

THE HIGH COURT
JUDICIAL REVIEW

2009 1226 JR

BETWEEN

ELIZABETH OWOSANYA

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MR JUSTICE COOKE delivered the 4th day of February, 2010.

1. Yesterday, application was made to this Court on abridged notice to the respondent for an interlocutory injunction to restrain the applicant's deportation on foot of a deportation order dated the 15th October, 2009. At the conclusion of the submissions, the Court decided that the injunction could not be granted. This is the statement of the Court's reasons for that decision.

2. The background to the application can be briefly stated as follows.

(a) The applicant is an unmarried woman now aged 22 years who arrived in the State from Nigeria in September of 2008 and claimed asylum.

(b) She claimed to fear persecution if returned to Nigeria, arising out of her previous refusal to take part in certain religious rituals.

(c) Her mother had fled Nigeria to Ireland in 2002 with one child, leaving the applicant, her father and six siblings behind.

(d) The mother subsequently gave birth in Ireland to a daughter who is an Irish citizen and on foot of that the mother withdrew her asylum application and obtained leave to remain in the State under the IBC/05 programme.

(e) The applicant has been residing here since her arrival with her mother, her brother, two sisters and her cousin who is a nephew of the mother. She claims to play an important role in that family group as a member of the family unit.

(f) The applicant's claim for asylum was the subject of a section 13 report and negative recommendation of the Refugee Applications Commissioner which was affirmed by a decision on appeal by the Refugee Appeals Tribunal dated 17th December, 2008.

(g) On the 26th June, 2009 an application was made for subsidiary protection which was refused by decision of the 28th October, 2009.

(h) A deportation order was made on the 15th October, 2009 which she says she received on or about the 29th October, 2009.

3. It is said the judicial review proceeding was originally initiated in November of 2009, but had not been served by the return date and was then struck out and reissued for the 1st February, 2010. On that date an undertaking not to deport the applicant was requested from the respondent but was not forthcoming and the proceeding was adjourned to the 15th February, 2010. When the applicant duly reported to the G.N.I.B. as required by the deportation order on 29th January, 2010 she learned that she would be deported on the 3rd February, 2010 hence the urgency of yesterday's application.

4. In the statement of grounds some 13 grounds were advanced as to the alleged illegality of the deportation order, but for the purpose of the criteria applicable to obtaining an interlocutory injunction, counsel for the applicant relied primarily upon the proposed contention that the decision was rendered unlawful by the inadequacy of its consideration of the alleged infringement of the applicant's right to respect for her private and family life which the deportation order caused by sundering the family unit in this country which compromised of her mother, siblings and cousin.

5. It is not disputed that the criteria applicable to the grant of an interlocutory injunction in these circumstances are effectively those articulated in the judgments in the *Campus Oil* case.

6. The first requirement is that the applicant establish that she has raised a fair issue to be tried. In the context of an application brought where the application for leave has not yet been heard, the applicant must show that a fair issue is raised as to the existence of a substantial ground for the grant of leave to seek judicial review of the decision to which the restrictions imposed by s. 5 of the Illegal Immigrant (Trafficking) Act 2000 apply.

7. Having regard, in the light of recent case law to the detail of the consideration given, to the representations made for

leave to remain and against the deportation order in this case as set out in the file note furnished with the deportation order, the Court has considerable doubt as to whether this part of the test is met. The obligation on the Minister is to consider the representations made and it is clear that he has done so because they are expressly referred to in the file note under the various statutory headings that are required to be considered and the issues as to private and family life are explicitly addressed and the particular circumstances are noted. Nevertheless the Court is prepared to accept that a fair issue may be raised for consideration if only because of the relative delicacy of the issue and the urgency with which the Court is compelled to consider the application.

8. More significant in this case however are the remaining branches of the Campus Oil criteria. Does the applicant suffer irreparable damage if the injunction is refused or would damages be an adequate remedy?

9. Where does the balance of convenience lie in granting or refusing the junction sought? In considering these issues, there are a number of factors in this case and, indeed, of other similar cases which have been brought before the Court as last minute applications of great urgency which must be taken into account.

- the applicant entered the State illegally and is now unlawfully present in the State, having had her asylum application determined in accordance with the procedures and the standards of national, European Union and international law.
- Her application for subsidiary protection and for leave to remain on discretionary humanitarian grounds have been refused.
- As a non-refugee and a non-Union citizen, she has no right in law as such to expect to remain in the State.
- The height of her case is that the order to deport her is defective in that its consideration of her Article 8 rights is inadequate. Even if that claim is ultimately sustained, it does not establish the legality of her presence in the State.
- It entitles her to a new decision based upon a reconsideration of the representations.
- Having exercised her right of access to the Court to assert her challenge to the defectiveness of the order, her continued presence in the State is not indispensable to the further prosecution of the judicial review proceeding.
- Her solicitor and counsel are instructed; her affidavit is sworn and the issue as to the adequacy of the explanation given in the file note to the deportation order is identified as an issue of law which does not require her personal presence in the State for its resolution. It is one of the benefits of modern communications technology with mobile phones, fax machines and e-mails that it permits instructions between solicitor and client to be exchanged expeditiously from anywhere in the world.

10. The following further factors also fall to be taken into account in considering where the balance of convenience lies. The application for an injunction is brought on abridged notice at the last moment when the deportation order has been in place since the 15th October, 2009. In accordance with the terms of the order, the applicant has quite properly reported periodically to the G.N.I.B., the purpose of which is to facilitate deportation. Thus, the fact that deportation was an imminent possibility has been apparent since the order was notified to the applicant and, by requiring such periodic reporting, the Minister has effectively put in train the implementation of the deportation order.

11. Although the applicant complains that the deportation will sunder the family unit, the applicant's primary family unit was in fact sundered six years before the applicant arrived in the State when her mother took her brother to Ireland leaving her, her father and other brothers and sisters behind.

12. The applicant is a single adult woman who does not have children and who has been in the State for a relatively short period of time. Thus, the status quo which is claimed to be disrupted is of relatively short duration and was created by the earlier voluntary disruption of the original family unit by her mother. If the present proceeding establishes that the existing deportation order is invalid then, subject to any new decision that may be made by the Minister, the applicant would be entitled to apply for the appropriate visa to revisit her mother and siblings from time to time so long as they choose to remain resident in Ireland.

13. The status quo is accordingly that there is in place a valid deportation which is in the course of implementation in accordance with law. This application requires the Court in effect to interrupt the normal course that follows the conclusion of an asylum process by the removal from the State of a non-national whose presence is unlawful. It asks the Court to hold that the balance of convenience lies in continuing the illegal status quo on the basis that the applicant, the illegality of whose presence is definitively established, has a statable prospect of invoking the Minister's exercise of his discretion to accede to *ad misericordiam* plea for leave to remain.

14. In conclusion, in the application of the criteria for the grant of interlocutory relief to cases such as this one, there is a fundamental distinction in the position of an applicant which must be borne in mind and it is this. The purpose of this substantive judicial review proceeding is not to establish the existence of some present right of the applicant to reside lawfully in the State which is currently being denied by some wrongful act or decision of the respondent. Even if fully successful the outcome of the proceeding can only be to require the Minister to make a new decision based on a reconsideration of the applicant's representations for the exercise of the Minister's discretion to permit her to remain.

15. This is not a case in which it is sought to establish that there exists some permanent or absolute impediment to the making of a deportation order such as prohibition on refoulement or the infringement of some constitutional right of an Irish citizen, spouse or child. Thus, the applicant's claim for injunctive relief effectively based upon a proposition that this Court should restrain the Minister giving effect to the provisions of the 1999 Act so as to permit the continued unlawful presence of the applicant in the State because the applicant claims to have a statable case for persuading the Minister to make a different decision at some future date. That, in the Court's judgment, is not a basis which fulfils the criteria for the grant of an interlocutory injunction.

16. These, therefore, are the reasons why the present application was refused yesterday.

