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THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 887 JR]

IN THE MATTER OF THE REFUGEE ACT 1996, THE IMMIGRATION ACT, 1999 AND THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

BETWEEN

C. O. I.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice McGovern delivered on the 2nd day of March, 2007

1. On the 12th May, 2006 the applicant was given leave to apply by way of application for judicial review for the reliefs set forth at paragraph 4 sub paragraphs (B, C, E, F, G, H and I) in the amended statement grounding the application for judicial review on the grounds set forth at paragraph 5 sub paragraphs (a), (b), (c), (d), (g), (h), (i), (j), (l) and (m).

2. The applicant is from the N. D. area of N. and claims to fear persecution in that country by reason of his race and political opinions. He arrived in Ireland on the 1st September, 2003 with his sister-in-law H.I. with whom he had resided as part of a family unit in N. They both applied for asylum simultaneously. Country of origin information established that the applicant's brother, M.I. and his family are missing following an attack by ethnic Militia in W. The applicant's brother is or was involved with the U.P.U. and the C.D.D. whose aims were the promotion of U. rights in W. Country of origin information suggest that M.I. and his family have been missing since a violent attack on his W. residence by Militia men.

3. The applicant and his sister-in-law both applied for asylum in this jurisdiction. The decision on the applicant's application for asylum was given before that of his sister-in-law.

4. The applicant arrived in Ireland on the 1st September, 2003 and made an application for refugee status. The Refugee Applications Commissioner (RAC) recommended that his application be refused and he was notified accordingly by letter of the 8th September, 2004. The applicant appealed to the Refugee Appeals Tribunal (RAT) but was unsuccessful. By letter dated 26th May, 2005 the applicant's legal representatives made an application seeking the permission of the respondent to make a further application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act, 1996. The application was made on the basis of fresh evidence directly relevant to the applicant's application for refugee status. The fresh evidence was the fact that the Refugee Appeals Tribunal made a decision in favour of the applicant's sister-in-law subsequent to the decision in the applicant's case. The facts relating to the two applications were almost identical. In his sister-in-law's case the RAT found that her evidence was supported by country of origin information and that the reasons for her fear of persecution are directly related to her husband's involvement with the U.P.U. and the C.D.D. whose aims were the promotion of U. rights in W. The Tribunal member accepted that the account presented by her was coherent, plausible and corroborated by newspaper articles to which she referred.

5. The applicant has two main complaints against the respondent. The first is the failure of the respondent to apply the correct test in considering the s. 17(7) application. The second is the respondent's failure to provide for consistency in the decision making process.

The Test to be Applied

6. The applicant sought the Minister's consent to make a further application on the grounds that his sister-in-law's application based on almost identical circumstances had been allowed and was found to be credible on the basis of objective country of origin information. By letter dated the 21st July, 2005 the Minister refused the applicant's request. The letter contained, *inter alia*, the following passages:-

> "It has been noted that in your letter you refer to the successful outcome of a relatives application. It should be borne in mind that each asylum application is assessed on its own individual merits and, consequently, comparisons cannot be accepted as having relevance."
>
> "Having examined the submissions made, in support of this request and the earlier recommendations of the Refugee Applications Commissioner and the Refugee Appeals Tribunal it was decided that the new evidence submitted does not significantly add to the likelihood of the applicant qualifying for asylum on the totality of the evidence already available and considered."

7. It is submitted by the applicant that the respondent applied an incorrect test when considering the application under s. 17(7). Reliance is placed on *Ladd v. Marshall* [1954] 1 W.L.R 1489 where Denning L.J. at page 1491 set out the following principles:-

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: First it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumed to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

8. In the case of *R v. Home Secretary Ex-Parte Onibiyo* [1996] Q.B. 768 Bingham M.R. stated with regard to a fresh or second application for asylum:-

> "The asset test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect but a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

9. In this application the applicant claims that by making reference to whether the fresh evidence "significantly adds to the likelihood" of the applicant qualifying for asylum he has erred in law in the test to be applied.

10. In my judgment in the case of *Kingloo Chia* [2006] 201 J.R. also given on this date (the two matters having been heard together) I stated:-

> "The preamble to the Refugee Act, 1996 describes it, *inter alia*, as "AN ACT TO GIVE EFFECT TO THE CONVENTION RELATING TO THE STATUS OF REFUGEES DONE AT GENEVA ON THE 28TH DAY OF JULY, 1951, THE PROTOCOL RELATING TO THE STATUS OF REFUGEES DONE AT NEW YORK ON THE 31ST DAY OF JANUARY, 1967, AND THE CONVENTION DETERMINING THE STATE RESPONSIBLE FOR EXAMINING APPLICATIONS FOR ASYLUM LODGED IN ONE OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES DONE AT DUBLIN ON THE 15TH DAY OF JUNE, 1990…AND TO PROVIDE FOR MATTERS RELATED TO THE MATTERS AFORESAID."
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> In *E.M.S. v. The Minister for Justice, Equality and Law Reform* (Unreported Judgment, Clarke J. 21st December, 2004) at page 5 of the judgment the learned judge stated "there is a potential difficulty in applying the jurisprudence of the Course of the United Kingdom in refugee matters to the Irish situation having regard to the difference in the manner in which the respective jurisdictions have legislated for the protection of those seeking refugee status."
>
> There is no equivalent provision in the United Kingdom legislation to s. 17(7) and the United Kingdom has introduced the Geneva Convention directly into domestic law in a manner not done by the Refugee Act, 1996. However it seems to be me to be clear from the preamble to the 1996 Act that the State in seeking to give effect to the Geneva Convention and other conventions mentioned therein assumes certain obligations and accepts the application of these conventions to the treatment of refugees save and insofar as the 1996 Act and subsequent legislation imposes controls on the manner in which the convention is implemented in this jurisdiction. In the *E.M.S* judgment Clarke J. stated "I am nonetheless satisfied that there are substantial arguable grounds for taking the view that the relevant jurisprudence of the United Kingdom Courts would be followed in this jurisdiction." He was referring to decisions in English law relating to the manner in which a fresh claim by an asylum seeker should be entertained. Obviously, the Courts in this jurisdiction will reach their own conclusions based on the legislation in the State. But while there are some differences of approach in the legislation in the United Kingdom and in Ireland the courts here and the United Kingdom have adopted a broadly similar approach to matters of Asylum Law. In *R. v. Home Secretary Ex-Parte Onibiyo* [1996] Q.B. 768 Bingham M.R. stated "the asset test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a reasonable prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

11. The respondent says that it clear from the wording of s. 17(7) that there are no express restrictions on the Minister's discretion and argues that the scheme for fresh applications in the UK is different to that in Ireland and that accordingly the English authorities are of no value in construing the section. The section must be decided on the basis of the established legal test of reasonableness as laid down by the case law including *O'Keeffe v. An Bord Pleanála* and that this is the appropriate test.

12. Undoubtedly *O'Keeffe v. An Bord Pleanála* is relevant and the Minister's decision must not be irrational or fly in the face of common sense but it is my view that having regard to the stated purpose of the 1996 Act that the test of "anxious scrutiny" should also apply. The State has assumed the obligation of not expelling or returning a refugee to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. In the *Onibiyo* Bingham M.R. stated

> "this is the over-riding obligation to which the State party to the convention commit themselves. The risk to an individual is if a State acts in breach of this obligation is so obvious and so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages in the administrative and appellate processes."

13. Since the purpose of the 1996 Act, is, *inter alia*, to give effect to the Geneva Convention and other related conventions on the treatment of refugees I think the test of "anxious scrutiny" is one which the courts should use as well as the O'Keeffe principles when considering matters of this kind. Of course if a decision is made on irrational grounds it will be susceptible to legal challenge. But there may be cases which might not come within the *O'Keeffe* definitions of irrationality but might legitimately fall to be reviewed by the courts. It seems to me that this could arise in circumstances of manifest error disclosing a reasonable possibility on the facts that the original decision was wrong. It is argued on behalf of the applicant that the question of whether new evidence significantly adds or not to the likelihood of the applicant qualifying for asylum on the totality of the evidence already available and considered is really a matter for the RAC and the RAT if a new application is permitted. Since s. 17(7) of the act is a preliminary process and a step in the process of having a new application considered it seems to me that it is important that the respondent does not rule out the possibility of an applicant having a further claim considered where there is a realistic prospect that a favourable view could be taken of the new claim in cases where fundamental human rights and issues are at stake.

14. The applicant also challenges the respondent on the reasons furnished in the letter of the 21st July, 2005 insofar as they state that "…comparisons cannot be accepted as having relevance". My attention has been drawn by the applicant to paragraph 43 of the UNHCR handbook on procedure and criteria for determining refugee status which states, *inter alia*,

> "These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he will also become a victim of persecution is well founded…"

15. Objectively there is a connection between the experience of the applicant and his sister-in-law whose application was accepted. A common connection between the two of them was the applicant's brother M.I. who has been missing with his family following an attack. It cannot surely be said that comparisons between the applicant and his sister-in-law are not relevant. This is not to say that it necessarily follows that the decision should be the same in each case. But at the very least the comparison is relevant to the determination of the nature of the persecution said to be feared. In the context of this application it seems to me that the Minister was in error in stating that comparisons cannot be accepted as having relevance. It appears to be an arbitrary statement and one which, in the context of this particular application, is without any objective justification. There maybe some cases where comparisons are not relevant but I hold that the Minister was wrong, in this case, to say that comparisons between the two cases was not relevant. Since the right of an applicant to a new hearing is dependent upon obtaining the consent of the Minister he must act fairly and in accordance with the principles of natural justice and it seems to me, in applying that test he simply cannot say that the comparisons between the two cases are not relevant.

Consistency in the decision making process

16. The applicant claims that the respondent has acted in denial of his constitutional right to the equality of treatment within the

asylum process on the basis that his case and that of his sister-in-law were treated differently on foot of similar country of origin information.

17. It seems to me that the courts must be careful not to interfere with decisions made in the asylum process where there has been no obvious error in law. The consequences for the asylum system if the Minister had to let someone remain in the State merely because of another decision could be quite destructive of the system. Counsel for the respondent points out that the creation of a highly structured asylum claim-system in the State indicates that the intention of the Oireachtas was to ensure certainty and finality in the asylum process, subject to procedural safeguards for an applicant.

18. In this case the applicant states that there is fresh evidence in relation to his rejected application for asylum but in fact the "evidence" is solely the fact that his sister-in-law has been granted asylum. No further evidence by way of facts has been produced and it is claimed that the finding in relation to his sister-in-law`s case should warrant a fresh hearing in relation to his own case. In the case of F*asakin v. RAT and the Minister for Justice, Equality and Law Reform* (Unreported Judgment, O'Leary J. 21st December, 2005) he stated at page 8 of the judgment

> "…the decision of a body in a particular case is neither evidence in another case nor does it create a binding authority for future cases. Each case must be considered on its own merits. Imagine the outrage there would be if an application was refused because the applicant's daughter had previously been refused. It is also noted in this case that as part of the appeal process the applicant quoted the terms of the decision made granting the applicant's daughter refugee status. In the view of this court, the Refugee Appeals Tribunal in its decision correctly stated the law when it held that it could not be influenced by the decision in the daughter's case."

19. On the particular facts in that case the application for leave was refused. But the observations of O'Leary J. point out the dangers that can arise in adopting too simplistic an approach and saying that because a favourable decision has been given in one case it should be give in another similar case. It could equally be argued that in the context of the present application perhaps the decision in favour of the sister-in-law was wrong and that the RAT was correct in its decision in the applicant's case. But this would require entering into the merits of the case itself. What I am dealing with is whether or not the Minister should, in the circumstances of this particular case, have permitted the applicant to proceed to a further application under the asylum process. It is clearly undesirable for the *jurisprudence* of the Tribunal to be variable or haphazard since it is a fundamental principle of justice that people should be treated equally and similar cases should be treated alike. In *Shirazi v. Secretary of State for the Home Department* [2003] E.W.C.A. Civ 1562 and [2004] I.N.L.R. 92 Sedley J. stated

> "I accept readily that it is not a ground of appeal that a different conclusion was open to the Tribunal below on the same facts nor therefore that another Tribunal has reached a different conclusion on very similar facts. But it has to be a matter of concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different Tribunals. …the differentials we have seen are related less to the difference between individual asylum seekers than to differences in the Tribunal's reading of the situation on the ground in Iran. This is understandable, but is not satisfactory. In a system which is as much inquisitorial as it is adversarial, inconsistency on such questions works against legal certainty."

20. In *Atanasov v. RAT and Others*, Supreme Court 26th July, 2006 Geoghegan J. stated

> "it is not that a member of a Tribunal is actually bound by previous decisions but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary".

21. How can it confidently be said that the reasoning in the applicant's case was correct when his sister-in-law achieved a different result on the same facts and in circumstances where there were so many common features between the two applicants based on their relationship and family history? It cannot be conducive to the proper conduct of the asylum process if this should occur. How can the applicant in this case not feel a sense of injustice if his application has been refused when that of his sister-in-law on the same facts has been accepted? At the very least it gives rise to a legitimate cause for concern and would warrant a review of the case. Since the applicant has exhausted his appeal under the legislation he can only have the matter reviewed by means of a fresh application. It is, in one sense, true that the applicant has not produced new evidence in the sense of new information from the country of origin nor a difference in his own circumstances or fears of persecution. But in my view he does not need to produce new evidence in that sense if he can show a good arguable case that his case should be reconsidered on the basis that the new information admits of a reasonable prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached in the earlier claim.

22. Section 17(7) does not state that the person making the application to the Minister for his consent to make a further application, has to produce new evidence in the sense of new information from the country of origin. It merely says that one cannot bring a further application without the consent of the Minister.

23. It seems to me to be quite unjust that the applicant cannot go back to the RAC and the RAT on the same facts and with the information that his sister-in-law's application has been granted so that a general review of his case can take place. I have already held that the Minister did not apply the correct test in stating that the new evidence submitted "…does not significantly add to the likelihood that the applicant qualifying for asylum on the totality of the evidence already available and considered". In my view the correct test is to show that there is a reasonable prospect of a favourable view been taken of the new claim despite the unfavourable conclusions reached on the earlier claim having regard to the additional information available.

24. In *Dikilu v. Minister for Justice, Equality and Law Reform and Interim Refugee Appeals Authority*, 2nd July, 2003 Finlay Geoghegan J. quashed decisions relating to two sisters who were refused asylum when the third sister had already been granted asylum. All had applied for asylum largely on the same facts although there were some minor differences. Since the applicant's decision in this case was received before that of his sister-in-law he was not in a position to challenge the refusal of his application on the same grounds as arose in the Dikilu case. But it is clear that he will do so if he were given permission by the Minister to proceed with a fresh application.

25. In the circumstances it seems to me that the plaintiff's decision in refusing leave to the applicant to make a further application is contrary to natural justice and basic fairness. But it also seems to be fundamentally at variance with reason and common sense not to allow the applicant make a new application for a declaration under the Act in the light of the decision given in his sister-in-law's case, and the country of origin information accepted as being credible. I have no doubt that applying the "anxious scrutiny test" the decision was unreasonable and unfair. But I think even if one looks at it from the standard enunciated in the *State (Keegan) v.*

Stardust Victims Compensation Tribunal [1986] I.R. 642 or *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 it is irrational. I believe it is important to have regard to the fact that the Minister's consent is a condition precedent to the applicant making a further application. The Minister's consent involves no more than entitling the applicant to bring a further claim but does not adjudicate on the claim itself. That would be a matter for the RAC or the RAT as the case may be.

26. I take the view that the refusal of the Minister to consent under s. 17(7) in the particular circumstances of this case is a denial of justice and fairness to the applicant who should be entitled to go forward to the relevant bodies established under the asylum legislation and to make a further application in the light of the fact that his sister-in-law has been successful in her application on, essentially, the same facts.

27. I hold that the respondent acted unlawfully in refusing his consent to a further application by the applicant under s. 17(7) of the Refugee Act, 1996 as amended.