Neutral Citation No: [2011] NIQB 93 | *Ref:* **TRE8340**

Judgment: approved by the Court for handing down | *Delivered:* **13/10/2011**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Koungou's Application [2011] NIQB 93

IN THE MATTER OF AN APPLICATION BY BERNARD ERIC KOUNGOU FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY AN IMMIGRATION OFFICER DATED 26 NOVEMBER 2010

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TREACY J

Introduction

1. The primary focus of this judicial review had been a rationality challenge of the respondent's decision dated 26 November 2010 to the effect that the applicants claim under Art 8 ECHR did not amount to a "fresh claim" under para 353 of the Immigration Rules. This determination has the consequence that the applicant does not enjoy a right of appeal against the refusal of his Art 8 claim.

2. Rule 5(3) of the Immigration Rules, which is concerned with fresh human rights claims and asylum claims provides:

> **"When a human rights claim or asylum claim has been refused (or withdrawn or treated as withdrawn under para333(c) of these Rules) and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) has not already been considered;**

> **and (ii) taken together with the previously considered material, create a realistic prospect of success, notwithstanding its rejection."**

3. The applicant's case is that an Art 8 ECHR claim had been made on his behalf by his current solicitors in the course of three letters dated 18, 19 and 24 November 2010. His application for judicial review was made on the basis that those written submissions had been received and considered by the respondent prior to making the impugned decision.

4. However, the decision letter of 26 November 2010, in its recitation of the relevant correspondence, does not refer to the letter of 24 November. Moreover, the substance of the impugned decision is stated in the following terms:

> **"Your client's asylum and/or human rights claim have been considered on *all* the evidence available, including evidence previously considered and the further submissions dated 18, 19 and 25 November 2010, but it has been decided that the further submissions are not significantly different from the material which has previously been considered therefore they do not amount to a fresh claim for asylum and/or human rights ..."**

5. The grounds of challenge in the Order 53 Statement proceeded on the basis that all of the applicant's representations, including those of 24 November, *had* been received and considered by the respondent. Despite the contents of para3(e) of the Order 53 Statement, para10 of the affidavit of Arlene Madden, para24 of the applicant's affidavit and the nature of the case being made by the applicant the fact that the written representations of the 24 November were *not* considered only came to light at the substantive hearing on 26 May 2011 when Counsel for the applicant, in opening the judicial review, mentioned the fact that the letter of 24 November was not expressly referred to in the decision. Upon further enquiry the respondent confirmed the letter of 24 November attaching the statement of Miss Makougang was not on file and was *not* before the decision maker when she made her decision.

6. This development prompted an amended ground by consent and with leave of the Court to include the following:

> **"3(h) The Respondent's decision is tainted by procedural unfairness and is consequently unlawful. This is because her decision was reached without consideration of the submissions of the Applicant made in a letter of 24 November 2010, which included a statement of Marie Makougang,**

> **corroborating her relationship with the Applicant and her [then] pregnancy. Had the material been taken into account, the Respondent could not rationally have reached a conclusion that the material submitted by the Applicant had been previously considered and that no realistic prospect of success on Art.8 ECHR grounds existed before a reasonable immigration judge."**

7. The applicant submitted that the requirements of procedural fairness had been breached by the decision makers failure to consider the written representations and accompanying statement

8. What fairness requires depends upon the circumstances of the case. The court was referred to the well known passage in the speech of Lord Mustill in ***R v Home Secretary ex p Doody*** **[1994] 1 AC 531** at 560:

> **"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5)** ***Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*** **(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will**

> **very often require that he is informed of the gist of the case which he has to answer."**

9. The applicant submits that fairness principle (5) above required that all of his representations and supporting evidence should have been considered before the impugned decision was taken. The failure to consider the applicant's submissions of 24 November 2010, which included the statement of Miss Marie Makougang corroborating his account of their relationship, denied him procedural fairness. Given the "heightened scrutiny" context of the impugned decision it was submitted there is a greater onus on the respondent in a case such as the present to ensure that all material is fully considered before reaching a decision.

10. The UKBA wrote to the applicant's solicitors on 19 November 2010 summarising the circumstances of the applicant's arrest. It stated:

> **"He claimed he has a girlfriend believed to be Marie Makougang. Neither he or Marie Makougang have made UKBA aware that they are in a subsisting relationship. He was reluctant to provide details of his girlfriend who he claims is pregnant but is unable to give details of how far her pregnancy is, etc. He wanted to ring her prior to providing this information. But he claimed he did not live with her."**

The applicant submitted therefore that the UKBA appeared to cast doubt on the relationship, by implication requiring a response from the applicant.

11. It was submitted that the *purpose* of the applicant's letter of 24 November 2010, attaching the statement of Ms Makougang and the copy of her status document, was to dispel the doubt about the nature of their relationship, which was evident in the UKBA letter of 19 November 2010, and to substantiate his claim to be in a relationship.

12. Mr Matthews avers, on behalf of the respondent, at para8 of his affidavit that the omission from consideration of the material of 24 November would not have made any difference to himself or Ms Marshall as the material was largely the same as that contained in the applicant's letter of 19 November. In a virtually identical paragraph, para6, in her own affidavit Ms Marshall deposes to the same effect as Mr Matthews.

13. In her *first* affidavit Ms Marshall avers:

> "**4. Nonetheless and having fully considered the representations and taking Mr Koungou's case in the round I considered that *insufficient* evidence**

> **had been presented to *substantiate* his claim to have a family life in the UK.**
>
> **...**
>
> **8. Factors I considered included the fact that *no evidence* had been provided to *substantiate* the Applicant's claim of established family life with Ms Makougang or her asserted state of pregnancy."**

14. The applicant submits it is therefore clear among the factors influencing Ms Marshall's decision was the lack of evidence to substantiate the Applicant's claim.

15. It is difficult to see how they can reliably depose in October 2011 that the material enclosed with the letter of 24 November 2010 would have made no difference to the impugned decision made almost a year earlier. Averments of this kind must be treated with caution especially where, as here, the Respondent never drew the courts attention to the omission, where the comments are made in the context of a judicial review contesting the impugned decision, where the passage of time has been considerable and, importantly, because of the context and nature of the decision under review discussed below.

16. Specifically, Ms Marshall avers in February 2011 [her first affidavit] that she made her decision because of the lack of evidence to substantiate the applicant's claim that he was in a relationship with a girlfriend who was pregnant. By contrast in October 2011 [her second affidavit] she avers that the overlooked evidence, substantiating or corroborating the claim, would have made no difference.

17. The applicant therefore submits that the late affidavit evidence is not reliable, as it is inconsistent with the earlier evidence, and that the real question is whether the overlooked evidence gave rise to a realistic prospect of success on appeal.

18. Where credibility is in dispute, Lord Phillips in ***R(L) v Secretary of State for the Home Department*** at para60, states*:*

> **"Where an applicant's case does turn upon an issue of credibility, the fact that the interviewer does not believe the applicant will not, of itself, justify a finding that the claim is clearly unfounded. In many immigration cases findings on credibility have been reversed on appeal. Only where the interviewing officer is satisfied that nobody could believe the applicant's story will it be appropriate**

to certify the claim as clearly unfounded on the ground of lack of credibility alone".

19. *Corroborating* evidence from the woman in the alleged relationship, particularly if pregnant, has the *potential* to materially enhance the credibility of the account. Ms Marshall and Mr Matthews focus on their own view of the decision but the relevant issue is how the evidence of Marie Makougang would or might have influenced the prospects of the applicant's success before a reasonable immigration judge.

Conclusion

20. The failure to consider the written representations of 24 November and the accompanying statement of Miss Makougang denied the applicant a full opportunity of making his best case. Nor can it be reliably maintained that the omission of the letter of 24 November had no effect on the soundness of the impugned decision. Accordingly, for the above reasons, procedural fairness requires the decision be quashed.