Neutral Citation Number: [2009] IEHC 436

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2006 344 JR**

**BETWEEN**

**A. A.**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 14th day of October, 2009**

1. This is an application for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated the 23rd March, 2006, to refuse to consent to the re-admission of the applicant to the asylum process pursuant to s. 17(7) of the Refugee Act 1996, as amended. The applicant is seeking *inter alia* an order of*certiorari* quashing that decision. Leave was granted by Birmingham J. on the 4th June, 2008. Although the leave was granted on four grounds the primary ground with which this judgment is concerned is:-

> "**A.** The Respondent erred in law and has applied an incorrect test having regard to criteria to be met by an applicant in relation to the re-admission of a claim for refugee status based on new information and / or information not previously available."

2. The substantive hearing took place at the Kings Inns, Court No. 1, on the 7th May, 2009. Mr. Saul Woolfson B.L. appeared for the applicant and Ms. Ann Harnett O'Connor B.L. appeared for the respondent.

**Section 17(7) of the Refugee Act 1996**

3. Section 17(7) of the Refugee Act 1996 provides as follows:-

> "A person to whom the Minister has refused to give a declaration may not make a further application for a declaration under this Act without the consent of the Minister."

4. Thus s. 17(7) enables a person who has been refused a declaration of refugee status to apply to the Minister for his consent to make a further application for a declaration of refugee status. The section is silent as to procedure and imposes no express restrictions on the Minister's discretion to grant or refuse his consent. The question for the Court in this case is, in essence, whether the Minister's discretion under s. 17(7) is fettered and if so, how and to what extent.

**Background**

5. The applicant is a national of Nigeria, born in 1971. He claims to be university-

educated. In 2004 he made an application for asylum to the Refugee Applications Commissioner claiming to fear persecution on two grounds – first, at the hands of his relatives' for refusing to become high priest of the shrine in their village and secondly, because his homosexuality was uncovered after he was raped during a robbery at his home in 2003. The applicant was represented by the Refugee Legal Service (RLS) during the asylum process. The Commissioner recommended that the applicant should not be granted a declaration of refugee status and that recommendation was affirmed on appeal to the Refugee Appeals Tribunal.

6. The Minister refused to grant the applicant a declaration of refugee status and in September, 2005 informed the applicant that he was proposing to deport him. The applicant engaged a firm of private solicitors who made representations to the Minister on his behalf as to why he should be permitted to remain in the State. At that point, it was disclosed that he had been diagnosed as being HIV positive in December, 2004, just days before his s. 11 interview with ORAC. The applicant claims that after his oral hearing in March, 2005 he furnished the Tribunal Member with a letter from Beaumont Hospital confirming his HIV status. This is disputed by the respondents. A number of medical reports was furnished confirming the diagnosis. The Minister's agents examined the applicant's file pursuant to s. 3 of the Immigration Act 1999 and s. 5 of the Refugee Act 1996. It was determined that the humanitarian grounds on file were not such as to conclude that he should not be returned to Nigeria and that no issues arose in relation to refoulement. The file was re-examined after the applicant's solicitors submitted two further medical reports but the same conclusion was reached and the applicant was informed in February, 2006 that the Minister had signed a deportation order. The applicant has been refused leave to challenge that decision by way of judicial review.

7. The applicant engaged a further firm of private solicitors and on the 16th March, 2008 they made an application under s. 17(7) of the Act of 1996, seeking the Minister's consent to make a further application for a declaration of refugee status on his behalf. While additional materials were furnished in relation to his original claim, the primary basis for the s. 17(7) application was as follows:-

> "Our client's status as HIV positive and his fear of persecution by reason of his membership of the social group comprising such persons. Persons who are HIV positive in Nigeria are subjected to stigma, discrimination and harassment within society amounting to persecution and are also subject to discrimination in the failure by the state and its policies and practice to provide essential life prolonging healthcare and treatment."

8. The applicant's solicitors furnished a number of medical reports in support of the s. 17(7) application; certain of those reports had previously been considered by the Minister at the leave to remain stage but a number of them had not. It was submitted that the applicant's HIV condition had not been previously been considered as a basis and reason for his fear of persecution. It was stated that his fear arises in the context of the discriminatory policy adopted by the Nigerian State in the manner in which it fails to make available essential, appropriate and necessary treatments for HIV sufferers and by reason of endemic societal discrimination and stigma and isolation of persons with HIV. 16 country of origin information (COI) reports were appended to the application, dealing with the situation for HIV patients in Nigeria. It was submitted that the information furnished was credible and sufficiently cogent to be capable of affecting a decision on an application for refugee status, that it materially and qualitatively altered

the claim and that a favourable view could be taken despite the unfavourable conclusions reached in the adjudicating of his previous claim.

**The Imputed Decision**

9. On the 23rd March, 2008 the Minister refused the applicant consent to make a further application for a declaration of refugee status. In coming to his decision he determined that in assessing requests pursuant to s. 17(7), the question must be asked:

> *"Could this new documentation / information / evidence have been produced during the course of the processing of the asylum claim, with due diligence, if considered relevant or helpful to the Applicant's claim?"*

10. The Minister determined that the answer to that question in the applicant's case was *"is an unequivocal yes."* He noted that the applicant was informed on his ORAC questionnaire that any medical evidence in support of his claim should be submitted without delay and that he was diagnosed in December, 2004 but he did not submit documentation to attest his being HIV positive until he applied for leave to remain in October, 2005. It was determined that in the light of that evidence, the provisions of s. 17(7) were not applicable and the applicant's request was denied.

11. The applicant's solicitors subsequently requested the Minister to revoke the applicant's deportation order pursuant to s. 3(11) of the Immigration Act 1999, making essentially the same submissions as they had made in support of the s. 17(7) application. The Minister refused that application and the applicant was refused leave to challenge that decision by way of judicial review.

**The Submissions**

12. Mr Saul Woolfson B.L., counsel for the applicant, argued that the test that the Minister should apply when assessing applications under s. 17(7) is that set out by Bingham M.R. (as he then was) in the English Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Onibiyo* [1996] 2 W.L.R. 490 as follows:-

> "The acid 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 that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

13. Mr Woolfson stressed that Clarke J. at the leave stage in *E.M.S. v. The Minister for Justice, Equality and Law Reform* [2004] I.E.H.C. 398 (21st December, 2004) and McGovern J. at the post-leave stage in *Itaire (C.O.I.) v. The Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 208 and *K.C.C. v. The Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 219 accepted that the Minister should apply the *Onibiyo* test when assessing applications under s. 17(7) of the Act of 1996.

14. Mr Woolfson accepted that the Minister was entitled to have regard to the question of whether or not the applicant could, with due diligence, have brought forward the evidence he relies on at an earlier stage. He argued vigorously however that it was incumbent upon the Minister to balance that fact with the broader interests of justice and the wider implications of refusing to allow the

applicant to make a further asylum application. In failing to do so, the Minister failed to apply the requisite fairness of decision-making.

15. Ms Harnett-O'Connor B.L., counsel for the respondents, argued that the Minister has an absolute discretion under s. 17(7) and that, on the basis of the syntax and grammar of the *Onibiyo* "acid test", the Minister was entitled to refuse his consent once he reasonably determined that the applicant could reasonably have been expected to rely on the evidence during his first asylum application. The Minister had no obligation to give any further consideration to the evidence relied on by the applicant.

**The Court's Assessment**

16. While the wording of s. 17(7) of the Refugee Act 1996 admits of no express restrictions on the Minister's discretion it is clear that the Minister must exercise his discretion, as is normal in the jurisprudence of this State, in accordance with natural and constitutional justice. In addition, the Minister is obliged to have regard to any obligations which Ireland may have under international law and he is therefore obliged to construe s. 17(7) in a manner which ensures, as far as possible, that Ireland complies with its obligations under the Convention Relating to the Status of Refugees 1951 ("the Geneva Convention"), which is the genesis of the Refugee Act of 1996. The Minister's discretion is thereby constrained by the prohibition against refoulement contained in Article 33(1) of the Geneva Convention, which is the basis for s. 5 of the Refugee Act 1996 which states:-

> "5.—(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."

17. It is clear in this case that the Minister considered himself obliged to conduct some enquiry rather than to refuse his consent in his absolute discretion. He clearly considered the applicant's s. 17(7) application in the context of the applicant's previous application for asylum and his application for leave to remain. He appears to have accepted that the evidence produced by the applicant was "new" but he refused his consent on the basis that the new evidence could, with due diligence, have been produced during the course of the processing of the applicant's original asylum claim if it was considered relevant or helpful to his claim.

18. I do not believe that it was sufficient for the Minister to consider only the applicant's failure to assert his fear of persecution by reason of his HIV status during his first asylum claim. It is difficult to see how with this confined consideration the Minister could have been satisfied that the possibility of refoulement could not occur unless some consideration of the substance of the claim had also taken place. In circumstances where it is determined that the Minister's examination was inadequate, the question for the Court is what test (if any) he ought to have applied?

19. The applicant contends that the Minister was obliged to employ the formula used in the *Onibiyo* "acid test" and consider whether the applicant's new claim was sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim. In this regard he relies on the decision of Clarke J. in *E.M.S.* and McGovern J. in *C.O.I.* and *K.C.C.* (cited at paragraph 0 above).

20. I believe that the applicant is correct in part. In examining whether the Minister is obliged to apply the *Onibiyo*"acid test" when assessing s. 17(7) applications it is important to examine the facts of *Onibiyo* and to some extent compare the situation which prevailed in the UK at that time with the statutory right to apply for the Minister's consent as provided for in s. 17(7) in this jurisdiction. The applicant Mr. Onibiyo applied for asylum which was rejected and his appeal from that decision was unsuccessful. He later attempted to make a fresh application for asylum, based on what he submitted were different grounds. The Secretary of State concluded that no fresh claim had been made and treated the further material as relating to the original claim. The applicant sought to appeal that decision but the Secretary of State indicated that since he had made no fresh decision, the applicant had no avenue of appeal available to him. Mr. Onibiyo brought judicial review proceedings which were dismissed in the High Court on the basis that no more than one claim for asylum could be made during one single, uninterrupted stay in the UK. It is significant that there was at that time no statutory provision allowing for the making of a second or further asylum application in the UK. The High Court found for the Secretary of State but the applicant appealed to the Court of Appeal where Bingham M.R. had regard to the obligations of the UK under Article 33 of the Geneva Convention (the prohibition of refoulement), which he said is binding until the moment of return. On that basis he found that a person may make more than one application for asylum during a single uninterrupted stay in the UK.

21. Bingham M.R.. was then faced with the question of what in fact constitutes a "fresh claim" for asylum following an earlier refusal. It is of importance that it was accepted by the applicant in *Onibiyo* that a "fresh claim" for asylum could not be made by advancing an obviously untenable claim or by repeating, even with some elaboration or addition, a claim already made, or by relying on evidence available to the applicant but not advanced at the time of an earlier claim. It was also acknowledged by counsel on behalf of Mr. Onibiyo that there had to be a significant change from the claim as previously presented, such as might reasonably lead a special adjudicator to take a different view. It does not appear to have been in dispute that if the "fresh claim" depended on new evidence, then it had to satisfy tests analogous to that formulated by the English Court of Appeal in *Ladd v. Marshall* [1954] 1 W.L.R. 1489, which Bingham M.R. summarised as being "previous unavailability, significance and credibility". Bingham M.R. also noted that in the Court of Appeal's decision in *Manvinder Singh v. Secretary of State for the Home Department* [1995] E.W.C.A. Civ 53, Stuart-Smith L.J. held that it is only where an applicant asserts that one or more of the fundamental ingredients of his claim is different from his earlier claim that it can be said to be a "fresh" claim. Stuart-Smith L.J. held that in deciding whether or not a fresh claim to asylum is made, "*it is necessary to analyse what are the essential ingredients of a claim to asylum and see whether any of those ingredients have changed".* Bingham M.R. followed this reasoning and also that of Carnworth J. in the High Court in *Singh* who held that there must be a change in the character of the application. Bingham M.R. then went on to formulate his "acid test", as seen at paragraph 0 above.

22. The first point to be made about *Onibiyo* is that it is clear that Bingham M.R. did not intend to introduce a rigid test where his words would be applied as an invariable formula. Before formulating his "acid test" he warned that "*[t]here is danger in any form of words, which can too easily be regarded as a binding formula*." His decision identified matters relevant to the consideration of what constitutes a "fresh claim" which are not very different from the long respected rules from *Ladd v. Marshall.* While those same matters are relevant to the Minister's consideration of a s. 17(7) application, the Minister is not obliged to use

any formulation of words in reaching his determination. The Minister enjoys a very wide discretion which is subject only to constitutional justice and his obligations under international agreements such as those incorporated into the Refugee Act 1996. That discretion cannot logically be constrained by his choice of words or phrases used in his decision on an application for consent to make a further application for a declaration of refugee status. A decision of the Minister should not be set aside simply because a different set of words were used.

23. The second point that must be made about *Onibiyo* is that Bingham M.R. clearly found that the existence of a "fresh claim" falls to be determined by the Secretary of State whose administrative decision is reviewable by the courts only on the ground of unreasonableness or irrationality. At the time of the *Onibiyo* decision the UK Human Rights Act 1998 was not yet in force and so, the *Wednesbury* principles applied. The more rigorous standard of "anxious scrutiny" is now applicable in the UK.. The underlying principle is applicable to the situation in Ireland. Section 17 (7) of the Refugee Act 1996 sets down that it is for the Minister to determine whether to permit an applicant to make a further application for a declaration of refugee status. Of logical consequence, it follows from the terms of the Refugee Act 1996 that it is for the statutory authorities –ORAC and on appeal the RAT – to determine whether the applicant is a refugee. The determination of whether consent should be granted is a matter for the Minister and not for this Court judicially reviewing the Minister's decision. The judicial review court may not substitute its view for that of the Minister and can only review the legality, propriety, rationality and constitutionality of the Minister's decision.

24. The third and most important point in relation to *Onibiyo* is that Bingham M.R. identified the UK's obligations under the Geneva Convention which are identical to Ireland's obligations even though the Convention does not have the force of law in this State. *Onibiyo* is undoubtedly a helpful case. This was the view taken by Clarke J. in *E.M.S.* and with which I concur. The "acid test" in *Onibiyo* does not however impose its language as the test in this State.

25. The law in this state is that the Refugee Act 1996 ought to be construed, as far as possible, to ensure that Ireland complies with its obligations under the Geneva Convention and, in particular, Article 33 of that instrument. To ensure that no person is returned to the frontiers of a state in which his or her life or freedom is at risk, in breach of the overriding prohibition of refoulement set out in s. 5 of the Act of 1996, the Minister must first consider whether the information on which the s. 17(7) application is grounded has already been fully considered whether by ORAC, the RAT or the Minister. If the Minister is satisfied that the information on which the s. 17(7) application has raised no genuinely new facts that have not previously been fully considered, then he can be satisfied that there is no risk of refoulement and he has fulfilled his obligations. If, however, the Minister is not satisfied that the information grounding the s. 17(7) application has already been fully considered, he must go on to consider whether the there is any substance in that new information. If he concludes that there is substance in the new information, he should refer the matter for investigation by ORAC. He is not obliged to employ any particular formula of words in coming to his decision on the substance of the information but he must be satisfied that the information admits of no risk of the applicant being refouled if the applicant is not permitted to make a further asylum application.

26. The Court is aware of the potential for a failed asylum seeker to abuse the s. 17(7) process for spurious reasons (as appears to have occurred in

the *Onibiyo* case) so as to unjustifiably prolong his stay in the State. It is in the common interest that evidence is presented at the first instance. That common interest is served by legal certainty and the finality of decisions which come at the end of a properly conducted asylum and immigration process. As the Minister has a wide discretion to grant his consent under s. 17(7), his refusal to consent will be unlawful only where he fails to consider the substance of the information, evidence or documentation that has not previously been fully considered.

**Application to This Case**

27. The Minister must, in view of Ireland's obligations to protect against refoulement, approach his assessment of any s. 17(7) application a little more widely than he did in this case. The application should not have been rejected solely on the ground that the applicant had not brought forward the relevant evidence at the appropriate time. It was not sufficient for the Minister to refuse his consent under s. 17(7) without a consideration of the possibility that the applicant might face a threat to his life and freedom for a Convention reason on his return to his country of origin. In other words, the Minister should at a minimum have examined the claim that the applicant could face persecution because of his HIV status and considered (i) whether the information, documentation and evidence relied on by the applicant had previously been fully considered and, if not, (ii) whether that information, documentation and evidence demonstrates that there was a likely / realistic / genuine prospect that the applicant's life or freedom might be threatened in Nigeria for a Convention reason. The Court stresses that the Minister was not obliged to use any particular phrases or to outline each argument made on behalf of the applicant.

28. When assessing the above matters, the Minister is entitled to consider all the facts surrounding the previous unsuccessful claim. By way of illustration he might have taken into consideration that the applicant in this case only brought his s. 17(7) application after he was advised by a third firm of solicitors who claimed that his previous solicitors "*did not advise him that HIV status and / or membership of the particular social group comprising such persons and persecution associated with that group can properly form the basis for the grant of refugee status and has been recognised within refugee law as such*." The Minister could quite correctly have considered this assertion by reference to the dictum of Finlay Geoghegan J. in *Muresan v. The Minister for Justice, Equality and Law Reform* [2004] 2 I.L.R.M. 364 in the context of an application for an extension of time under s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 where she held:-

> "I have concluded that a change of counsel in the circumstances of this case is not good and sufficient reason to extend the period […]. 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 *s. 5(2)* 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)*. There was no such clear error in this case."

29. The Minister might also appropriately have taken into account that the applicant was diagnosed in December, 2004 but he did not assert a fear of persecution by reason of his HIV status until March, 2008 – some three years and

four months later. The Minister could also have had regard to the fact that when the applicant's file was examined under s. 3 of the Immigration Act 1999 and s. 5 of the Refugee Act 1996, the applicant's HIV status was known to him and his agents did consider the situation of medical treatment available to HIV sufferers in Nigeria. In addition the Minister would have been entitled to have regard to the fact that, as was noted at paragraph 0 above, the applicant's asserted fear of persecution was stated to arise, *inter alia,* in the context of the discriminatory policy adopted by the Nigerian State in the manner in which it fails to make available essential, appropriate and necessary treatments for HIV sufferers. The Minister might have had regard to the fact that the medical evidence is that the applicant has not required any specific medical interventions related to his infection so far and while he might require the initiation of treatment within a few years it is also possible that he might remain well without treatment for 8 to 10 years. The Minister might also have regard to the jurisprudence of the European Court of Human Rights which has confirmed that Article 3 of the Convention does not preclude the deportation of a third country national simply because they have been receiving medical treatment which would be unavailable or difficult to obtain in their country of origin (see e.g. *N v. The United Kingdom* Application No. 26565/05, judgment of the 27th May, 2008).

30. It is important however that while the Minister was entitled to take all these factors into account, the Court agrees with the view expressed by Bingham M.R. that:-

> "However rarely they may arise in practice, it is not hard to imagine cases in which an initial "claim for asylum" might be made on insubstantial, or even bogus grounds, and be rightly rejected, but in which circumstances would arise or come to light showing a clear and serious threat of a kind recognised by the Convention to the life or freedom of the formerly unsuccessful applicant. A scheme of legal protection which could not accommodate that possibility would in my view be seriously defective."

31. Finally the Court is aware that in *K.C.C. v The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 176, a previous judicial review of a s. 17(7) decision, McGovern J. held that the credibility of the applicant was so damaged that it was not necessary to decide the issue of whether the Minister applied the correct test in refusing the application, as the Minister was acting within his powers on account of the applicant's lack of candour. While serious issues have been raised in relation to the applicant's candour and his reasons for not disclosing his HIV status to ORAC and the RAT in this matter I do not believe that they reach the level where the Court should exercise its discretion to refuse the application. However while the applicant succeeds in his application to have the Minister's decision quashed on the ground that the Minister erred in law and acted ultra vires and / or in breach of the applicant's right to fair procedures and natural and constitutional justice, I will make no order as to costs in favour of the applicant.

**Result**

32. The Court is satisfied that the Minister erred in law and applied an incorrect test as to the matters that require consideration where an applicant seeks consent under s. 17(7) to make a further application for a declaration of refugee status, based on information that has not previously been fully considered. The Minister's decision will be quashed and the matter remitted for a fresh consideration.