[2020] IEHC 451

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 775 JR]

BETWEEN

N.D. (ALBANIA), N.D., K.D. AND A.D.
(A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND N.D.)

APPLICANTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 22nd day of September, 2020

1. The first-named applicant was born in Albania in 1993. She arrived in the State on 19th March, 2014 and applied for asylum. The following month she gave birth to the fourth-named applicant in the State. The asylum application was rejected by the Refugee Applications Commissioner in January 2015.

2. Following the commencement of the International Protection Act 2015 she applied for international protection. That was rejected by the International Protection Office on 14th August, 2018. Permission to remain in the State was also refused.

3. The first and fourth-named applicants then appealed to the International Protection Appeals Tribunal on 17th August, 2018 and an oral hearing took place on 5th February, 2019.

4. The applicants were represented at that hearing by the same solicitor and counsel that appear in the present judicial review. The pleadings allege that the evidence at the tribunal wasn't taken on oath or affirmation.

5. Counsel for the applicants informs me that neither she nor her solicitor noticed that an oath wasn't administered, but that this was pointed out by one of the first-named applicant's brothers in a consultation after the hearing date, but before the IPAT decision. The applicant's lawyers decided not to take any action at that point, but to await the outcome from the tribunal first. That outcome came on 29th March, 2019 when the tribunal rejected the appeals. The applicants were so notified on 3rd April, 2019.

6. The notification of the appeal decision started the five-day period for an application for review of the permission to remain refusal.

7. On 10th April, 2019, which was after the five-day period had expired, the applicant's solicitors sought a 21-day extension of time to allow the making of a review application. That was granted on an "*exceptional*" and "*not to be repeated*" basis on 16th April, 2019 allowing up to 24th April, 2019. No such application was made by that date, but instead again after the expiry of the relevant period, a further application for an extension of time was made on 15th May, 2019. The Minister was under no obligation to entertain this, especially in view of the terms of the first extension, and in the absence of a review

application within the five days as extended, the Minister proceeded with the deportation process and wrote to that effect to the applicants' solicitors on 19th August, 2019 confirming that as no information had been submitted regarding a review, the original refusal of permission to remain was being upheld.

8. On 21st August, 2019 the applicants wrote to the IPAT requesting a rehearing of the appeals and also wrote to the Minister for Justice and Equality requesting that no steps would be taken to issue deportation orders pending the proposed rehearing. The ground of seeking a rehearing of the protection appeals was the alleged problem with a lack of oath or affirmation at the hearing. If nothing else, the letters indicate the applicants' knowledge of the situation as of 21st August, 2019. On 22nd August, 2019 IPAT refused the requested rehearing on the basis that it was *functus officio* and that any further correspondence should be addressed to the Minister.

9. On 9th September, 2019 deportation orders were made against the applicants. Those were notified by letter dated 27th September, 2019 which was received by the applicants' solicitor on 30th September, 2019.

10. The present judicial review proceedings were filed on 30th October, 2019, the primary reliefs sought being *certiorari* of the deportation orders and of the decision refusing leave to remain or of an alleged refusal to accept an alleged review application, which was said to have been submitted by letter of 21st August, 2019.

11. I granted leave on 11th November, 2019 and a purported amended statement of grounds was filed on 14th November, 2019 although contrary to the correct procedure it doesn't highlight what the amendments are either by underlining or strike-through. A statement of opposition was duly filed although unhelpfully it was omitted from the book of pleadings prepared on behalf of the applicants.

12. I have now received helpful submissions from Ms. Lorraine Lally B.L. for the applicants and from Ms. Katherine McGillicuddy B.L. for the respondents.

Position of second and third-named applicants

13. Ms. Lally indicated that she had no instructions from the second and third-named applicants. Nonetheless the applicants' solicitors unfortunately hadn't, as of the hearing date, made any efforts to come off record for those applicants, which is the correct procedure in a case where instructions peter out. Ms. McGillicuddy applied to strike out the proceedings against the second and third-named applicants and I granted that application at the hearing.

Preliminary objections

14. Three preliminary objections were raised on behalf of the respondents as to acquiescence, time, and lack of compliance with High Court Practice Direction HC81.

Acquiescence

15. Paragraph 3 of the statement of opposition contends as follows: *"The Applicants are guilty of acquiescence and as a result the discretionary remedy of Certiorari ought not be*

granted. The Applicants' were legally represented at the oral appeal hearing held by the First Named Respondent. The onus rested on the Applicants and/or their legal representatives to request and/or make all necessary and relevant representations to the First Named Respondent at the outset of the oral hearing regarding their desire to provide sworn or affirmed evidence if this was their wish. The procedure which the Tribunal Member intended to adopt was outlined at the outset of the hearing. No preliminary issue was raised by the Applicants and/or their legal representatives at that stage. The Applicants acquiesced in the conduct of the oral hearing because they did not make any request or representation regarding the taking of evidence by way of oath or affirmation. Furthermore, they did not object to the oral hearing being conducted without the witnesses appearing before the Tribunal Member swearing an oath or making an affirmation before giving their account."

16. What happened here was that the applicants and their legal representatives were aware of the problem before the IPAT decision, but didn't do anything. They waited to see if they got a positive outcome. That is a classic form of acquiescence. One can't both approbate and reprobate. Ms. Lally says that, having consulted colleagues to ensure she was acting ethically, the applicants' lawyers made a tactical decision not to raise the matter in the hope that they would get a positive decision. On the one hand, one must always bear in mind the duty of lawyers to keep the court or tribunal right even if it is not in one's interests. As against that, subject to the duty to ensure that the court or tribunal is not misled, a lawyer isn't required to make every legal point, and can waive or keep silent about a point that might have been taken if she thinks it's in the client's interests to do so. So while some fine judgment may be involved and while reasonable people may disagree about marginal cases, I will assume for present purposes that it was legitimate to decide not to raise the point. But what isn't quite as legitimate is that when one then gets a negative decision one cries foul and says there is a serious problem here. An applicant can't be allowed to do that. Being aware of a problem before a decision is made and doing nothing in the hope of a positive decision amounts to acquiescence that precludes reliance on the problem later: see *per* Henchy J. in *Corrigan v. Irish Land Commission* [1977] I.R. 317 at 326.

Time

17. Paragraph 1 of the statement of opposition contends that, "*The within application for leave to apply for judicial review has not been brought within the 28 day time limit set out in section 5 of the Illegal Immigrants (Trafficking) Act 2000 as amended. No explanation has been provided by the Applicants for their failure to institute proceedings within the applicable time limit. No extension of time has been sought by the Applicants."*

18. The making of an application out of time, without seeking an extension of time and without providing an explanation, as here, is fatal in any event. The claim in relation to the review process is misconceived because they didn't make a review application within the five days provided or as exceptionally extended by the Minister. Furthermore in purely formal terms the applicants received the deportation decision on 30th September, 2019 so are a couple of days out of time even for the challenge to that.

19. However, there is a more fundamental problem here. It is accepted by Ms. Lally that there are no independent grounds to challenge the deportation order or the related refusal to accept the purported out of time review. Everything is predicated on the alleged flaw in the procedures before IPAT. One can't challenge a decision subject to a time limit (here, s. 5 of the Illegal Immigrants (Trafficking) Act 2000) by a side-wind simply by challenging a subsequent decision that is premised on the earlier decision. Even if the subsequent challenge is within time as dated from the later decision, which this isn't, one is still subject to the s. 5 time limits that applied to the original decision if the challenge amounts in substance to a collateral attack on such an earlier decision: see *Nawaz v. Minister for Justice and Others* [2012] IESC 58, [2013] 1 I.R. 142.

20. While the time issue strictly doesn't arise having regard to the fact that the proceedings fail anyway, if I am wrong about the question of acquiescence I would have held the proceedings to be time-barred in any event.

Non-compliance with the practice direction

21. Paragraphs 4 and 5 of the statement of opposition raise complaints about the applicant's non-compliance with Practice Direction HC81, failure to exhibit material and non-disclosure at the *ex parte* stage. Full disclosure of relevant materials is crucial, especially at the *ex parte* stage and it is suboptimal that the respondents in their replying affidavit here had to exhibit a great deal of relevant material that the applicants had not put forward. But given that the application fails anyway, I don't make any formal finding under this heading.

Procedures before IPAT

22. While the action fails at the first hurdle, before concluding it is worth noting that two points regarding tribunal procedures might call for comment. Firstly, as regards the applicants' request for a rehearing of their appeal, it is true that reg. 10 of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (S.I. No. 116 of 2017) allows for correction of errors in IPAT decisions. However, that does not give any authority to set aside a decision in full and to hold a rehearing after the decision has been made; nor is there any other legal authority for such a course. The request to the IPAT to rehear the matter was totally misconceived.

23. Secondly, as regards the administration of the oath, it is true that s. 42(8)(d) of the 2015 Act is phrased in enabling rather than mandatory terms, but for consistency and in order to ensure that evidence that is given to the tribunal is offered with due solemnity and seriousness, the administration of an oath in line with the religious beliefs of each witness should be the default position for the tribunal. Affirmation arises, not if a witness declines to give an oath, but only in limited circumstances where the oath is contrary to the witnesses' religious beliefs or if the witness has no religious beliefs. Taking evidence without either an oath or affirmation should only be in the limited circumstances set out in the Chairperson's Guideline No: 2019/1 on Taking Evidence from Appellants and Other Witnesses, where this is in the interests of justice (para. 11.2). Those guidelines were issued under a statutory power in s. 63(2) of the 2015 Act; and in sub-section (6) of that section, the legislature identifies consistency as a specific statutory *desideratum* and

providing that the chairperson can take other actions for "*the avoidance of undue divergences in the transaction of business by the members"*. The tribunal is fully entitled to view refusal to take an oath where the conditions for affirmation are not satisfied as being in and of itself undermining of the credibility of the account offered, all other things being equal. That is only common sense. Someone who hesitates about swearing to the truth of something is giving you important information about the reliability of their account, all other things being equal.

24. Other statutory procedures such as under the Mental Health Act 2001 and the Residential Tenancies Act 2004 are not focused to the same extent on the credibility of accounts that normally can't be directly verified. The need for an oath is considerably greater in the international protection context where credibility as such looms large and where the nature of the events being attested to in faraway locations and unusual circumstances often eludes direct proof or disproof.

25. While the challenges of the COVID emergency have necessitated electronic remote hearings involving alternatives to the oath or affirmation, in particular the statement of truth (s. 21 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020), and while the ongoing secularisation of society makes oaths, with their emphasis on religious beliefs, look like a pre-Enlightenment anachronism and an embarrassment, the unfortunate reality is that the oath still has a powerful role in bringing out the truth. There are people, both Irish and non-Irish, who are relatively untroubled about the theoretical civil and criminal consequences of lies to a court or tribunal, but who nonetheless hesitate if asked to call down their deity as a witness to such lies. The rational, bureaucratic, mind fails to appreciate that merely stiffening the criminal penalties for perjury has no effect whatever on that viewpoint. The existence of such witnesses has been illustrated from experience in the IPAT since it began to administer oaths in recent years, and is reinforced by the experience in the Asylum List particularly since the salutary disciplines of Practice Direction HC81 were introduced. Scrapping the oath makes academic sense, but would materially increase the amount of false evidence in practice. Would that it were not so, but it would be wishful thinking to ignore the reality. Overall the real objection to oaths is that apocryphally attributed to Dr Garrett Fitzgerald: "*I know it will work very well in practice, but tell me ... how will it work in theory*?" (Seamus Martin, "Saturday Column", *The Irish Times,* 6th July, 1985, citing an attribution by Anthony O'Reilly).

Order

26. The proceedings are dismissed.