Neutral Citation Number: [2009] IEHC 437

THE HIGH COURT

JUDICIAL REVIEW

2004 224 JR

BETWEEN

OL. J., F. J., OY. J. and R. J.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE REFUGEE APPEALS TRIBUNAL

AND

THE COMMISSIONER OF AN GÁRDA SÍOCHÁNA

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 9th day of October, 2009

1. This is an application for leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated 5th September, 2003, to make deportation orders in respect of the second, third and fourth named applicants. Ms. Ruth Dowling B.L. appeared for the applicants and Ms. Emily Farrell B.L. appeared for the respondents. The hearing took place at the King's Inns in Court No. 1 on 24th June, 2009. The essential issue is whether the second, third and fourth named applicants are persons whose applications for asylum have been refused by the Minister within the meaning of s. 3(2) (f) of the Immigration Act 1999.

Background

2. The applicants are nationals of Nigeria. The first named applicant is the father of the second, third and fourth named applicants. He claims to have three wives (V., E. and S.) who had six, five and four children, respectively. The dates of birth of his children indicate an overlap with the three marriages and the first named applicant (who is referred to hereafter as "the father") claims to have fifteen children in total. The second and third named applicants are the daughter and son of E. and the fourth named applicant is the daughter of V. They claim to have been born in 1980, 1982 and 1983, respectively.

3. The father arrived in Ireland on 11th August, 1998, with his third wife, S., and their two youngest sons. On 14th August, 1998, the father and S. made individual applications for asylum in the State. The father was assigned the reference number 69/6683/98A and S. was assigned number 69/6683/98B. The court was not made aware of the position of the two sons who accompanied their parents.

The ORAC stage

4. The father claimed to fear persecution by reason of his political opinion. He gave an account of being arrested and detained by police under the then military government of Nigeria in 1998, because of his financial support for a students' union. He escaped from detention and fled to a nearby village. The police detained and beat his wife S. and one of their sons. After she escaped, a friend arranged for the father, S. and their two youngest children to leave Nigeria.

5. At the time of his interview with ORAC in August, 1999, the father said his first two wives and thirteen of his children were in Nigeria. He provided the names of all his children together with their dates of birth.

6. Negative recommendations issued from the Office of the Refugee Applications Commissioner (ORAC) in respect of the father and S. It was found that the father's claim of persecution was not substantiated and that there were a number of items that cast doubt over the authenticity of his story. The father and S. each lodged notification of their intention to appeal to the Refugee Appeals Tribunal (RAT) on 19th January, 2000.

Arrival of the fourth, second and third named applicants

7. On 20th January, 2000, the fourth named applicant arrived in the State. In her affidavit, she says she fled Nigeria with other family members – it seems these were her two half brothers, the older sons of S. and her father. She says she did not apply for asylum, but in the replying affidavit of Dermot Cassidy, it is stated that an ASY-1 Form was completed in respect of her and she was then reunited with her "parents" and their application was regarded as including her application.

8. The second and third named applicants arrived in the State some eighteen months later, on 28th June, 2001. This brought the number of people who had arrived in Ireland claiming to be the father's children to seven. The latest children to arrive say on affidavit that they met with Immigration Officers upon arrival in the State and outlined their claim. They also say they were taken to St. Vincent's Hospital after their arrival in Ireland and that the third named applicant was

operated upon in relation to bullet wounds that he had sustained. No evidence was furnished in that regard. They say they then went to live with their father.

9. The second and third named applicants claim to have been born in 1980 and 1982 respectively, and in accordance with those dates were adults when they arrived in Ireland in 2001. They were, however, assessed as minors by the HSE and ORAC. On 29th June, 2001 – the day after they arrived in the State – a Social Worker wrote to ORAC indicating that the second and third named applicants had been reunited with their father. She expressed concern that, "*given their physical appearance and details of their schooling, they appeared to be significantly younger than the ages they claimed to be*." She considered them both to be under eighteen. No mention was made of their being taken to St. Vincent's Hospital or having sustained bullet wounds.

10. On the same day (29th), the applicants' father sent a handwritten letter to ORAC. He named the second and third named applicants and wrote as follows:-

> *"I agree that the above named persons will stay with me and we will [illegible] together with them. They are my children and I don't want them to apply another asylum but I want them to add themselves to my application [sic]."*

11. He signed and dated the letter and then he added, "*and they do not want to apply for asylum for their self. When I ask them if they wish."* The letter was then signed and dated by the second and third named applicants. No reference was made to the fourth named applicant who had arrived in January, 2000, at the age of seventeen and who, according to the affidavit of Dermot Cassidy, had applied for asylum and filled out an ASY-1 Form.

The RAT stage

12. In February, 2002, the RAT wrote to the father's solicitors indicating that as the Refugee Act 1996, had commenced in full, his client's appeal would be considered under the Act. He was invited to submit grounds of appeal and supporting documentation in advance of the oral hearing.

13. By letter dated 11th April, 2002, the father and S. submitted to the RAT two Form 1 Notices of Appeal. The covering letter indicated that the appellants were the father and S. "for themselves and on behalf of their children" (court's emphasis). It provided a summary of the facts pertaining to the claim. In addition to setting out the claim advanced by the father and S., reference was made to the experiences of the second, third and fourth named applicants in Nigeria after 1998. In particular, it was recorded that after the three other children left for Ireland in 2000, the second and third named applicants returned to their family home in Nigeria. After some time, the police started coming to the house and questioned them about their parents' whereabouts. They contacted the Odua People's Congress ("OPC") which led to them being seriously injured in a shootout between the OPC and police in January, 2001. The third named applicant was admitted to hospital in Nigeria. The man who had arranged for their father's travel helped them to join him in Ireland. Upon their arrival in Ireland, both required hospital treatment. Shotgun pellets were removed from the third named applicant's back and arm and it was stated that he would require a further operation for a nerve injury in his arm. Six bullets remained in his body and would be removed shortly. The second named applicant had an eye injury for which she had been treated and further treatment had been scheduled. No medical evidence was furnished in respect of either child with the appeal papers.

14. Reference was again made to the children in the Grounds of Appeal appended to the letter of 11th April. It was noted that the father and S. had four children; two arrived with them in 1998 and the other two had arrived afterwards as had three of his children from a previous marriage (*i.e.* the second, third and fourth applicants).

15. A joint oral hearing was held in respect of the appeals of the father and S. The second and third named applicants attended the oral appeal hearing and gave evidence. The fourth named applicant and the four sons of S. and the father do not appear to have given evidence.

16. The RAT affirmed the earlier negative recommendations made by ORAC. The heading of the decision refers to reference numbers 69/6683/98A+B and it refers to the first named applicant and to S. by name. It does not list any of the children as "applicants." However, the decision does refer to them and records that the father had no contact with the rest of his family since he left Nigeria other than with "*three of his children who arrived here after him*" and two further children who "*also came to this country and have applied for asylum*." The second and third named applicants are referenced by name and the decision records that they testified at the oral hearing about their experiences with the police and the OPC between 1998 and 2001. It records that they said they did not know their father came to Ireland and they came here as a coincidence.

17. In his "Conclusions", the Tribunal Member refers to the evidence given by the second and third named applicants and says,"[*t]his has no relevance to this application save to the extent that their testimony corroborates the account of the Applicants that [the father] is wanted for serious offences in Nigeria, at least in 2001*". He also stated that it was "quite amazing" that the children should coincidentally decide to arrive in Ireland two years after their father had left Nigeria, not knowing where he had gone, and equally that the father did not know they were coming to Ireland.

18. The Tribunal Member's decision to affirm the ORAC recommendations was notified to the father and S. by letters dated 15th July, 2002.

19. By letters dated 19th and 22nd July, 2002, the applicants' solicitors wrote to the RAT and the Minister, respectively, noting that the RAT decision only made reference to the father and S. "*thereby clearly indicating that he did not deal with and did not mean to include the couple's seven children all of whom were included in the family's asylum application and received separate reference letters* (C –I)" (court's emphasis). Clarification was sought as to how the Minister intended to deal with the refugee status applications of the seven children (*i.e.* the second, third and fourth named applicants and their four half brothers). By letters dated 3rd and 19th September, 2002, the RAT and the Ministerial Decisions Unit, respectively, confirmed that the Tribunal Member did consider the seven children in reaching his decision.

20. It is only from this correspondence that the court is aware that each child has a separate Asylum Number. No proceedings have been brought challenging the RAT decision.

The Applications for Leave to Remain

21. By letter dated 23rd September, 2002, the Minister wrote to the father, referring to his application for a declaration, "*for you and your seven children*." The letter referred to each of the seven children by name. The father was notified that the Minister had decided not to grant them declarations of refugee status and was proposing to deport them. He was invited to make representations as to why he and his children should be allowed to remain temporarily in the State.

22. By letter dated 14th October, 2002, the applicants' solicitors wrote to the Minister on behalf of the applicants, seeking leave to remain. They indicated that they acted for the father and S. and had instructions to make the submission "*on their behalf and their children*". Reference was made to the experiences of the father and S. in 1998 and the experiences of the second and third named applicants in 2001. The medical needs of the second and third named applicants were set out, and numerous references were provided in respect of the family and the children, confirming that they were a polite, hardworking, churchgoing family.

Deportation orders

23. Deportation orders were made in respect of the father, S. and the seven children on 5th September, 2003. The deportation orders were communicated to them by letters dated 20th November, 2003. Individual letters were sent to the father, S. and the second and third named applicants. The fourth named applicant and her four half brothers were named in the letter addressed to S.

24. The court was informed that the father was subsequently permitted to stay for health reasons and that his deportation order was revoked on humanitarian grounds. He has now been in the State for almost eleven years. No information was provided on his wife and their four children. The second, third and fourth named applicants were deported in April, 2004, shortly after these proceedings were initiated. They sought leave to re-enter the State on the basis that their judicial review proceedings were pending, but that application ultimately failed. They have been outside of Ireland since 2004. They did not apply for revocation of their deportation orders.

Extension of Time

25. The deportation orders were communicated to the applicants by letters dated 20th November, 2003. These proceedings were commenced on 16th March, 2004, some four months outside of the fourteen-day period allowed by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. The applicants have applied for an extension of time. In their respective affidavits, the second, third and fourth named applicants say they consulted a solicitor in relation to their case and now wish to challenge the deportation order. They say they have acted as quickly as they reasonably could in light of their distress and they humbly ask the court for understanding and any extension of time necessary. No further explanation is proffered for the delay.

26. Counsel for the respondents argued that the applicants have provided an insufficient explanation for the delay and have not shown any good or sufficient reason for the court to grant an extension of time. She pointed out that in effect, the applicants are challenging the RAT decision which was notified to them in July, 2002. There was therefore a delay of one year and nine months before these proceedings were commenced.

THE SUBMISSIONS

27. In their very similar affidavits, the second, third and fourth named applicants say that they did not apply for asylum at all, nor did anybody ask them to do so. The second and third named applicants, in particular, claim to have understood that they were being afforded the protection of the State because of the trauma and injury they sustained in Nigeria which, they claim, was accepted by the authorities that they encountered upon arrival in Ireland in 2001.

28. Counsel for the applicants argued that the deportation orders made in respect of the second, third and fourth named applicants are invalid because those applicants are not persons whose asylum applications have been refused by the Minister within the meaning of s. 3(2) (f) of the Immigration Act 1999. She argued that they did not apply for asylum and were not considered by ORAC or the RAT as being asylum applicants. They were not in Ireland during the ORAC investigation, when the s. 13 reports were compiled in respect of their father, or when notification of intention to appeal was lodged with the RAT in January, 2000. The RAT decision referred to their father and S. as the "appellant" and did not refer to the individual reference numbers given to the second, third and fourth named applicants. Moreover, the letter of consent of June, 2001, was not signed by the fourth named applicant.

29. Counsel argued that the second, third and fourth named applicants had an entitlement for their asylum applications to be considered at first instance by ORAC. She also submitted that the principle of family unity should operate in favour of the children and not against them, and that it requires that if the claim of the head of a household is first assessed and rejected, consideration should then be given to the individual circumstances of the children before an adverse recommendation is made in respect of them. She further argued that it was inappropriate for the second and third named applicants to be included under their father's application, as they were adults when they arrived in the State.

The Respondents' Position

30. Counsel for the respondents argued that the second, third and fourth named applicants were included under their father's asylum application and that they do fall within the meaning of s. 3(2) (f) of the Act of 1999. She referred, in particular, to the signed letter of 29th June, 2001; the letter of 11th April, 2002, from the applicants' solicitors accompanying the Notice of Appeal; the letters of September, 2002, from the RAT and the Ministerial Decisions Unit; and the leave to remain application of the same month. She argued that it is clear from the RAT decision that the second and third named applicants expressed individual fears of persecution which were considered by the Tribunal Member.

31. She pointed out that if the applicants wished to argue that the RAT had failed to consider their claims for asylum, the appropriate time to commence such a challenge would have been upon receipt of the letter notifying the father that his appeal had been unsuccessful. They chose instead to apply for leave to remain. They therefore acquiesced in their inclusion under their father's asylum application and waived their entitlement to complain. Reliance was placed on the

decisions of O'Neill J. in *Brennan & Ors v. Governor of Portlaoise Prison & Anor* [2007] I.E.H.C. 384; McKechnie J. in *M.Q. v. The Judge of the Northern Circuit* [2003] I.E.H.C. 88 and MacMenamin J. in *C.C. v. Judge Early & Ors* [2006] I.E.H.C. 147.

THE COURT'S ASSESSMENT

32. This being an application to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicants must show substantial grounds for the contention that the Minister's decision to make deportation orders relating to each of them ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

33. It is clear from para. 38 of the decision of Fennelly J. in the Supreme Court in *A.N. (Nwole) & Ors v. The Minister for Justice, Equality and Law Reform & Anor [*2007] I.E.S.C. 44, that at the time when the applications for asylum were made in that case, as in the present case, the Minister (and by necessity ORAC) operated a policy of treating an application made by a parent as having been made also on behalf of all the family and treating them all as a family unit. Fennelly J. indicated that he considered that such a policy would be reasonable although in *Nwole* he found that the Minister did not act according to that policy because, *"At no stage in the asylum process did any document emanating from or required by the Minister advert to the existence of applications on behalf of the appellants."*

34. While the principles outlined in *Nwole* are clear, the facts of this case are quite different and can be distinguished. Unlike the mother in *Nwole*, the father in this case was at all times aware that the second, third and fourth named applicants were being included under his asylum application. After the two older children arrived in the State the father wrote to ORAC stating that he did not want them to make individual applications, that he wanted them to be added to his application, and that they indicated to him that they did not want to make individual applications. He signed that letter as did the two older children. All members of the family were assigned individual Asylum Numbers. There can be no clearer evidence that all parties were aware that the decision in the father's case would apply equally to the children. The father was in the best position to know the dates of birth of his children. He did not contradict the age assessment made by the HSE and all of his children were involved in his pending appeal hearing.

35. While it is evident from an examination of the letter of 29th June, that the fourth named applicant did not sign that letter, it does not necessarily follow that because she did not sign the letter she did not apply for asylum or that her application was not included under her father's application. The evidence before this court is that an ASY-1 Form was completed on her behalf when she arrived in the State, at a time when she was considered an unaccompanied minor. She was then reunited with her father and the individual claim made on her behalf progressed no further. This gives rise to the logical assumption, based on the accepted practice of dealing with families together under the principle of family unity, that her claim was subsumed into that of her father. If the date of birth she gave (November, 1983) is accepted, she was just sixteen when she arrived in the State in 2000.

36. It is clear from para. 215 of the UNHCR '*Handbook on Criteria and Procedures for Determining Refugee Status'* that it can be assumed, in the absence of indications to the contrary, that a person of sixteen or over may be regarded as sufficiently mature to have a well-founded fear of persecution. It is not therefore unreasonable to imagine that if the fourth named applicant had wished to advance a separate and individual fear of persecution in an individual application, she could have pressed for her claim to continue in its own right without being added to her father's claim. In the circumstances, and in the absence of any evidence to the contrary, it would seem that her personal fear of persecution was dependent on her father's asserted fears and she was included with her other siblings and half siblings in the father's claim.

37. Further evidence of the claim including the children may be seen in the Notice of Appeal of April, 2002, and the accompanying letter where their solicitors expressed individual fears of persecution on behalf of the second and third named applicants, based on their experiences in Nigeria following the departure of the father and S. in 1998, when they were put in the care of a family friend.

38. No individual fears were expressed on behalf of the fourth named applicant or on behalf of her four half brothers. The fact that the fourth named applicant did not give evidence at the oral hearing is neither unusual nor determinative of whether the appeal decision applied to her. Her half brothers did not give evidence either.

39. The second and third applicants are recorded as having given evidence of their experiences after their father had left Nigeria and of their difficulties with the OPC and the police in 2001, which are events which allegedly occurred after the fourth named applicant had arrived in Ireland. It appears that their evidence was called to establish that the father was still being sought by the police for his activities with the students' union.

40. While the RAT decision makes no reference to the seven children as "applicants", it does refer in detail to the evidence of the second and third named applicants and it details that two children arrived in Ireland with the father and S.; that three more children had followed and that two further children arrived subsequently. It is expressly noted that the last two children to arrive had applied for asylum. In the circumstances, I am satisfied that the Tribunal Member was aware of the policy of treating all members of a family as a family unit and that he treated the father's appeal as including each of the seven children. This is not a case where individual fears were expressed on behalf of all or any of the children which were not addressed by the Tribunal Member, or where the decision is silent as to the existence of children family members.

41. This view is fortified by the applicants' conspicuous failure to commence judicial review proceedings in 2002, challenging the RAT decision, when their solicitor wrote to the Minister and to the RAT seeking clarification as to the asylum applications of the seven children. The Minister and the RAT replied in unequivocal terms confirming that the seven children had been included in the RAT decision. If the applicants had, at that stage, been of the view that their asylum applications were not properly considered, they could have commenced proceedings challenging the RAT decision. They were at all times represented by a solicitor with considerable experience in the area of Asylum and Immigration. With the benefit of legal advice, they chose the route of applying for leave to remain temporarily in the State. They cannot, almost eighteen months later, legitimately complain that they were not properly the subject of those submissions and that the deportation orders are without legal effect. I accept the respondents' submission that like the applicants in *M.Q. v. Judge of the Northern Circuit and D.P.P.* [2003] I.E.H.C. 88, and *C.C. v. Judge Early & Ors*. [2007] I.E.H.C. 147, the applicants, by their conduct in the present case, surrendered or waived the option of challenging the RAT decision or the Minister's

decision not to grant them a declaration of refugee status.

42. The custom in 2002 was to treat family members as a unit where the granting of asylum to the parent benefited the dependent children and spouse. If aggrieved by a negative decision issued to their parent or spouse, the individual family members could commence an individual asylum claim if they could assert an individual and separate fear of persecution. The applicants did not do this. The father did not seek judicial review. Instead, they all willingly submitted to the leave to remain process. It was therefore not open to them to commence alternative proceedings in March, 2004, challenging the deportation orders on the basis that they had never been refused a declaration of refugee status. The facts relied on were known to them at the very latest in September, 2002, when they were notified that the RAT had decided to affirm the recommendation that they should not be granted declarations of refugee status. No issue as to age was raised and no objection to the fact that the second, third and fourth applicants were not here when the ORAC interviews with their father took place. The court is satisfied that the second, third and fourth named applicants were persons whose claims for asylum were refused.

43. No case has ever been made by any of the applicants as to what is the nature of their claim for asylum. Two of the applicants claimed that their arrival in the State almost three years after their father was not planned by him and was a total coincidence, and that they were treated as refugees by the authorities at the airport. The fourth applicant, who arrived with two other children, denied that she had applied for asylum.

44. The contents of the affidavits sworn by each of the applicants contradict established material facts of which the deponents must be presumed to have been aware. In view of the findings as to their waiver by conduct on any right they now rely on, I do not propose to outline those particular deficiencies of candour in the affidavits. The court is entitled to consider a number of factors in determining whether to grant an extension of time. Two of those factors are the merits of the application and the reasons for the delay. As previously mentioned, no reason was offered for the delay apart from their "distress".

Conclusion

45. In the light of the foregoing, I am neither satisfied that substantial grounds have been shown, nor that good and sufficient reason has been established to grant an extension of time and accordingly, I refuse the application.