leave was granted but should refrain from expressing any view beyond that on the merits of the contentions put forward. As the assessment of the relevant arguments will ultimately be a matter (in the event that leave is given) for the judge having carriage of the substantive hearing, it would not, in my view, be appropriate at the leave stage to go further.

2. The Facts

2.1 It would appear that Ms. Odunbaku arrived in Ireland in June 2003. She has given her date of birth as 8th of September, 1988 (although this is, as I have noted, a matter of some controversy). On the basis of her stated date of birth she was 14 years of age on her arrival in the State. On her arrival she was unaccompanied and was the subject of age assessment interviews carried out by the RAC on respectively on 3rd July, 2003 and 4th July, 2003. While there were some minor differences between the views of those who carried out the respective assessments on those occasions it would appear that the overall conclusion was to the effect that the applicant was "estimated to be in the region of 16 going on 17". In other words it appears to have been accepted that the applicant's date of birth was 8th September though the view would appear to have been taken by the RAC was that she must have been born in 1986 rather than 1988.

2.2 In any event Ms. Odunbaku was thereafter placed in a hostel which, on the evidence, appears to be a reception centre for minors under the age of 16. While in that hostel she was in the care of the East Coast Health Authority.

2.3 It would appear that in January 2004 a social worker at the hostel wrote to the RAC indicating a suspicion that Ms. Odunbaku was in fact over 18 years of age. As a result of this communication a further interview was arranged on 30th January with an official of the RAC. At and after this interview a re-assessment appears to have been engaged in by the same official who had, in fact, carried out the assessment on 4th July of the previous year. The re-assessment would appear to have taken the view that Ms. Odunbaku was over 18 years of age.

2.4 Thereafter Ms. Odunbaku made an application for asylum which was processed in the ordinary way. She sought the services of the Refugee Legal Service ("RLS") on 3rd February, 2004 and, it would appear, was classified as a minor by that service. On her behalf the RLS wrote to the RAC on 24th February, 2004 requesting reasons for the re-assessment of age. The interview which was due to be carried out in the ordinary way by the RAC was scheduled for 1st March. By faxed letter of 27th February the RLS wrote to the RAC expressing dissatisfaction with the age assessment and requesting an adjournment of the asylum assessment interview then scheduled for two days later. It would appear that February 27th was a Saturday and March 1st was a Monday. In those circumstances the interview would appear to have gone ahead.

2.5 By letter dated 19th March, 2004 the RAC informed Ms. Odunbaku that her application was unsuccessful. The RLS sent letters dated 31st March, 2004 and 1st April, 2004 to the RAC contesting the age assessment. In those letters judicial review of the age assessment was threatened. However a technical difficulty arose in relation to the manner in which the RLS was able to deal with the case thereafter on behalf of Ms. Odunbaku. It would appear that in order for the issuing of a legal aid certificate sufficient to allow the RLS to bring judicial review proceedings on behalf of a minor it is necessary that the consent of a next friend be available to the RLS. However given that the RAC had determined that Ms. Odanbaku was of full age, no next friend was appropriate in the process before the RAC (and on appeal the RAT). In those circumstances the RLS felt it could not act and, it would appear, as an exceptional measure, the Irish Refugee Council agreed to assist Ms. Odunbaku and submitted a notice of appeal on her behalf to the RAT dated 1st April, 2004.

2.6 By virtue of the fact that the decision of the RAC contained one of the findings specified in s. 13(6) no oral appeal was available to Ms. Odanbaku. The RAT did, however, by letter dated 8th April, 2004 indicate that further consideration of the matter was deferred pending internal consideration of certain of the issues raised by the Irish Refugee Council and, it would appear, in particular issues concerning the age status of the applicant.

2.7 It would also appear that the applicant received some informal legal assistance from a lawyer attached to the RLS and, with that assistance, made a further submission in respect of her appeal to the RAT by letter dated 12th August, 2004. In September 2004, at a time when Ms. Odanbaku was unaware that a decision had been reached by the RAT, she attended at the Northside Community Law Centre, which is a law centre that provides free legal advice to those who cannot afford or otherwise get same and who live in the catchment area that is the electoral areas of Dublin North Central and Dublin North East. A solicitor attached to that centre wrote to the RAT on 14th September seeking a deferral of the appeal decision pending further investigation. However it would appear that the RAT had already decided to refuse the appeal and notification of that refusal was communicated by letter from the Minister of 22nd September, 2004.

2.8 Finally it should be noted that on 12th October, 2004 the same solicitor submitted an application for what is often called humanitarian leave to remain in the State. That application was, in the ordinary way, made to the Minister. The solicitor also attempted to gather the papers necessary to consider whether judicial review proceedings ought to be commenced. In that context a difficulty arose concerning the appointment of a next friend. On 21st December, 2004 an application was made to the President of this court seeking an order from the court appointing a person for the purposes of acting as a next friend. The President indicated that it might be appropriate to approach an interested voluntary organisation for the purposes of seeking their consent to act as such next friend. On that basis the solicitor concerned wrote to the Irish Refugee Council on 24th December, 2004 requesting that it consider appointing a person to act as next friend. On 26th January, 2005 it was confirmed that the Chief Executive of the Irish Refugee Council would so act and the application for leave was brought on 7th February, 2005.

3. Extension of Time

3.1 It has been necessary to set out in some detail the sequence of events leading to the bringing of the application for leave because it is clear that in respect of all the decisions concerned the application is well outside the 14 day period specified. However it seems to me that there are wholly exceptional circumstances in this case. It is, of course, disputed as to whether Ms. Odanbaku is and was at any relevant time an unaccompanied minor. If it were appropriate otherwise to grant leave to challenge a determination of the RAC that she was not an unaccompanied minor, then it would seem to me that, in logic, it would be appropriate to approach the question of an extension of time on the basis of it being at least arguable that the applicant is and at all material times was such a minor. For the purposes of the application to extend time her actions would need to be viewed on the basis of that possibility. Furthermore it is clear that significant technical difficulties were encountered by those seeking to represent her interests deriving, in part, from the procedures operated by the RLS in respect of minors and in part from the difficulties encountered by her later representatives in assembling all necessary materials and securing an appropriate next friend.

3.2 In all those circumstances it would seem to me that it would be wrong to shut out the applicant from the ability to challenge the decisions which she seeks to challenge solely on the basis of being out of time. In the event, therefore, that I become satisfied that there are substantial grounds in respect of any of the challenges which she seeks to mount I would be prepared to extend time.

4. The Age Question

4.1 In *Moke v. The Refugee Applications Commissioner* (Unreported, High Court, Finlay Geoghegan J., 6th October, 2005) this court had to consider the procedures required of the RAC when considering the question of whether a person was an unaccompanied minor.

4.2 At p. 13 of the judgment Finlay Geoghegan J. came to the view that the following procedures required to be followed so as to bring such procedures into conformity with the principles of constitutional justice:-

> "(i) the applicant must be told the purpose of the interview in simple terms. It may be as straightforward as informing the applicant that the interviewers need to decide whether the applicant is or is not under the age of 18 years.
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> (ii) where an applicant claims to be under 18 years of age and the interviewers form a view that this claim may be false, the applicant is entitled to be told in simple terms the reasons for or grounds upon which the interviewer consider the claim may be false and to be given an opportunity of dealing with those reason or grounds.
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> (iii) where, as in this instance, the applicant produces a document which purports to be an original official document which includes a record of his alleged date of birth and the interviewers are not prepared to rely upon such document, the applicant is entitled to be told of their reservations and given an opportunity to deal with same.
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> (iv) if the decision is adverse to the applicant then he must be clearly informed of the decision and the reasons for same. The reasons need not be long or elaborate but should make clear why the applicant's claim to be under 18 is not considered credible. The initial information and communication may, of necessity, be given orally but should be promptly confirmed in writing.
>
> (v) where the decision is adverse to the applicant and, as stated, there exists the possibility of reassessment then such information should be communicated clearly to the applicant again initially orally and also in writing. Such communication should include how such reassessment may be assessed by the applicant".

4.3 It was not disputed at the hearing before me that the procedures set out in *Moke* represent the current law in this jurisdiction. On that basis I am satisfied, on the facts of this case, that there are substantial grounds for arguing that the appropriate procedures were not followed. While it is true to state that the challenged decision in relation to age assessment was itself a reassessment it seems to me that the reassessment which Finlay Geoghegan J. spoke of at item (v) is a reassessment subsequent to a negative assessment from the perspective of the person concerned. The January decision was the first negative assessment of Ms. Odanbaku. She would not appear to have been informed that it was, in accordance with the standard practice which is set out in some detail in *Moke*, open to her to seek a further assessment and in support thereof to present expert evidence. Furthermore there would appear to be substantial grounds for contending on the evidence that the basis for the adverse finding (not least the assessment made by the social worker in the hostel in which she was then resident) was not put to Ms. Odanbaku. In all those circumstances I am satisfied that there are substantial grounds, sufficient for the purpose of leave, to permit a full hearing of a challenge to the age assessment decision of the RAC.

4.4 However it is clear from *Moke* that the mere fact that there has been an invalid age assessment does not, of itself, necessarily lead to the conclusion that subsequent decisions made in the refugee process are themselves invalid. At p. 18 of her judgment Finlay Geoghegan J. said the following:-

> "In the statutory scheme established by the Act of 1996 for making and determining applications for asylum (as distinct from any child protection purposes) it appears, the most that can be said is that the invalid age assessment decision of the respondent may have deprived the applicant of the potential benefit of the assistance of a guardian appointed by the

health board either to make the application on its behalf or to assist him in pursuing the application already made.

There may well be cases in which it would be in breach of an applicant's right to fair procedures for the respondent to proceed with a s. 11 interview and to issue a s. 13 report and recommendation without carrying out a valid determination as to whether or not a person who claims to be an unaccompanied minor is such. This would depend upon the relevant facts. In this application no such ground is advanced in the statement of grounds. Further, on the affidavit sworn by the applicant after he had had the full benefit of advice from his present solicitors and counsel, including advice as to his position as a minor, no complaint is made by the applicant in relation to his treatment by the respondent in the holding of the s. 11 interview or the processing of his asylum application."

4.5 It is, therefore, clear that in order that an invalid age assessment might be said to have affected any subsequent decisions made by either the RAC or the RAT it is necessary for the court to be satisfied that the impugned age assessment decision had some material and practical effect upon the process before those other bodies. No such contention was made in *Moke*. However, it is argued, such a situation pertains here. In substance the contention of the applicant is that in a number of material respects the consideration of both the RAC and the RAT was materially affected by the earlier decision as to age. In simple terms the contention is to the effect that the assessment of certain aspects of the credibility of the applicant was such that a different view as to the age of the applicant at certain material times had the potential to affect such credibility assessment. I now turn to that question.

5. The Effect of the Age Assessment

5.1 There can be little doubt that the assessment of an account given by a person (and in particular any alleged inaccuracies or inconsistencies in such an account) can be materially affected by the age of the person concerned. This is not, of course, a matter of technicality. While there may be formal consequences of a person being just over or just under 18 years of age it is unlikely that any significant difference as to the assessment of the credibility of such person would flow from the fact that a person was (say) 18 years and one month on the one hand or 17 years and 11 months on the other hand. However a more significant age disparity could well have a material effect on the assessment of an account given. On the facts of this case it would appear that the difference between the age contended for by Ms. Odanbaku and the age as found by the RAC was of the order of a minimum of three years. Material events, important to the assessment of the credibility of Ms. Odanbaku's account, therefore occurred at a time when, on her case, she may well have been barely a teenager but where, on the view taken by the RAC, she was significantly older.

5.2 It is, in my view, at least arguable that the assessment of her credibility was potentially affected in a material way by the view of her age taken by the RAC. In those circumstances it seems to me that it is arguable that this case, unlike Moke, is a case where there may have been a material effect on the process both before the RAC and before the RAT on appeal (not least because the appeal before the RAT was, for the reasons indicated above, a paper appeal) sufficient to provide substantial grounds for the proposition that both of those determinations would also fall if the original age assessment decision itself were to be set aside.

5.3 In those circumstances I am satisfied that there are sufficient grounds for granting leave to challenge the decisions of both the RAC on the substantive refugee application and also the RAT on appeal from the decision of the RAC.