[2019] IEHC 739

THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 1 J.R.]

BETWEEN

M.U.A. (PAKISTAN)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of October, 2019

1. The applicant was granted a student visa for the UK on 6th September, 2010 which expired on 20th October, 2012. A second student visa was issued on 17th July, 2013 which expired on 15th August, 2014. The applicant then voluntarily left the UK and came to Ireland where he applied for asylum on 20th March, 2015 never having previously sought international protection in the UK. The Irish authorities made enquiries with the UK Home Office who confirmed that the applicant's fingerprints matched their records and that they had no record of a protection application there. On 9th August, 2015 the applicant submitted a notice of change of address to the Refugee Applications Commissioner and all subsequent correspondence was sent to that address, including the correspondence impugned in these proceedings. He attended an interview pursuant to the Dublin III regulation on 25th September, 2015 and was given an information leaflet as to the procedures involved in the Dublin system. On 25th November, 2015 the Commissioner decided that the UK was responsible for the applicant's asylum claim under art. 12(4) of regulation 604/2013 and a notice of decision to transfer was sent by registered post to the applicant's last notified address. This letter was signed for. The applicant was subsequently to claim that he did not receive this correspondence. On 9th September, 2016 the applicant's solicitors sent a late appeal to the Refugee Appeals Tribunal claiming that the applicant had not received the original decision letter. On 29th September, 2016 the tribunal wrote indicating that an affidavit would be required averring to the reasons for the delay. On 11th October, 2016 such an affidavit was sent; and by letter dated 14th December, 2016 the tribunal wrote to the applicant's solicitors stating that the late appeal would not be accepted. The crucial part of the letter states that: *"The reasons are that:- 1. ORAC complied with regulation 18(2)(b) of S.I. 525 of 2014, in relation to the service of Transfer Decision. A registered letter was sent to the correct address. This was then delivered and signed for at that address. 2. The Tribunal is unaware of any other late appeal having being accepted in similar circumstances. This is considered to be a relevant consideration given the comments of Butler J. at para. 6 of D v. RAT, 22nd January, 2003".*

Procedural history

2. Haughton J. granted leave on 3rd January, 2017. A statement of opposition was filed and the matter came for hearing before Keane J. on 3rd May, 2017 at which stage it was adjourned pending an application by the applicant to amend the statement of grounds to add a challenge to the validity of the European Union (Dublin System) Regulations 2014

(S.I. No. 525 of 2014). Keane J. then delivered judgment on that application, *sub. nom. R.P. v. Minister for Justice and Equality* [2019] IEHC 377 (Unreported, High Court, 31st May, 2019), allowing the amendments sought. Keane J. then indicated that he was not retaining seisin of the case and the proceedings as amended then came on for a fresh hearing. The primary relief sought in the amended statement of grounds is *certiorari* of the letter of the tribunal dated 14th December, 2016 and a declaration that reg. 18(3) of the 2014 regulations is *ultra vires.* In that regard I have received helpful submissions from Mr. Feichín McDonagh S.C. (with Paul O'Shea B.L.) for the applicant and from Mr. Robert Barron S.C. (with Ms. Emma Doyle B.L.) for the respondents.

The legal framework

3. At the time of the contested decision, the relevant legal framework was set out in the 2014 regulations, reg. 6(2) of which stated that an appeal against a transfer decision shall *"be made within 15 working days of the sending to the applicant of the notification under Regulation 5(2)*". Butler J. in *D. v. Refugee Appeals Tribunal* (Unreported, High Court, 22nd January, 2003) held that there was a jurisdiction in the Refugee Appeals Tribunal to accept late appeals in exceptional circumstances, thus holding the time limit in effect to be directory rather than mandatory. That conclusion is perhaps not absolutely self-evident but presumably the Minister was aware of that jurisprudence when making the 2014 regulations and did not clarify the position in the Dublin system context, bearing in mind that the *D.* decision was in the context of substantive claims rather than Dublin transfers. Regulation 18(3) of the 2014 regulations stated that where notice under the regulations had been sent to the person in accordance with reg. 18(2)(b), that is by registered post to a last furnished address, "*the notice is deemed to have been duly served on or given to the person on the third working day after the day on which it was so sent".*

The interpretation of the tribunal letter

4. The interpretation of the letter of 14th December, 2016 challenging the proceedings is crucial to the disposition of the case. As noted above, the letter sets out two reasons for refusing to extend time. What do these reasons mean? In interpreting the reasons, the overall principle must be one of a presumption of validity of an executive act: see *per* Finlay J., as he then was, in *Re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 14th December, 1977). If a decision can be construed in a way that renders it valid and if reasons can be construed in a way that makes sense, that is how the court should construe them. It would be just as much a breach of separation of powers to fail to construe reasons in a way that renders the decision valid, assuming such interpretation to be legitimately open, as it would be to fail to construe legislation in a way that renders it valid, assuming such an interpretation is legitimately open.

5. Mr. McDonagh's interpretation of the contested letter of 14th December, 2016 is that it is "*an incomprehensible decision*" and does not contain any coherent reasons at all; or alternatively if the first point in the letter means simply that the letter was sent to the applicant that is not a valid reason; or alternatively it misinterprets the 2014 regulations by implying that the applicant was deemed to have received the letter and therefore his affidavit evidence was irrelevant.

6. One point that can be made immediately is that clearly the letter of 14th December, 2016 was not a blanket refusal. It was not a treatment of the 2014 regulations as if there was an absolute bar on late appeals. It expressly left the door open to late appeals by referencing the decision in *D. v. Refugee Appeals Tribunal*. For that reason, the argument about the alleged invalidity of the regulations simply does not arise because contrary to the applicant's false premise, the tribunal treated the time limit as something less than absolute. The core of that ground in the amended statement of grounds is that *"there is no discretion to extend time. It appears therefore that the tribunal refused to entertain the appeal simply on this account*". That is manifestly erroneous. There is no analogy with the decision in *R. v. Secretary of State for the Home Department* ex parte *Saleem* [2000] 4 All E.R. 814 where there was no discretion to extend time. The only sensible meaning of reason number 1 is that, as the registered letter had been signed for, the tribunal did not accept that the applicant had shown good reasons for an extension of time. It follows logically and inevitably from the fact that the letter was signed for, even though the tribunal did not laboriously spell this out, that either the applicant did actually receive it or alternatively he had given an address for correspondence where, as is put in the respondent's written submissions, he was "*not in a position for whatever reason to monitor correspondence".* It doesn't really matter which of these applies, although one can observe in passing that common sense suggests it is far more likely that the applicant did receive the letter. On reflection I wonder if I can be forgiven for saying that it certainly seems to suit people to claim ignorance of letters informing them of obligations. Letters informing people of their rights seem to rarely go astray for whatever reason. But the validity of the tribunal decision does not require whether the applicant actually got the letter or not to have been positively found by anybody. Relevant in this context also is the Supreme Court's judgment in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 at pp. 395 to 396 upholding an analogous "deemed service" provision set out in that Bill, where the Supreme Court noted that an applicant *"is not a passive participant in that process*". Thus the premise of the statement of grounds that "*it was irrational and unfair for the first Respondent to request affidavit evidence only to reject the Appeal on a basis that rendered any affidavit evidence irrelevant*" is a false one. The fact that the applicant's affidavit evidence was sparse and unparticularised and left as many questions unanswered as it purported to address probably does not improve his position under this heading.

7. The other grounds for the relief sought, which are that "*it is a breach of natural justice and fair procedures and the European law principle of Effectiveness*", are wholly unparticularised. The decision is not a breach of natural justice. The tribunal simply did not accept that the applicant's explanation was sufficient to extend time. The principle of effectiveness is not infringed either. That principle appears to be consistently misunderstood on behalf of applicants (no matter how often I explain it – but let's try again). It does not mean that every EU-law-based application must automatically be successful, just that national procedural rules should not make the exercise of EU rights impossible or unduly difficult. Here the applicant had an opportunity to appeal which would have made the exercise of any EU law rights both possible and relatively straightforward - a letter advising him of the adverse decision was signed for at the

address furnished by him. His failure to avail of that opportunity does not mean that the principle of effectiveness was breached. A makeweight argument about legitimate expectation is also pleaded but is unparticularised and unsubstantiated. Reason number two in the tribunal decision is just a statement of fact that there are no comparable circumstances where other persons were given late leave to appeal so therefore the doctrine in the *D*. decision does not assist the applicant. That is a fair point and stating it does not make the decision invalid.

8. For those reasons much of the elaborate legal construction erected by Mr. McDonagh simply does not arise and does not need to be dealt with in detail because the key premises of those legal confections are simply misconceived.

Order

9. The proceedings are dismissed.