Neutral Citation [2016] IEHC 543

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 640 J.R.]

BETWEEN

P.O. AND G.E. (A MINOR SUIING BY HER MOTHER AND NEXT FRIEND P.O.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Humphreys delivered on the 3rd day of October, 2016

1. The applicants are a mother and child, the mother having arrived in the State from Nigeria on 13th August, 2007, and having claimed asylum on that date. The second named applicant was born in the State on 11th September, 2007, and an asylum claim was lodged on her behalf on 1st October, 2007. Both of the asylum applications were rejected in due course and deportation orders were made for both applicants on 25th November, 2008.

2. The first named applicant then evaded the Garda National Immigration Bureau for a period of six and a half years and was apprehended on 20th July, 2015. The State claimed in correspondence that she was apprehended on entry from Northern Ireland. She has rejected that position in other proceedings and in correspondence that is exhibited in these proceedings. In view of the somewhat indirect route chosen to address this point I do not find that she has adequately adduced evidence in these proceedings to enable me to make a finding on this point.

3. The applicants then on 20th July, 2015 made applications for revocation of the deportation orders under s. 3(11) of the Immigration Act 1999.

4. On 25th July, 2015, Eagar J. directed the release of the first named applicant in the first Article 40 application *P.O. v. Governor of the Dochas Centre* [2015 No. 110 S.S.]. That was appealed to the Court of Appeal by the State but the appeal was withdrawn.

5. On 27th June, 2016, the Minister made a decision to affirm the deportation orders. The 28 day period for bringing judicial review of that decision expired on 25th July, 2016, but prior to its expiry, solicitors for the applicant had written on 29th June, 2016, threatening to bring a judicial review application within the limitation period. However no such application was brought.

6. After the expiry of the limitation period for judicial review the applicants were taken into custody. The first named applicant was arrested at 7:10pm on 27th July, 2016, and the second named applicant was put into the custody of the Child and Family Agency. The first named applicant physically resisted her deportation on 27th July, 2016, thereby frustrating her removal on that date.

7. On 28th July, 2016, the day after the detention, solicitors for the applicant wrote to INIS, threatening an injunction application, and the day after that, 29th July, 2016, they applied for an inquiry under Article 40, the second Article 40 inquiry. I granted that application for an inquiry, in proceedings entitled *P.O. v. Governor of Dochas Centre (No. 2)* [2016 No. 846 S.S.]. That inquiry then proceeded. In the meantime on 2nd August, 2016, the present action was commenced by the filing of a statement of grounds, over a week out of time.

8. On 10th August, 2016, at approximately 2:30pm, Barton J. delivered judgment dismissing the Article 40 application which had come before him and which had resulted in an *inter partes* hearing: See *P.O. v. Governor of the Dóchas Centre* [2016] IEHC 557 (Unreported, Barton J., 10th August, 2016). Ms. Rosario Boyle, S.C. and Mr. Anthony Lowry, B.L. appeared for the applicants; Mr. Colm Smyth, S.C. and Ms. Cindy Carroll, B.L. for the Governor; and Ms. Sarah McKechnie, B.L. for the Child and Family Agency.

9. An *ex parte* application for an injunction brought in the judicial review proceedings (the applicants' third set of proceedings) came before me later in the day on 10th August, 2016. At that time I heard a very able submission from Mr. Lowry on behalf of the applicant. At approximately 7.50 pm on that date I gave an *ex tempore* ruling refusing the injunction and I now take the opportunity to set out more formal written reasons for having done so. I should also note by way of postscript to that that after circulation of the unapproved version of this judgment, Mr. Lowry very helpfully drew my attention to some further authority and this final version of the judgment has regard to that material.

10. It appeared to be suggested at one stage that an applicant had an entitlement not to be deported prior to the determination of his or her proceedings (based on *Okunade v Minister for Justice* [2012] 3 I.R..152, *Conka v Belgium* (Application No. 51564/99), *N.A. v The United Kingdom* (Application No. 25904/07) and *Abdolkhani and Karimnia v Turkey* (Application No. 30471/08). That is not so. The entitlement is to a hearing prior to deportation, not to determination of the proceedings. "*Whether that court hearing is procedurally a leave application or an application for a stay or an injunction does not alter the fact that the applicant has access to the court to seek to have a temporary restraint placed on the deportation order. It is deportation before such access is provided that infringes the ECHR*" (para. 9.40 of Okunade).

11. In terms of the criteria for granting an injunction as set out in the judgment of Clarke J. in *Okunade*, and on ordinary equitable principles, I assume in favour of the applicants that there is an arguable case and that damages are an inadequate remedy. The real issue in this application is therefore the balance of justice and convenience, and there are a number of factors that need to be considered in relation to that question, which I will address as follows. While I have taken into account all the circumstances, it seems to me in the present case that there are eight factors of particular noteworthiness and of potentially more general application, seven of which militate against granting an injunction to one or both of the applicants.

(1) The need for orderly implementation of the immigration system and of decisions lawful on their face militates in favour of refusing an injunction

12. A primary factor here, as in all immigration cases, is the need for an orderly implementation of the immigration system and orders

that are lawful on their face as referred to by Clarke J. at para. 9.42 of *Okunade*. Such a consideration strongly weighs against injunctive relief in this case and immigration cases more generally where there is an extant order requiring removal from the State.

(2) The ability of applicants to make their case through lawyers in judicial review proceedings militates in favour of refusing an injunction

13. A further factor is whether the ability of applicants to make their case would be impaired by a refusal of an injunction as referred to at para. 9.41 of *Okunade*; and it is accepted here that it does not arise. In almost all judicial review proceedings, applicants are not disadvantaged legally by their removal because judicial review relates to issues of law on which their lawyers can be adequately instructed in advance without the applicants' personal presence being required.

(3) The fact that an injunction is sought in proceedings challenging the refusal to re-open a historic decision strongly militates in favour of refusing an injunction

14. An important factor is whether the applicant is challenging an original deportation decision or what might be called a last-ditch attempt to revoke an existing decision, whether under s. 3(11) of the Immigration Act 1999 or s. 17(7) of the Refugee Act 1996.

15. In this case, there was no challenge or judicial review in respect of the original deportation orders. What happened instead was that the 2008 orders remain unchallenged, and the judicial review relates only to a refusal of an application for a revocation order which application was made on the day she was arrested and apprehended.

16. Having failed to successfully challenge the underlying decision, the applicants have engaged in a process or device essentially of applying to revoke the deportation orders and then restarting the process from there. That history certainly militates strongly against the grant of an injunction in this or in any s. 3(11) proceeding. To generally look favourably on injunctions of such an eleventh-hour nature would be to facilitate the frustration of the immigration system, which is premised on decisions being challenged when originally made and being challenged within the correct time.

(4) The absence of a serious risk of persecution if deported, consequent on a previous failed asylum application, militates against the grant of an injunction

17. A further factor is the presence or absence of serious protection issues as in *Conka v Belgium* and as referred to in *Okunade* at para. 10.6. In the present case it is accepted that there are no protection issues specifically arising. While the applicants originally claimed persecution, that claim failed and no proceedings were brought to challenge that decision.

(5) Prior evasion of the GNIB strongly militates in favour of refusing an injunction

18. As regards the first named applicant she is only here in the State because she evaded the authorities and acted improperly for many years. The history of evasion is certainly a massive factor to be weighed in the balance against her.

19. The second named applicant is not personally responsible for that evasion although she is relying on the first named applicant to act on her behalf. At the same time, the decision in *Chigaru v. Minister for Justice and Equality* [2015] IECA 167 (unreported, Court of Appeal, (Hogan J.), 27th July 2015) para. 24 suggests that the issue under the heading of conduct should be laid at the door of the first named applicant, for the purposes of consideration of this particular factor in the injunctive context.

20. As against that approach however, in *Butt v. Norway* (Application No. 47017/09, 4th December, 2013), it is said that "*the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children … The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period (para. 79)".*

21. Thus, what in Oslo and Strasbourg are considered to be "*strong immigration policy considerations*" are categorised as "*entirely unjust*" in Chigaru: the children "*are completely innocent of the various deceptions which their parents have practised and it would be entirely unjust to visit them with the consequences of their parents' wrongdoing*" (para. 24). It would appear that *Chigaru* was decided *per incuriam* on this point because *Butt* was not drawn to the attention of the Court of Appeal. In the light of the *Butt* decision, one would have to raise the question as to whether the view that children cannot have any parental misconduct held against them might require reconsideration. In view of ss. 2(1) and 4(a) of the European Convention on Human Rights Act 2003, the question arises as to whether it is open to a court to exercise a common law or equitable jurisdiction in such a way as to categorise an approach approved by Strasbourg as "*entirely unjust*". In a context where an appellate decision may be open for reconsideration on the basis of the *per incuriam* doctrine, one would have thought that "*immigration policy considerations*" are a matter for the executive rather than the court. The court cannot adopt or operate its own immigration policy, a point I sought to make in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468.

22. In the present case there is yet a further factor militating against an injunction, namely the fact that the first named applicant physically resisted her lawful deportation on 27th July, 2016. This only reinforces the conclusion to be drawn from prior conduct.

(6) The failure of applicants to initiate proceedings within time militates against the grant of an injunction

23. The next issue is whether the applicants have challenged the impugned decision in time and in this case they have not. There is no affidavit explaining their failure to challenge the s. 3(11) decision in time or grounding any application for an extension of time. The failure to properly ground the judicial review proceedings and to initiate them within time militates against equitable relief on general principles.

(7) A lack of strength in the applicants' case militates against an injunction

24. One factor to be considered is the strength or weakness of the applicants' case as referred to at para. 9.42 of Okunade. It seems to me that the applicants' case here, even assuming it to be arguable, is extremely weak. The grounds as pleaded seem to be largely lacking in substance and the only point that particularly stands out is one that I have already rejected in *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (unreported, High Court, 12th May, 2016) as being incorrect on multiple grounds. The fact that I subsequently gave leave to appeal to the Court of Appeal in *K.R.A.* does not mean that any point so certified must be regarded as

having any particular strength for the purposes of subsequent applications. Otherwise the grant of leave to appeal on any point tangentially relevant to deportation would bring deportations generally to a halt. For the purposes of an injunction, a point that has already been rejected is not necessarily a strong point, even if it is the subject of leave to appeal. Much may depend on what the point actually is.

(8) Disruption to applicants may be a factor in favour of an injunction but such considerations are not decisive

25. A further factor is the degree of disruption to family life and in particular the life of the child as referred to at para. 10.8 of *Okunade* and elsewhere in the judgment. Certainly, there will be disruption in the event of the deportation of the applicants but, as against that, the second named applicant is only eight years old and young children have an adaptability that is not quite so pronounced in the teenage years and beyond. So while there will be disruption, it is somewhat diluted by the tender years of the second named applicant. Admittedly, the children in *Chigaru* and *Okunade* were between 4 and 8 and benefitted from an injunction, but nonetheless 8 is still a relatively adaptable age compared to older children. I do not read *Chigaru* and *Okunade* as laying down any rule that children of 4 or older are not adaptable.

26. A related issue is the extent to which the applicants have spent time in the State as opposed to elsewhere. That issue came up collaterally in the second Article 40 application, and perhaps more directly in the first, but there is something of a lack of information about the precise evidence and decisions in those cases. Even assuming in favour of the applicants that is arguable that they have been here since 2007, as they maintained in correspondence, and that contrary to the State's position they have not been to and fro between here and Northern Ireland, that is perhaps a mild point favouring retention of the *status quo* but is hardly decisive, even leaving aside the first named applicant's position as an evader for most of this period.

27. There will always be disruption to the applicants (why else apply for an injunction) but that disruption, even if severe, is not decisive and can be outweighed – in this case is readily outweighed – by other and countervailing factors.

28. In that context, going back to the related question of the lack of strength of the applicants' case, there is a sense in which a court is not doing a child any favours by retaining them in the country until such time as they become less adaptable and then deporting them when the substantive action fails. That seems to me to be a practice that does not, in fact, assist or benefit the child in the long run and is not in the interests of a child if it appears to the court likely that the child's legal objection to deportation is not going to succeed ultimately. That issue has not been raised in the injunction caselaw to date, and the principle that a point not argued is a point not decided applies here. The best interests of children do not automatically require an assumption that every day spent in Ireland is a bonus and a benefit. Indeed the more embedded the child is in Ireland the more distressing might be said to be the eventual deportation. Balance of convenience is no longer relevant when the case is over. To that extent, if a court forms the view that the action is not likely to succeed, it may properly consider that the best interests of the child are served by facing the disruption of deportation at this point rather than at a later stage when the case has been dismissed and when the disruption may be significantly greater because the child's adaptability is significantly less.

29. The fact that a child may have been born here and may know no other country may be one among the many factors to which regard can be had (see *Okunade* and *C.C. v. Minister for Justice and Equality* [2016] IESC 48 (unreported, Supreme Court, 28th July 2016)) but it does not seem automatically decisive. The court cannot operate on the premise that if a child has known no other country he or she must necessarily be allowed to stay, whether for the time being or indefinitely, irrespective of all other factors. Judges hear individual cases on a narrow basis, focusing primarily on the rights and submissions of the parties actually before the court. A limited focus of that kind, which could be seen as potentially open to being influenced by sympathy if not sentimentality towards individual applicants, especially child applicants, significantly distorts the wider interests involved. Immigration decisions fundamentally transcend such a narrow, applicant-focused, frame of reference. To admit a person into the county is to admit not simply them but also such members of their extended family as are entitled to family reunification, and more significantly it is to admit their descendants unto the thousandth generation. Such a decision with all of its long-term economic and demographic ramifications is quintessentially one for the executive. The court, armed as it is only with legal perspectives and the urgings of the parties actually before it, is ill-equipped to blunder into this area.

Conclusion

30. Weighing in the balance all those factors and all the circumstances of the case, it seems to me the balance of justice and convenience very strongly militates against the grant of any injunction in this case. I therefore refused the application and listed the leave application in the asylum review for 10th October, 2016. I will now direct the applicants to furnish the CSSO with a copy of this judgment on or before that date.