Neutral Citation Number: [2010] IEHC 92

THE HIGH COURT

JUDICIAL REVIEW

2006 1125 JR

BETWEEN

OLABISI ADENIRON, ADEBOLA ADENIRON (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND OLABISI ADENIRON), BOLANDE ADENIRON (A MINOR SUING BY HER MOTHER AND NEXT FRIEND OLABISI ADENIRON), ATINUKE ADENIRON (A MINOR SUING BY HER MOTHER AND NEXT FRIEND OLABISI ADENIRON) AND SOLOMON ADENIRON (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND OLABISI ADENIRON) [NIGERIA]

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 18th day of March, 2010

1. The applicants are nationals of Nigeria and members of the Yoruba ethnic group. The first applicant is the mother of the second, third, fourth and fifth applicants ("the children") who are all minors. The second, third and fourth applicants were born in Nigeria in 1993, 1995 and 1998 respectively while the fifth applicant was born in Ireland in 2005. He is not an Irish citizen.

2. The mother and children have been in Ireland since March, 2005. They seek **leave** to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated the 11th August, 2006, to make deportation orders in respect of them.

3. The initial stages of the leave application took place on the 20th and 21st May, the 22nd June and the 1st July, 2009. At that time the Court refused an extension of time to challenge the decision of the Refugee Appeals Tribunal to affirm the recommendation that the applicants should not be granted refugee status and directed that the application for leave to challenge the Minister's decision to deport the applicants should be heard together with the application of the father [2009 1204 J.R.], who claims to have joined his wife and children in the State in December, 2006. As a result, the hearing of the application of the mother and children resumed on the 16th December, 2009. The father's application was also heard on that date and the hearing concluded on the 18th December, 2009 on which date the Court grant leave for the father to challenge the Minister's decision to refuse him subsidiary protection. Mr. Karl Monahan B.L. appeared for the applicants and Mr. David Conlan Smyth B.L. for the respondents.

Background

4. There is a rather a complicated asylum history in this family's case. In March, 2005 the mother arrived in Ireland with her three Nigerian-born children while she was eight months pregnant. She gave birth to Solomon (the fifth applicant) in Ireland in April, 2005. Each of her four children was included under her asylum application. The essence of her claim was that she and her husband had converted from Islam to Christianity and this led her husband to refuse the title of chief of his village. As a result he was beaten and the entire family was threatened. The mother fled Nigeria with her children and came to the State. She said that she was unaware of her husband's whereabouts when she made her asylum claim.

5. The Refugee Applications Commissioner recommended that she and her children should not be declared refugees in June, 2005. A number of negative credibility findings were made in the s. 13 report including a finding under s. 13 (6) (a) of the Refugee Act 1996, i.e. that the mother showed either no basis or a minimal basis for the contention that she is a refugee. The applicants then proceeded with their paper-based appeal to the RAT which confirmed the recommendation of the Commissioner by decision dated the 10th May, 2006. Like the Commissioner, the Tribunal Member made a number of negative credibility findings.

6. On the 25th May, 2006, the Minister notified the applicants that he had decided not to grant them declarations of refugee status and was proposing to deport them. They were invited to apply for leave to remain in the State. On the 16th June, 2006 their nominated RLS Solicitor applied on their behalf for leave to remain, setting out the same facts that had grounded the unsuccessful asylum application. He also submitted that the family had made successful attempts to integrate into Irish society, that they lived peacefully in Mosney and that the mother is a dedicated student having completed several courses in Ireland and a University diploma in Nigeria. The children were pursuing education, were of excellent character (letters of reference were appended), the youngest child was born in Ireland, the mother is "a *well-educated independent woman*" and they would be an asset to Irish society. It was again stated that the mother was unaware of her husband's whereabouts.

7. On the 13th July, 2006 the applicants' file was examined by two officers of the Repatriation Unit pursuant to s. 3(6) of the Immigration Act 1999 and s. 5 of the Refugee Act 1996. The first officer found that repatriating the mother to Nigeria would not be contrary to s. 5 of the Refugee Act 1996 and that the humanitarian considerations on the file were not such that they ought not to be returned. Specific consideration was given to the situation of the child born in Ireland – it was found that he is not an Irish citizen and was entitled to Nigerian citizenship. It was noted that he does not have an automatic right to remain in the State and his mother is not eligible for inclusion in the IBC 05 Scheme. The officer stated that no issue arose under s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000 and she had also had regard to s. 3(1) of the European Convention on Human Rights Act 2003. A second officer confirmed the recommendation that the Minister should make deportation orders against the mother and children.

Deportation orders were signed by the Minister on the 11th August, 2006 and notified to the applicants by letter dated 4th September, 2006. On the 8th September, 2006 Mr. Seán Mulvihill, Solicitor came on record for the mother and children and these proceedings issued on the 18th September, 2006. The absence of any revocation application by the mother despite the passage of time and the subsequent arrival of the husband in the State in December, 2006, was defended on the basis that this would necessarily admit of the validity of the deportation order.

I. The Issues in the Case
8. The challenge to the validity of the Minister's decision to make deportation orders against the mother and children was grounded on the following errors asserted:

a. The Minister's failure to consider the Article 8 rights of the mother and children;

b. His failure to consider the individual circumstances of the Nigerian-born children; and

c. His selective use of COI.

(a) Article 8
9. It was argued that in determining to make a deportation order, the Minister failed to give any consideration at all to the mother and children's right to respect for their private and family life under Article 8 ECHR. In *Kozhukarov v. The Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 424 Clarke J. held

> *"It seems to me that there are strong grounds for arguing (more than sufficient to establish the threshold of substantial grounds required at this stage) that, in addition to the matters identified in Kouaype [v The Minister for Justice, Equality and Law Reform [2005] I.E.H.C. 380], it is also, in principal and provided that the appropriate facts can be established, open to a party to seek to challenge the making of a deportation order (or in an appropriate case a refusal to revoke a deportation order) where it can be shown that there are substantial grounds for arguing that the making of (or refusal to revoke) such an order would be in breach of any other legal obligation on the part of the Minister (that is to say an obligation other than those imposed by s. 5 of the 1996 Act or s. 3(6) of the 1999 Act."*

10. While the applicants accepted that it might have been open to the Minister to find that the deportation of the applicants would be justified and proportionate within the meaning of Article 8(2), they argued that the question of their Article 8 rights was simply never addressed. Regard to the applicants' family and domestic circumstances as required by s. 3(6) of the Immigration Act 1999 is not sufficient for the consideration required under Article 8 of the ECHR.

(b) Position of the Children
11. It was argued that the Minister erred by ignoring the individual circumstances of the three Nigerian-born children. Information on each of the children's individual circumstances had been furnished to the Minister in the application for leave to remain but the only child he had regard to was Solomon who is Irish-born but is not an Irish citizen. In that regard his only consideration was to state that he did not have an automatic entitlement to remain in the State and gave no other reason for deciding to deport Solomon and his mother and siblings.

(c) Selective Use of COI
12. The applicants argued that the Minister engaged in selective use of the U.K. Home Office COI report on Nigeria which he had sourced and relied upon in the consideration of whether to make deportation order against the mother and children. He extracted portions of that report which support the conclusion that refoulement would not be in issue and ignored those portions of the report that would contradict that conclusion.

II. The Respondents' Submissions
13. Mr Conlan Smyth B.L., counsel for the respondent, submitted as a preliminary point that no revocation application has been made on behalf of the mother and children, even though in their leave to remain application the mother claimed she did now know of her husband's whereabouts and the Minister considered the family rights of the mother and children on that basis. It was now known that the father arrived some months later but the Minister was never informed of that fact.

(a) Article 8
14. No mention was made of Article 8 of the ECHR in the applicants' leave to remain application nor was it implicitly suggested that their removal to Nigeria would breach their right to respect for their private and family life. The applicants have failed to show that their representations were not considered by the Minister. The Minister considered the situation at that time, insofar as the information was furnished to him.

15. The European Court of Human Rights in *Niemietz v. Germany* (1993) 16 E.H.R.R. 97 held that a person's private life equates to the work, social and educational ties formed since arriving in the State fifteen months earlier. The mother did not work in Ireland because she was not entitled to do so. It was difficult to see how her private life had been ignored by the Minister who had expressly considered the representations made as to the family's social ties in Ireland when assessing the representations made to him under s. 3(6) (i) of the Immigration Act 1999.

(b) Position of the Children
16. The respondents submitted that the Minister referred expressly to the children by name and he noted their dates of birth and the location of their births. There can be no doubt that he was aware of the family circumstances of the applicants and that he gave express consideration of those circumstances insofar as they were known to him. While some time was spent in dealing with the position of the Irish born but non-citizen youngest child, there was no proof before the Court that an *unfair* emphasis was placed on the position of that child.

(c) Selective Use of COI
17. The respondents argued that this is not a case in which the Minister compared and contrasted COI. There was no conflicting COI before the Minister. He had regard to the COI before him, considered it and concluded that there was no evidence that the repatriation of the mother and children to Nigeria would contravene s. 5 of the Refugee Act 1996.

Decision
18. These being applications to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, the applicants must show substantial grounds for the contention that the Minister's decision ought to be quashed. Each of the applicants' grounds will be addressed in turn

to determine if substantial grounds sufficient for leave to argue those grounds further have been identified.

(a) Article 8

19. The balancing of the competing interests of the family and the State under Article 8 must be conducted on the basis of facts. The applicants have not identified any facts which would indicate that the deportation would interfere with their right to respect for their private and family life. The family were in the State for approximately fifteen months when the leave to remain application was considered. Their entitlement to remain in the State pursuant to s. 9(2) of the Refugee Act 1996 expired when they were notified that the Minister had decided not to grant them refugee status. They had at that stage been in Ireland for little more that one year and their sole claim to be in the State arose from their asylum claim. As far as the Minister was aware, the applicants were here as a family and the father's whereabouts were not known. There could be no question of any interference with the family's Article 8 rights on the basis of those facts. If they are to be deported, the family (insofar as it was known to the Minister) will be deported together. No circumstances existed in this case which raise the sort of exceptional circumstances as identified in *Kozhukarov*. In that case, the family facing deportation had lost a baby who died at a very early age and was buried in Ireland. Clarke J. recognised that circumstances such as existed in that family's case could give rise to a legitimate challenge to the deportation order pursuant to their Article 8 rights. There were no such exceptional circumstances in these applicants' submissions or in their file. While the Minister has an obligation to have regard for the rights guaranteed by the European Convention on Human Rights in all his administrative and legislative actions, it is not the case that he must seek out hypothetical and unidentified breaches of those rights. As held by Cooke J. in *Oladimeji (J.O.) (a minor) v. The Refugee Applications Commissioner & Another* [2009] I.E.H.C. 478, the Court is "*not required to suspend common sense when asked to review that process*" and "*ought not to permit formalistic arguments of technical illegality to distract it from the need to apply common sense so as to ensure that the process remains not only lawful but fair, flexible, and expeditious*." This ground is not made out.

(b) Position of the Children

20. Equally, the Court sees no merit in the applicants' second ground. Certainly, the position of the Irish-born child, Solomon, was explored at length as it had been posited that he was "*Irish born",* giving the impression that citizenship rights were being asserted on his behalf. Had he been a citizen from birth, no deportation order could have been made against him and this would have had an impact on the examination of his mother and siblings' files. Solomon's situation is, however, that he was not a citizen but that notwithstanding, the limitations which the Courts have recognised which attach to the family of citizen children were stated in full. It was necessary in the consideration of his status to clarify any lingering doubts as to the effect of the changes to Article 9 of the Constitution introduced by the 27th amendment which was approved by referendum in 2004 and under the Irish Naturalisation and Citizenship Act 2004, which came into operation on the 1st January, 2005. This short dissertation on the changes to the law which affected the status of the youngest child Solomon and his family did not in any way diminish the consideration given to the other children whose biographical details were noted as also the fact that they were attending school in the state for the previous fifteen months. No special personal or humanitarian considerations were brought to the Minister's attention or contained in their files which would require further comment. The Minister is obliged to consider the family and domestic circumstances of proposed deportees only insofar as they are known to him and has no obligation to enter into correspondence to obtain further details of those circumstances. In the circumstances this ground fails.

(c) Selective Use of COI

21. This issue was very minimally addressed. No country of origin information at all was furnished to the Minister in support of the leave to remain application nor was it suggested that the family would face any danger were they to be deported to Nigeria. The Minister therefore conducted his own enquiries as to whether their return to Nigeria would, in his opinion, put them in danger of a threat to their life or freedom on account of their race, religion, nationality, membership of a particular social group or political opinion, such that the deportations would breach s. 5 of the Refugee Act 1996. Insofar as the Court could understand the applicants' arguments it was asserted that the Minister was selective in his reliance of extracts from COI reports that he sourced but no information contrary to that which was relied upon was before the Minister or this Court. The criticism here was tenuous in the extreme and unstateable.

Conclusion

22. As indicated on the 18th December, 2009 the Court is satisfied that the applicants have *not* established substantial grounds for the contention that the Minister's decision to deport the applicants. Leave is refused. The grounds argued in the case were of such a tenuous nature that the suspicion remains that the challenge was no more than the deployment of a delaying tactic to remain in the State. The Court cannot but be aware that it is now five years since the mother and children arrived and the youngest child was born and four years since the father joined the family in the State. The delay since the serving of the deportation orders is now more than three and a half years and the children are approaching critical stages in their education development with two of the older children scheduled to sit the Leaving Certificate examinations in the next two years. These are matters which were not before the Minister when he decided to make deportation orders against the applicants and they have therefore not been taken into account by this Court in coming to its decision in these proceedings.