Neutral Citation No: [2010] NIQB 25 | *Ref:* **TRE7769**

Judgment: approved by the Court for handing down | *Delivered:* **25/2/2010**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

A's application [2010] NIQB 25

IN THE MATTER OF AN APPLICATION
BY A
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION
BY THE UNITED KINGDOM BORDER AGENCY
DATED 18 JANUARY 2010

_____

TREACY J

Introduction

[1] The Applicant is a South African national who, by her amended Order 53 Statement, seeks, inter alia, an order quashing the decision of the United Kingdom Border Agency ("the proposed respondent") to transfer the applicant to the Detained Fast Track ("DFT") process while she was awaiting the outcome of her asylum claim having previously been granted temporary admission to the UK. The Order 53 Statement pleaded a number of grounds but in essence her case revolved around the proposition contained at para 3(j) of the amended Order 53 Statement which was in the following terms:

> **"The decision was made without adequate enquiry into the applicant's medical history in respect of her HIV infection, her current physical and mental health, her general prognosis in respect of this infection and her current treatment plan in Northern Ireland. This ground relies upon the judgment in *R***

(MT) v Secretary of State for the Home Department
[2008] EWHC 1788 (Admin), para 36".

Background

[2] Although this application was received into the Office on 20 January 2010 there have been regrettable difficulties in obtaining a sworn affidavit from the applicant. The absence of a sworn affidavit was the subject of detailed submissions between the parties. By letter dated 12 February 2010 the applicant's solicitors contacted the office indicating that they had received authority from the LSC to instruct English Solicitors to attend their client at Yarlswood IRC to swear the applicant's affidavit and that they had agreed to do so on Tuesday 16 February. This was at a time when the leave application had been concluded and I had reserved my decision. One of the matters that it was intended to address was the significance of the absence of a sworn affidavit from the applicant. Rightly however the applicant's legal advisers considered it appropriate to bring this development to the Court's attention given the importance of sworn affidavit evidence in judicial review proceedings. The sworn affidavit that was filed and served is in identical terms to the unsworn affidavit of the applicant.

[3] When the issue of the absence of sworn affidavit evidence had been previously raised the applicant's solicitor, by letter dated 10 February 2010 had indicated that they had been trying to arrange for the applicant's affidavit to be sworn since 4 February 2010 and that they had spoken to Yarlswood IRC on a number of occasions when it was explained that the procedure was that legal visits were by appointment only and that a solicitor will not see anyone who has not instructed them to attend. The applicant's solicitor did contact a solicitor in Luton who had agreed to visit the applicant and swear an affidavit but that they had requested fees in the sum of £500. A request to the LSC to obtain authority for this sum was refused. I understand from the applicant that obtaining sworn affidavits using English Solicitors has not proved a difficulty or particularly expensive in the past and that the difficulty referred to in the present case had not been encountered before. In any event this problem has now been resolved and the Court does not require to rule on what the effect would have been if a sworn affidavit had not been before the Court.

[4] Nonetheless, it is important that the requirement of Order 53 for sworn affidavits is adhered to. *This is particularly important where an applicant is deposing to facts upon which it is intended to rely in order to obtain leave. Whilst this requirement has, in practice, been relaxed in urgent and exceptional cases such dispensation, to*

further the ends of justice, do not detract from the primary requirement enshrined in Order 53 that applications for judicial review should be grounded on sworn affidavits.

[5] The applicant who was born on 30 June 1968 has deposed that she travelled to the Republic of Ireland in February 2004 as she was in fear of her life following the murder of her partner in December 1999 and an assault on her by one of her partner's assailants. She went to the local police in South Africa but they wouldn't provide her with adequate protection – she asserts. That was the basis of her asylum claim.

[6] On 23 April 2009 the applicant's solicitor wrote to the proposed respondent advising them of the applicant's asylum claim and requesting that a screening interview be arranged.

[7] In July 2009 the applicant was diagnosed as being HIV positive. The applicant provided her solicitor with a short statement in respect of the impact of this diagnosis from which it appears that she has been prescribed HAART (Highly Active Anti Retroviral Therapy) and suffers from the side effects of her medication along with depression.

[8] The applicant attended a screening interview on 21 September 2009 and was granted temporary admission to the UK. She was subject to temporary restrictions including a residence requirement and that she report once per fortnight to Donegall Pass PSNI Station and that she refrain from work. The applicant instructed her solicitor that she had adhered to all these restrictions while she awaited the outcome of her asylum claim. The applicant had her substantive asylum interview on 25 November 2009. At the time of her application for judicial review the applicant was still awaiting the determination of this claim.

[9] The applicant reported to Donegall Pass Police Station on 18 January 2010 in accordance with her temporary admissions restrictions and was arrested. The applicant was spoken to by the proposed respondent at Donegall Pass and detained under immigration legislation in order to facilitate her transfer to a UK mainland detention centre so that her asylum claim could be processed. She was served with a Detention Authority Form IS.91 dated 18 January 2010 in which the reason given for the decision to detain is that the applicant was an "illegal entrant or a person to whom Section 10 of the Immigration & Asylum Act 1999 applies". The applicant advised her solicitor during detention that she did not wish to be detained or removed from Northern Ireland in order to have her asylum claim determined under the DFT procedure.

[10] On 18 January 2010 a pre-action letter was sent to the proposed respondent which is in the following terms:

> **"Further to our telephone conversation this afternoon. We would ask you to reconsider our client's detention and removal from Northern Ireland. We understand our client is to be removed tomorrow and transferred to Fast Track. Our client had her screening interview on 21 September 2009 and substantive interview on 25 November 2009 and is awaiting a decision.**
>
> **Our client is HIV positive and is receiving medical treatment for her condition in Belfast and has a support network. To remove her to a detention centre is outside the remit of the intake selection for this type of case. As we understand the exclusion criteria at 2.3 of your policy 'those with infectious/contagious disease which cannot be effectively and appropriately managed within a detained environment' is met by our client and it is therefore inappropriate to detain her in a removal centre.**
>
> **We put you on notice that if removal is not cancelled in respect of our client today we shall have no alternative but to apply to the High Court for a judicial review to stop removal forthwith."**

[11] The DFT exclusion criteria is set out in a document entitled "DFT and DNSA – Intake Selection (AAU Instruction)". Section 2.3 provides as follows:

> **"2.3 Suitability Exclusion Criteria**
>
> **UK Border Agency policy is that certain individuals are unlikely to be suitable for entry or continued management in the DFT or DNSA processes. These persons are:**
> **…**
>
> - **Those with infectious/contagious disease which cannot be effectively and appropriately managed within a detained environment. …"**

[12] Following the solicitor's pre-action letter of 18 January 2010 his office was in contact with an Immigration Officer who advised his office that the proposed respondent considered that Dungavel IRC had adequate facilities to cope with the applicant's HIV status and also that this was the first time in her experience that a person had been moved from the non-detained asylum process to the DFT in these circumstances.

[13] The applicant sought leave to apply for judicial review on 21 January 2010. Prior to the case being heard Counsel for the proposed respondent provided the applicant's Counsel with a number of documents that contradicted the applicant's instructions to her Solicitor which had formed the basis of the first affidavit which she relied on in these proceedings. I permitted a short adjournment to allow the legal representatives to take the applicant's instructions in respect of the contradictory material.

[14] One of the documents furnished was a UKBA minutes sheet which contains a number of allegations namely that the applicant had sought employment and that she did so using a valid South African passport which contained a *fake* Leave to Remain stamp. The applicant admitted to her solicitor that she had sought work early in 2008 through Trackers Recruitment Agency and advised that she got a job as a Care Assistant at a Residential Care Home in Lisburn the name of which she couldn't recall and admitted that she had worked at the Care Home from about Easter 2008 until January/February 2009. The applicant also instructed her solicitor that her sister, who lives in South Africa, has her passport and that the applicant had only a copy and this is what she had used to get a job. She also instructed that it was *a lady in the Care Home who had given the applicant an IRLR stamp which she had then attached to the copy passport.* She also advised that the IRLR stamp that she had been given was used by all the foreign nationals who worked in the Care Home. The solicitor also records in his second affidavit that the applicant accepted that she had not provided him with "truthful instructions" and that she apologised for this.

[15] In her sworn and recent affidavit at para.8 she frankly accepted that the first affidavit sworn on her behalf by her solicitor omitted to provide information in respect of issues that might be significant in terms of this case and she apologised for what she characterised as her "error of judgment". The applicant then goes on to say that she has read the second affidavit of her solicitor dated 27 January 2010 and can confirm that her instructions to him in that affidavit are accurately recorded. She goes on to say in para.9: "In particular I can confirm that: '(iii) I came to Ireland with my passport in February 2004 and lived with my sister … in Belfast and she took my passport from me as she had paid for my trip to join her. She did not return my passport to me. *My sister* took my passport to do something with it so that I could work. She did not return my passport and

gave me a photocopy of it which *included a stamp for leave to remain*. My sister left Belfast in December 2007 and did not give me my passport back'.

[16] Having apologised for her error of judgment in omitting to provide information that might be significant and confirmed that the solicitors second affidavit accurately recorded her instructions she then avers in para.9(iii) of her sworn affidavit to give an account which is wholly at variance with para.11 of her solicitor's second affidavit where she had claimed that it was a lady in the Care Home who had given her an IRLR stamp which she had then copied to her passport. She now maintains, in her sworn affidavit, that it was her sister who had failed to return her passport and had given her a photocopy of it which included a stamp for Leave to Remain. This is plainly an unsatisfactory state of affairs and it reinforces the point as to why it is vitally important that an affidavit is sworn by an applicant rather than relying on a third party affidavit reporting the instructions which had been given. Apart from the fact that Order 53 requires an affidavit, the consequences of making a false averment on oath may have rather different consequences than if the false instructions are merely relayed via the solicitor instructed.

[17] The applicant's claim for asylum has now been refused but she has indicated in para.18 of her affidavit that if she is removed she still wishes to continue this case from South Africa to a substantive hearing as she may secure declarations that her rights under the European Convention have been breached and that such declarations could be used in order to secure a claim for damages in the appropriate forum.

[18] By letter dated 12 February 2010 the Court was also informed that the applicant's solicitors had received a copy letter from the Colposcopy Clinic at the RVH stating that an appointment had been made for their client to attend Dr Hobbs Consultant on Monday 1 March 2010 for certain treatment. The letter indicated the intention of the applicant's solicitors to make representations to UKBA that she ought to be permitted to return to Northern Ireland so as to undergo this treatment.

[19] After the Reasons for Refusal letter dated 29 January 2010 the applicant's solicitor by letter dated 12 February 2010 furnished fresh evidence regarding the applicant's health. These representations were considered by the proposed respondent as a fresh application for asylum and/or human rights. By letter dated 16 February 2010 the UKBA stated that after full consideration the claim was considered "clearly unfounded and as such her claim has now been refused and certified. This means that your client does not have an in country right of appeal although she can appeal once she has returned to South Africa".

Conclusions

[20] Against the foregoing background I am satisfied that leave must be refused. In the first place, as the application for leave for judicial review is on an ex parte basis there is an obligation on the applicant to show the greatest degree of good faith sometimes referred to as the obligation of *uberrima fides* and to explain faithfully to the Court all of the matters which may be relevant to the application for leave to apply for judicial review. It is well established that if the Court is not satisfied that this has been done that this of itself may be a reason for refusing leave.[1]

[21] In the present case the applicant gave instructions to her solicitor which formed the basis of the first affidavit, which was filed on her behalf by him in support of the application for judicial review. As we have seen, from the history of the proceedings summarised above, it is now common case that those instructions omitted to include facts which might have been significant to the determination of the leave application. The matter is, however, compounded by the fact that when, belatedly, the applicant did file an affidavit it contained material which was directly contrary to the instructions which she had furnished to her solicitor and which are referred to in his second affidavit which again I have summarised above. Against that background I am driven to the conclusion that the applicant has not complied with the foundational obligation referred to in the preceding paragraph.

[22] Secondly, I am satisfied that in light of the fact that her asylum claim has now been determined against her and that she has no in country right of appeal that the matter has become largely academic. Finally, it should be noted that there is no evidence that the applicant did not receive adequate treatment whilst in England. Indeed, the applicant has not averred otherwise. In those circumstances, certainly so far as this applicant is concerned, the principal ground relied upon seems entirely moot. Moreover, whilst I appreciate that the point being made is that the decision to transfer her to DFT was made without adequate enquiry, this ground is wholly unsupported by any expert or other appropriate evidence which would be necessary in my view to ground such a claim.

[23] Accordingly, for these reasons the application for leave to apply for judicial review must be refused.

---

[1] See Judicial Review in Northern Ireland, Gordon Anthony para3.18 and para10.3 of Judicial Review Handbook, 5th Ed., Michael Fordham QC