Neutral Citation [2013] IEHC 68

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012 / 317 J.R.

Between:

A. A. M. [SOMALIA]

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 15th day of February 2013.

1. The applicant is a young man from Somalia who came to this State in search of asylum as an unaccompanied minor. He was declared a refugee on 19th October 2007. Since his arrival he has been in education and he successfully sat his Leaving Certificate in the summer of 2009 when he was 20 years old. Unfortunately, he has since been unemployed and in receipt of jobseekers allowance of €196 weekly and rent allowance which pays almost 80% of his monthly rent. While he currently attends a third level educational course in Athlone, he has never been employed. Apart from earnings from male hairdressing services provided from his accommodation, he is entirely dependent on State subventions. From his limited resources, he sends $200 each month to his family who live in Kief refugee camp in Merka in Lower Shabelle in Somalia.

2. On 27th January 2010, more than two years after he was granted refugee status, the applicant applied for family reunification with his mother and four siblings under s. 18(4) of the Refugee Act 1996. His two brothers and two sisters were born between 1987 and 1994 and they and their mother were originally supported by an uncle living in Canada but when the applicant obtained refugee status he took over responsibility for their support.

3. As is the norm when family reunification is sought, the application was directed to the Family Reunification (FRU) Section / Unit of the Department of Justice which in turn referred it to the Refugee Applications Commissioner for investigation. The Commissioner is required under s. 18(2) of the Refugee Act 1996 to prepare a report for the Minister setting out the relationship between the refugee concerned and the subject of the application and the domestic circumstances of the person.

4. The Commissioner's investigation into Mr. Ali Mohamed's claim commenced with an examination of his earlier refugee file and then of the FRU questionnaire which he was required to complete and return to the Commissioner's office. In that questionnaire he informed the Commissioner that he would be unable to supply birth certificates for any of his family members due to the well recognised problems which prevail in Somalia in the aftermath of more than thirty years of conflict. He also explained that his family live in a camp now controlled by Al Shabaab which is hostile to the government which operates in some parts of Mogadishu. He stated that his mother and siblings were dependent on him *"because in Somalia there are no jobs and every family depends on their family members abroad. My mother is old. She cannot work and my brothers and sisters are very young they cannot support themselves so I send money which I make from hairdressing in my room. I send $200 every month to cover their needs. Without me it is very difficult for them to survive. This is not only me it is every family in Somalia."*

5. In his questionnaire he also explained that since Al Shabaab came to power, all NGOs were expelled from the Shabelle area and foreign aid refused. His family in Somalia thus no longer had access to humanitarian aid. Although they had been registered with the UNHCR as IDPs, they no longer had access to documents or to the support of the UNHCR. Thereafter, the applicant produced photographs of his family members and receipts showing regular money transfers to them. On 28th May 2010 the Commissioner completed his report and furnished it to the FRU Section of the Minister's Department and to the applicant. The report is no more than a repetition of the information provided by the applicant in his FRU questionnaire and the limited correspondence exchanged between the Commissioner's office and the applicant. It contains no analysis of the information provided by the applicant and no assessment or investigation of the domestic circumstances of the family in Kief IDP Camp in Merka or their relationship with the applicant. It does not address or consult any independent, objective reports on the quality of daily living in Kief camps controlled by Al Shabaab, their access to water, food, shelter, essential medicines, clothing or otherwise and it does not address what a dollar or a euro will buy in the camp.

6. After the applicant was notified that the Commissioner's report had been furnished to the Minister, a year passed by without contact with the Minister's Department. On 9th August 2011 the applicant's solicitor enquired on the progress of the application and took the opportunity to furnish more money transfer receipts and to re-emphasise the famine in Lower Shabelle and the continued ban on foreign aid agencies in Al Shabaab controlled territory. On 14th November 2011 the FRU sent a formulaic response, informing the applicant's solicitor that *"applications are generally dealt with in chronological order and your client's application will be dealt with in due course."* Six weeks later the applicant was notified that his application had been refused.

7. The decision furnished to the applicant, dated 9th January 2012, notes that no documents establishing the family relationship had been furnished and that DNA would therefore be required. However the question of dependency would be examined without prejudice to the DNA examination *"if the Minister considers that this may be an appropriate case to exercise his discretion".* The following matters were referred to in the letter:

- The absence of medical evidence to establish any medical or physical disability leading to inability for his family members to maintain themselves

- That the money transfer receipts were photocopies

- The receipts amounted to €2830 for the period September 2009 – May 2011 being €7 for each family member each week

- The applicant was declared a refugee in October 2007 but did not seek family reunification until 2010

- The fact that the family in Somalia had been supported by an uncle until the applicant was granted refugee status and that it was not clear why this assistance was terminated

- The applicant's mother, who was described as "old", was 47 and two of his brothers and sisters, described as "young", were adults

- The applicant may be in a position to continue to provide financial assistance to his family in Somalia given that the cost of living in Somalia would be lower than that in Ireland.

8. While some of the findings made in the decision were either not relevant or plainly wrong in that information provided in the questionnaire was ignored, the principal finding which grounded the refusal of family reunification was that the applicant had failed to establish that his family were "dependent" on him in the narrow sense of being *financially* dependent. The reason provided was that the sums sent each month were insufficient to establish dependency for five family members, three of whom were adults, and thus did not meet the requirements of s. 18(4).

9. The applicant commenced judicial review proceedings challenging the decision of the FRU Section. Leave was granted by order of Cooke J. on the following grounds:-

> *1. The respondent erred in fact and in law in finding that transfers of €2830 from the applicant to the family members in Somalia in the period September 2009 – May 2011 are not enough to establish financial dependency. €157 ($200) a month is almost 3 times the gross minimum wage (US$69 per month/US $830 per annum) in neighbouring Kenya and a very substantial amount given the circumstances of the subjects of the application in a displaced persons camp in Somalia and/or the current situation in Somalia.*
>
> *2. The respondent applied the wrong threshold or test with respect to dependency. The test posited in the Refugee Act is not forward looking and does not relate to the possible position in Ireland in the future. The finding that the subjects of the application would, in effect, be better off in Somalia, where the cost of living is lower, is not a relevant consideration in deciding whether they are dependent upon the applicant.*

SUBMISSIONS

10. At the hearing of the substantive application for judicial review on 1st November 2012, Mr Colm O'Dwyer BL appeared for the applicant instructed by KOD/Lyons Solicitors and Ms Sinead McGrath BL appeared for the respondent instructed by the Chief State Solicitor's Office. It was argued on behalf of the applicant that the Minister showed no rational basis for his finding that transfers of $200 a month is insufficient to establish dependency. The Minister did not enter into any particular analysis which would support this conclusion. The applicant did his best to provide information in support of his claim in the difficult circumstances of a Somali refugee with family members in an Al Shabaab controlled area. None of that was considered and instead the decision is based on irrelevant, unfounded assumptions and is therefore unreasonable. The applicant relies on the judgments of Hogan J. in *R.X. & Others v. The Minister* [2010] IEHC 446 and Cooke J. in *Hassan Sheikh Ali v. The Minister* [2011] IEHC 115.

11. On behalf of the respondent, it was argued that the onus is on the applicant to establish dependency. The respondent relies on the judgments of the Court of Justice of the EU in *Centre Publique d'Aide Social de Courcelles v. Lebon* (Case C-316/85; 18 June 1987) and *Yunying Jia v. Migrationsverket* (Case C-1/105, 9th January 2007), which relate to Regulation No. 1612/68 and Council Directive 73/148/EEC, respectively; and the judgment of the Court of Appeal in *SM (India) v. Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426, which relates to the domestic regulations transposing Directive 2004/38/EC. The respondent contends that the decisions in *R.X.* and *Hassan Sheikh Ali* turned on different issues and are distinguishable. In this case the applicant did not discharge the burden of establishing dependency. He provided no evidence in relation to the daily lives and subsistence of his family members in the IDP camp or of the cost of living there. The Minister cannot be expected to guess at those conditions.

DECISION

12. It is clear from the impugned decision that the Minister's agents provisionally accepted the relationship of the applicant to his family members but refused his application on the basis that "dependency" was not established, so the exercise of the Minister's discretion under s. 18(4) of the Refugee Act 1996 did not arise. As is well established, s. 18(4) gives the Minister discretion to grant permission to certain family members to enter the State and reside with the refugee. The exercise of this discretion is conditional on two factors, namely that the person concerned is a member of the refugee applicant's family and that the person is "dependent" on the refugee. The terms of s. 18 (4) (a) are important; it provides:-

> *"The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.*
>
> *(b) In paragraph (a), "dependent member of the family", in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully."*

13. Under the terms of s. 18(4), even for those whose relationship and dependency are established, there is no guarantee that they will in fact be granted permission to join the refugee in the State as the Minister is free to have regard to other factors which he considers important. The Minister is perfectly entitled to have regard to the education, health and employment prospects of those family members who wish to enter the State and the degree of likelihood that they will become a burden on the State. He cannot be criticised if, in Ireland's current difficult financial state, he refuses permission for persons who will immediately become social welfare dependent, provided that due consideration has been given to the circumstances of the refugee applicant and his dependent family members. Equally, he is perfectly free to exercise discretion on humanitarian grounds and grant such persons leave to enter and remain. The exercise of discretion under s. 18(4) is a matter for the Minister and absent any discriminatory or arbitrary behaviour it is not for the Court to interfere with the exercise of Ministerial discretion.

14. The Court nonetheless feels compelled to make the following general observations before looking at the particulars of this case.

Having considered the legality of a number of family reunification decisions in recent years, the Court is of the view that there is something manifestly unfair in operating a family reunification system which raises hopes, uses valuable resources for both the applicants and the State, and rarely delivers a happy result as lack of resources either to fully support family members abroad or to wholly maintain those family members in Ireland should they join the refugee are the main categories of refusal.

15. While Ireland has opted out of Council Directive 2003/86/EC on the right to family reunification, it is nevertheless of value to consider that the Directive allows Member States which are party to it to impose pre-conditions for the family reunification of refugees who fail to apply promptly for family reunification. Article 7(1) of the Directive provides:

> *"When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:*
>
> > *(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;*
> >
> > *(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;*
> >
> > *(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members."*[1]

16. Borrowing from the thinking behind those permissible requirements it can be seen that the burden placed on the host State arising from unconditional family reunification was a matter of concern to the drafters of the Directive. It is not beyond speculation that the potential burden of admitting foreign nationals likely to become reliant on social welfare may also be a matter of concern for the Minister when he is exercising his discretion under s. 18(4). In the experience of the Court, many adult refugees from Somalia have had limited access to secondary education and do not speak English. They are often severely disadvantaged in finding employment and are frequently totally reliant on State subvention. They are unlikely to have the resources to maintain any member of their extended family in Ireland. The position may be marginally better for Somali refugees who come to Ireland as children or teenagers, who have access to free State education and ultimately can compete for employment in a difficult market on a more level playing field. However, it is a rare young adult, irrespective of nationality, who is in a position to maintain and house siblings and parents in Ireland from his / her own resources. He / she may well be able to trim personal expenditure and send sums from part time earnings or social welfare to transform the lives of siblings dependent on those sums to buy food, water and clothing in camps in Somalia, Kenya and Ethiopia and certainly those siblings may be entirely dependent on such remittances for their subsistence but the situation changes when they have to be supported with the same resources in Ireland. The applicant in this case falls somewhere between the two above examples. He was almost eighteen when he arrived and twenty when he sat and passed the Leaving Certificate examination. He can speak English now and he is acquiring more education but he is not employed and there is little doubt that despite his best intentions he would not be able to maintain or accommodate his mother and siblings if they were permitted to enter the State and reside with him.

17. In light of these factors, it seems to the Court that even if he were to establish a blood relationship to his mother and siblings and to establish a high degree of financial and / or other form of dependency, his claim to family reunification is more likely than not to fail because he has insufficient resources to house and maintain his family, which are matters the Minister is perfectly entitled to consider when exercising his discretion under s. 18(4). Those factors are not, however, relevant to the question of whether the family members are "dependent" on the refugee for the purposes of s. 18(4) (b). This is clear from the judgment of Cooke J. in *Hassan Sheikh Ali v. The Minister* [2011] IEHC 115, where there was some ambiguity as to the Minister's objective in referring to the inability of the applicant to maintain the family members in Ireland were they to be granted permission to reside with him. Cooke J. held:

> *""There is no doubt, in the judgment of the Court that if the finding as to the applicant's financial ability to support his sister and the three children in the State, forms part of the conclusion that they are not "dependent members of the family" because they are not "dependent" financially on him, there is an error of law. It is not disputed that so far as the concept of "dependence" ... is concerned, the question is one of fact as to whether the subjects of the application are**, in their circumstances in the country of origin** "dependent" in the sense of reliant for subsistence on the means and support of the refugee". (The Court's emphasis)*

18. Similarly, at paragraph 57 of his judgment in R.X. & Others v. The Minister [2010] IEHC 446, Hogan J. held that s. 18(4) *"does not ... posit a test of whether the refugee could afford to support the family members if they were to come to Ireland. It rather addresses itself to the somewhat different question of whether the family members were dependent on the refugee at the date of the application".*

19. Thus, an inability to maintain family members in Ireland is not relevant to the assessment of "dependency" for the purposes of s. 18(4) (b).

20. What factors, then, are relevant to that assessment? The parties in this and other cases agree that there are no guidelines available to applicants as to how the FRU Section will assess "dependency" in family reunification cases. In this case, $200 per month was considered insufficient. In *Hassan Sheik Alli*, sums of between $100 and $400 monthly and up to €1000 on one occasion were found by the FRU Section not to establish dependency of the Somali refugee's adult sister and his deceased brother's three children on the refugee. Without guidelines or guidance, the refugee simply has no idea what the FRU Section will accept as being a sufficient sum to establish dependency on his / her remittances. In the meanwhile, years go by and the refugee visits a solicitor for advice, a dossier of receipts is built up; information is obtained on the conditions in which his / her extended family members are living; money is sent to buy mobile phones so contact can be maintained; money is sent to obtain photographic identification, to pay for trips to the capital cities of the countries in which they live to facilitate DNA testing or to acquire supporting documentation; to pay for medical reports on any relevant medical conditions, all in the hope of meeting the undefined, impalpable threshold of "dependency".

21. As mentioned above, as these cases come before the Courts with some frequency, it is observed that even where the familial relationship between the refugee and the person who is the subject of the applicant has been accepted, it is common for the FRU Section to rely on two alternative reasons for refusal, namely (1) the money sent is insufficient to establish dependency or (2) the refugee's personal circumstances and prospects in Ireland are such that he / she cannot maintain the family members in the State. As noted above, the second ground has been found to be an invalid consideration in relation to the assessment of dependency, though potentially relevant to the exercise of discretion should dependency be established. The Court is concerned, in this case, with the

validity of the first ground, i.e. insufficiency of money transferred.

22. Refugees who lack English language skills and who are totally dependent on social welfare supports are at a very obvious disadvantage when attempting to establish dependency and those Somali refugees who have come before this Court appear to be particularly affected. In contrast to the total absence of guidance which is available to refugees whose status has been recognised in this State, refugees recognised by other Member States of the EU who have transposed the family reunification Directive 2003/86/EC will be fully aware which, if any, of the criteria outlined in Article 7 of that Directive apply. If a refugee has not acted promptly and cannot meet those criteria, then a goal can be set for achievement in the future by rapidly seeking employment. If that option is not available, the refugee can be resigned to sending remittances and the waiting expectant family members can adjust their expectations. No such clarity is available for such persons in this State who, if fortunate enough to find a solicitor and barrister to act pro bono, can raise a legal challenge before the Court and if successful can attempt to persuade the Minister for a second time that the circumstances exist for him to exercise his discretion and that he should exercise that discretion in favour of the refugee. Others wait until hope fades. Such a process lacks clarity or transparency and *cannot* be fair. The system calls for an overhaul. Time and money could be saved if the Minister were to draw up guidelines on what is required to establish "dependency" and, where such dependency is established, under what conditions family members will be permitted to join the refugee.

23. Returning from the general to the particulars of this case and the decision challenged. As previously outlined, there was no information before the FRU Section which would permit the officer dealing with the application to lawfully determine whether the family members were dependent on Mr Ali Mohamed. There was no information before the Commissioner or before the Minister, nor was any such information sought, as to what sums were sent previously from the uncle in Canada and whether the remittances in this case met or exceeded those amounts. No investigation was carried out into the actual living conditions in the camp or of the capacity and prospects of the applicant's mother and siblings to earn money or barter within the camp as a means of survival. Perhaps the fact that the mother and sisters are survivors in a camp which is documented to be without latrines, running water, medical care or supplies since Al Shabaab took over is testimony to the adequacy of the sums to finance their survival and escape from diseases associated with malnutrition. The Court is speculating but sadly, so was the FRU which is not a permitted exercise of a statutory function.

24. It is clear that no objective yardstick was identified by which the FRU Section reached its determination that $200 monthly was an insufficient sum to amount to dependency on the applicant. Why was it not enough and what sum would be enough? Objective COI shows that people were starving in southern Somalia owing to the famine, drought, and conflict and the halting of food aid by Al Shabaab. The information before the Commissioner and the Minister was that the applicant's family members used to get their clothes and food from aid agencies but those agencies were ordered out and are no longer present in Shabelle. Nonetheless the FRU Section found that the $200, which translated to €7 per week for each family member, was not sufficient to establish dependency.

25. The Minister's agents must have a benchmark or standard by which the determination on dependency is made. Without such standard the determination must be considered arbitrary. If there are no guidelines for applicants, perhaps it can be assumed that the Minister himself has no guidelines. Converting remittances in dollars into euros and dividing the total sum by the number of claimed dependents to establish the value to each person cannot, by any measure, have any relevance to the buying power of the money in the hands of the recipients. The Court must therefore ask itself what the Minister is looking for when he seeks details of how a family member is dependent on the refugee and evidence of such dependency. As dependency is always a matter of fact which differs according to circumstances, it ought to be possible for the Minister to request the Commissioner to determine objectively and with a reasonable degree of precision, how much is required to maintain a person in a named and well recognized IDP camp in a very poor part of Somalia. The Commissioner is the statutory investigator with regard to the domestic circumstances of the person who is the subject of the application and his agents should be in a position to provide those answers. If that investigation were conducted, then the Minister would have an objective measurement. There is no evidence of any such measurement in this case.

26. As was found both by Hogan J. in *R.X.* and by Cooke J. in *Hassan Sheikh Ali*, the concept of "dependency" in s. 18(4) of the Refugee Act 1996 is a question of fact. As Cooke J. held, the question is whether the person is *"reliant for subsistence on the means and support of the refugee."* This Court further held in its recent judgment in *Ducale & v. The Minister* [2013] IEHC 25, *"There is nothing in that definition to suggest that dependency is measured by the size and frequency of financial contributions nor is it suggested that the dependency is confined merely to economic reliance on those financial contributions."* Economic dependency may of course be a key factor in assessing dependency, but the Minister must not measure economic dependency on Irish standards.

27. As previously noted, insofar as economic dependency is concerned, the Court considers that the Minister must identify some objective yardstick by which dependency can be assessed. It is quite simply insufficient to speculate or to apply Irish norms as to the cost and standard of living in the family members' place of residence. As the Court held in *Ducale, "financial dependency must be seen as a flexible state of affairs which is not necessarily determined by the size of a contribution but rather on its effect in the context of the specific country of residence and personal circumstances of the person in receipt of the contribution. Much must depend on what the contribution provides when received in the hands of the recipient."* A finding of a lack of dependency cannot be sustained in the absence of objective information setting out a rational basis for that finding.

28. As no such objective yardstick was identified in this case, the Court is satisfied that the decision of 9th January 2012 ought to be quashed and the matter remitted to the Minister for fresh consideration. It is not for this Court to set down guidelines as to the exercise of Ministerial discretion under s. 18(4) but a system must, sooner rather than later, stop the haemorrhage of scarce resources in defending flawed FRU decisions and instead ensure that vulnerable refugees do not endlessly pursue futile applications thus depleting their own financial and emotional reserves. If refugees were better informed on what constitutes dependency and what conditions are de facto applied to family reunification applications, their attentions might be better directed towards obtaining language skills, training, qualifications, work experience and ultimately employment in Ireland before applying again for family reunification.

1.Article 12 provides by way of derogation that this requirement may only be imposed on a refugee if the FRU application is not made within three months of refugee status being granted