Neutral Citation: [2014] IEHC 292

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1169 J.R.]

BETWEEN

G.N.L.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM, THE REFUGEE APPEALS TRIBUNAL, RICARDO DOURADO (TRIBUNAL MEMBER)

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 30th day of May 2014

1. This is an application for leave to seek judicial review of a decision of the Refugee Appeals Tribunal dated 10th August 2010. The applicant is seeking orders of *certiorari* and *mandamus* quashing the decision and remitting the matter for re-consideration.

Background:
2. The applicant in this case claims she was born in Kinshasa on 18th August 1977 and is a national of the Democratic Republic of Congo. The applicant recounts that she arrived in the State on 15th May 2007 from the DR Congo via Brazzaville and an airport in France and that she claimed asylum on the same day. The applicant's husband was living in Ireland at the time and had been granted leave to remain in the State. The applicant received a negative recommendation from the Office of the Refugee Commissioner at first instance and subsequently appealed that decision to the Refugee Appeals Tribunal. That appeal was rejected by the Tribunal and it is that decision which the applicant impugns in these proceedings.

3. The applicant claims she fears persecution in her country of origin owing to her membership of a particular social group and her political opinion. In this regard, the applicant claims to be a member of the 'AJM' association who provide support for the opposition political party, the MLC (Movement for the Liberation of Congo). She states that she fled the DR Congo because the army controlled by the President want to have her killed. She claims that following elections in DR Congo she was the victim of an attack which led to her fleeing her home and coming to Ireland.

Submissions:
4. Counsel for the applicant, Sunniva. McDonagh S.C. challenges the decision of the Tribunal Member under a number of headings in her submissions. In particular, counsel raises issue with: (i) the Tribunal's credibility findings; (ii) procedural delay; (iii) the 'embellishment' of the applicant's claim; (iv) the findings made with regard to the AJM organisation; (v) findings in respect of the applicant's answers to specific questions; (vi) the incorrect application of s. 11B Refugee Act 1996; (vii) the failure to consider country of origin information or future risk of persecution; and (viii) a lack of fair procedures owing to the conduct at the oral hearing.

5. Of particular note is the central assertion advanced on behalf of the applicant that in assessing credibility the Tribunal misconstrued the nature of the case in making a finding that the applicant's claim was based on her husband's case. Counsel submits that this was a fatal error in circumstances where she had two distinct claims, namely that she had fled when her husband disappeared in the first instance and secondly that she fled when her sister's home was raided and her sister disappeared. The applicant also claims that fellow members of the AJM disappeared and were murdered at this time. Counsel submits that the Tribunal's assessment was doomed to failure from the outset based on this fundamental error and that the core of the applicant's claim was never considered by the Tribunal.

6. Counsel for the respondent, Siobhan Stack S.C., refutes the contentions and claims made on behalf of the applicant under the above headings. In this regard the respondent focuses on addressing: (i) the admissibility of the applicant's verifying affidavit; (ii) the applicant's allegations as to the conduct of the appeal hearing; (iii) the assessment of credibility; (iv) the status of AJM; (v) the Applicant's claim of persecution which allegedly caused her to flee in 2007; (vi) the applicant's role in AJM; (vii) the applicant's sister's name; (viii) the inconsistency of evidence on the dates of elections in 2006; and (ix) the alleged unreasonable delay.

7. In particular, the respondent emphasises that the Tribunal Member made a number of significant credibility findings and provided detailed reasons in the decision having comprehensively reviewed the evidence given by the applicant throughout the asylum process. It is submitted that the decision must be read as a whole and as such the respondent does not accept the applicant's summary of the Tribunal Members findings as set out in their legal submissions as a full reflection of the reasons given.

8. In respect of the central claim raised by the applicant that the Tribunal misconstrued the nature of the case and failed to consider the core claim, the respondent is of the view that the applicant is attempting to de-construct the Tribunal decision. It was submitted that the applicant is seeking to place reliance on one phrase in the decision which states that "The applicant's husband's application for refugee status was refused after his interview and was upheld at his appeal. The applicant's claim which is based on her husband's claim is unsustainable and unmeritorious". The applicant's reliance on this approach is stated to be legally impermissible and factually incorrect.

9. Counsel contends that the above statement by the Tribunal Member is factually correct and that the husband's claim was refused and that it was presumably based on his alleged political activities and membership of AJM in the DR Congo before he left in 2003. It is submitted that the applicant chose not to rely on her husband's asylum application in her appeal before the Tribunal and that the cases of *MMA v. Minister for Justice, Equality and Law Reform* [2009] IEHC 217, *JNA v. Refugee Appeals Tribunal* [2012] IEHC 480 and *MLTT (Cameroon) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 568 are inapplicable in the circumstances.

10. Counsel submits that the Tribunal recorded that at the hearing the applicant did not disagree when it was put to her that she

claimed her persecution commenced when her husband disappeared. The Tribunal in this context noted that the applicant had mentioned that her husband was the founding member of AJM at her interview and yet at her appeal it was stressed that this factor was the cause of the commencement of her persecution and as such, a failure to mention this earlier undermined her credibility. It is submitted by the respondent that the Tribunal was entitled to comment on such matters which are indicators of the general truth of the claim and that the Tribunal did not "entirely misconstrue the case" but considered the evidence in the context of the evidence given at the appeal that her persecution commenced in 2003, when her husband, the founder of AJM disappeared.

11. Counsel submits that the Tribunal considered in detail whether the applicant suffered persecution as alleged in light of her own membership of AJM and her alleged role therein. The respondent does not dispute that the applicant stated at interview that her husband disappeared in 2003 and she had relocated because of that, however, it is noted the applicant returned to DR Congo and only left it in 2007. The Tribunal found for a series of reasons set out extensively at paragraphs (a) to (1) of the decision that the applicant's story underlying her claim for asylum had been contrived.

Procedural Point:
12. At the opening of her submissions, Ms. Stack S.C. for the respondent raised a particular issue with the Grounding Affidavit sworn in the English language by the applicant on the 23rd August, 2010. The respondent submits that this was done despite the fact the applicant required an interpreter at her interview and oral hearing and that it was clear that the applicant was not fluent in English. As such, counsel submits that the affidavit sworn does not comply with Order 40 Rule 14 of the Rules of the Superior Courts, 1986, which provides for a certification in the jurat to the effect that the affidavit was read in the officer's presence to the deponent and that the deponent seemed perfectly to understand it. The respondent records that these provisions have been interpreted recently by Cooke J. in *Saleem v. Minister for Justice* [2011] 2 I.R. 386, where he stated:

> "The court has not been informed whether the applicant can read and write any language other than English, but it is clear that he is illiterate so far as concerns the affidavit in the English language. On that basis alone, the requirement of O. 40, r. 14 applied in this case and the jurat should have contained an appropriate certificate. That not having been done, the affidavit could not be used unless the court was satisfied that it had been read over and 'perfectly understood' by the applicant. Obviously, this court could not be so satisfied given the applicant's admission that the affidavit contained an incorrect statement which he did not understand to be there.
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> Secondly, as the applicant appears to have little or no understanding of English, this was not a case in which the affidavit should in any event have been sworn in the English language. The correct approach is that the affidavit should be sworn originally by the applicant in the language which he speaks. This should be translated by an appropriately qualified translator and both the original and the certified translation should be put in evidence as exhibited to an affidavit in English sworn by the translator."

13. It is submitted that as a result, the verifying affidavit of the applicant is inadmissible as it was not translated, and further that it is clear from the applicant's solicitor's affidavit that the applicant did not "perfectly understand" its contents.

14. Counsel also raises complaint that there IS no averment in the applicant's Grounding Affidavit to the effect that each exchange or statement made between the interpreter, the Tribunal, the Presenting Officer and the applicant were translated and faithfully recorded in the notes exhibited to the affidavit. Such complaint is raised in the context where the notes taken by the applicant's counsel are in English. It is submitted that it is clear that the applicant did not have the means of knowledge to make the relevant averments, even if the affidavit had been translated.

15. In light of these complaints raised by the respondent in respect of the applicant's affidavit and certain concerns noted by the court the applicant procured a translator to translate her affidavit dated 23rd August 2010 from English into French and the translator has made appropriate averments in this regard. The applicant herself then swore the affidavit in French dated 1st April 2014 and this was then filed in the Central Office of the High Court. It is submitted that on the basis of the decision of Finlay Geoghegan J. in *Muresan v. Minister for Justice, Equality and Law Reform* [2004] IEHC 348 the court has discretion to extend time owing to the oversight and error of her lawyers and the court is urged to exercise its discretion and not to visit an injustice upon the applicant through no fault of her own. It is submitted that such oversight by the applicant's lawyers provides 'good and sufficient reason' for the exercise of the courts' discretion in this regard. Counsel for applicant was reluctant to accept that the defect placed the proceedings out of time. Proceedings grounded on affidavit verifying the facts in the pleadings not issued and served within the statutory time limit, are invalid.

16. Having heard the respective arguments raised by the parties, it is the view of this court that the interests of justice would not be served by permitting a procedural point such as this to prevent an applicant from obtaining an order of *certiorari* of an asylum decision if such were justified. Therefore, before considering whether the Court's discretion should be exercised to permit the applicant an extension of time in respect of her affidavit, I shall proceed to consider the substantive merits of the application.

Findings:
17. The Tribunal made a fundamental error of fact by saying that the applicants claim for asylum was based on her husband's failed claim. It was not. The applicant's claim for asylum was based on her own personal involvement in politics. Though I accept that significant negative credibility findings are made by the Tribunal Member which by themselves might sustain a refusal of asylum, I am unable to sever the error in the decision because it is not possible to assess what weight was given to the misconeption that the applicant's claim was based on her husband's failed claim. It likely that the error played a major role in the final decision.

18. In the light of this finding I am of the view that it would be unjust not to extend time for this application for judicial review. The original English language affidavit sworn by the applicant ought to have been accompanied by a statement that the officer who administered the oath was satisfied that the deponent understood its contents. This defect was remedied by the submission of a French language version of the same affidavit years out of time. However I accept that the applicant was not personally at fault and it would be unjust to deprive her of the benefit of these proceedings because of technical errors by her advisors. In this regard I note the comments of Finlay Geoghegan J. in *Muresan v. Minister for Justice, Equality and Law Reform* [2004] IEHC 348 to the effect that "It is inevitable that different counsel will take a different view of the same case. It appears to me that if the Courts were to permit an extension of the period provided for under sub-s. (2) of s. 5 of the Act of 2000 simply upon the grounds that a new counsel had come into a case and had taken a view that a differing and additional claim on new and distinct grounds should be made that this would defeat the legislative intent as expressed in s. 5(2) of the Act of 2000. It may be that on certain facts the clear oversight or errors by lawyers acting for an applicant may amount to a good and sufficient reason for extending the period under s. 5(2)." In my view, on the facts of this case, the error of the lawyers acting for the applicant in failing to have the affidavit certified in the appropriate manner amounts to good and sufficient reason for extending the time.

19. I therefore extend the time, grant leave and make an order quashing the decision.