Neutral Citation Number: [2008] IEHC 80

This judgment is circulated in redacted form to avoid identification of the parties

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 416 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999

BETWEEN

G.O., Ol.O., P.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND OM.O.), R.A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND S.O.), S.O., OM.O. AND J.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND OM.O.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Ms. Justice Clark delivered on the 19th day of February, 2008

1. This is an application by seven members of the O. family who are of Nigerian origin for leave to judicially review a decision of the Minister refusing to revoke deportation orders directed to the first applicant, G.O. who is the mother and grandmother of the other applicants and Ol.O. the second applicant who is her son and the brother or uncle to the other applicants.

2. P.O. and his cousin R.A. are Irish born infants. J.O. the brother of P. is a Nigerian born minor and the remaining applicants are daughters of G.O..

3. G.O. arrived in the country with her daughters and their partners and one small child in July 2002. All in the party applied for asylum. Shortly afterwards both daughters gave birth to Irish born children and they and their partners have residency rights in the State as parents of Irish born citizen children. Ol.O. arrived in early 2003 as an unaccompanied minor seeking asylum. He was under the care of the Health Board until reunited with his mother G. at the end of 2003.

4. The first applicant G.O. is now 40 years old and a native of Nigeria. She and her son Ol. have been through the refugee process and have failed to establish that they are entitled to asylum within the State either at first instance or on appeal. The applicants alleged that they were persecuted because they had converted from Islam to Christianity. Credibility seems to have been a major problem as the narrative of the reasons for seeking asylum were found non credible and one document relied on was deemed a forgery.

5. On the 4th June, 2004 they were notified in writing of the Minister's proposal to make deportation orders and were invited to make submissions for temporary leave to remain. Submissions outlining reasons why they should be permitted to remain were sent to the Minister's office on the 28th June, 2004, 12th August, 2004 and 3rd September, 2004. Many documents, testimonials and certificates were produced to show that G.O. was an experienced business woman capable of contributing to the Irish economy and of maintaining herself by running a proposed travel agency and internet café. Her son who was described as an athlete and a good student was sitting his leaving certificate exams that summer and had ambitions to become a pilot.

6. The decision on leave to remain was deferred to allow G.O. and her son Ol. to apply for residency based on the Irish citizenship rights of the two Irish born family members. These applications pursuant to the IBC/05 scheme were made on 18th January, 2005 and were based on being grandparent and uncle of Irish citizen children. The applications were refused on the 5th and 6th October, 2005 and on the 2nd March, 2006 the applicants were notified that the Minister had made Deportation Orders dated the 3rd February, 2006.

7. The applicants did not challenge the legality of the Deportation Orders themselves but instead brought an application to revoke the Deportation Orders on the basis under s. 3(11) of the Immigration Act, 1999 that the first applicant and her son Ol. were part of a traditional Nigerian family and as such were very involved in the rearing of the three infant grandchildren. In particular, the first applicant outlined that as a grandmother she was the primary care giver to her grandchildren as one of her daughters was in full time employment and the other was attending a course in further education. No mention was made of the roles of the fathers in the care of those children or at all.

8. The Minister refused to revoke the Orders and the applicants now seek an Order of certiorari quashing those decisions on the grounds that in coming to his conclusion the Minister failed to have any or any proper regard for the applicants' rights under article 8(1) of the European Convention of Human Rights which states that :

> "Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

9. In effect, it is argued that because G.O., who has no legal status in the State has adult children and grandchildren here, her position must be considered anew and separately from the considerations examined in her refugee application or indeed in her application to remain on humanitarian grounds. In other words, before a Minister can decide whether to revoke an unchallenged deportation order, he has to engage in a new process where the rights being considered are those of family members who are now legally in the State.

10. Counsel are in agreement that the threshold for seeking leave to challenge such an Order is on the basis of an arguable case and both agreed that this was a slightly lower standard than substantial grounds as is required in other cases for Judicial Review under the Refugee Act. I was referred to a decision of MacMenamin J. in *Akujobi* where the law on the threshold required for applications under s. 3(11) was examined. I was informed that the public interest in finality in administrative orders is apparently no bar to challenges to deportation orders made at the end of a long process seeking status as a refugee. It seems to be accepted that the statement of the Minister's powers recited in s. 3(11) to amend or revoke a deportation order provides another step in the immigration/asylum process. The applicants must therefore establish a case which could succeed if fully argued, rather than a case which will succeed or is likely to succeed.

11. At the opening of the proceedings I was notified that the second applicant had married an EU national in 2006. The case therefore proceeded on the basis of the refusal to revoke the deportation order relating to G.O. only.

12. Counsel for the Minister argued that the application for leave to remain included submissions relating to the applicant's family rights and therefore her position within the extended family had already been considered by the Minister. The State also argued that it was up to the applicant to make her case more fully knowing that her asylum claim has failed and that the deportation order had not been challenged. It was not adequate to merely mention the Constitution, the Convention and the United Nations Charter on the Rights of Children. I was reminded that the court should be very slow to interfere with a ministerial decision which comes at the end of a very full and extended unchallenged process. I believe that there is some merit in the State's rebuttal arguments.

13. There is no precise definition of "family life" in Convention case law although an examination of Article 8 decisions reveals that they invariably involve an existence of close personal ties between couples, whether married or not, and the assumed close relationship between parents and their young children. Counsel for the applicants placed much reliance on of *Gul v. Switzerland* (1996) EHRR 1996 vol. 22 and *Sisojeva and Ors. v. Latvia* a case adjudicated recently by the European Court Grand Chamber in Strasbourg on the 15th January, 2007.

14. While these cases are helpful in establishing the tests to be applied to the facts, they do indicate that adult children are not generally included as members of a family afforded protection under Article 8(1). Generally, the protection of family life under Article 8 involves close family members, such as parents and their minor children and as has been stated in a number of such cases, the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. In *Gul* the Court said:

> "The boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.
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> The present case concerns not only family life but also immigration, and the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory (see, among other authorities, the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67)."

15. The facts of that case are that the applicant *Gul* left Turkey in 1983 and made his way to Switzerland where he applied for political asylum; this application was rejected by the Minister for Refugees in 1989. His wife joined him in 1987 so that she could receive medical treatment there after a serious accident. Their daughter Nursal was placed from birth in a home in Switzerland and has remained there ever since. In 1990 Mr. and Mrs. Gul were granted a residence permit on humanitarian grounds based on the wife's ill health. They then sought permission to bring their sons to Switzerland which was refused. The reason to refuse was based on Mr. Gul's indigence and total reliance on social welfare payments and his inability, due to his wife's ill health to raise and educate his 8 year old son as a daughter was already in state care since her birth. Local law granted an unfettered discretion to the Cantonal authorities to grant residence permits. In deciding whether to grant a permit, the authorities were obliged to take account of the country's moral and economic interests, and of the degree of immigrant penetration.

16. As one of the sons was over 18, his case was not considered by the European Court of Human Rights who confined their examination to the decision to exclude the younger son from entry. The case failed in the Court of First Instance and on appeal the Court divided 14-10 in favour of finding that that there was a violation of Article 8. The majority found that financial considerations are not a sufficient reason to separate a child from its parents and that the decision to refuse entry to the younger son did not achieve a proper balance between the competing interests of the individual and of the community as a whole.

17. The *Sisojeva* case arises from the stateless situation in which the applicant family, in common with many ethnic Russians in the Baltic States, found themselves following the break up of the Soviet Union and the reestablishment of Latvian independence. The first two applicants being a married couple arrived in Latvia from Russia in 1969 and 1968 respectively, at the age of 20 in the case of the wife and 22 for the husband and since then had lived continuously in Latvia and raised a family in the 30 years of their residence there. Their daughter, the third applicant was born in Latvia in 1978 and has always lived there and they no longer had ties in Russia. The dispute with the Latvian Government was over the withdrawal of Latvian residency rights because the applicants had unlawfully sought and obtained Russian passports based on false Russian addresses. They had thereby become stateless people in Latvia facing the possibility of deportation. In order to regularise their position in Latvia, they were required to engage in a long and involved process before they could apply for Latvian citizenship and with no guarantee that they would succeed.

18. The Court reiterated

> "that the convention does not guarantee the rights of an alien to enter or to reside in a particular country....Contracting States have the right, as a matter of well established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens...Neither the Convention nor the protocols thereto, contain any blanket ban on expulsion of foreign nationals or stateless person.
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> Nevertheless the Court reiterates that the decisions taken by States in the immigration sphere can in some cases amount to interference with the right to respect private and family life secured by Article 8(1) of the Convention, in particular where the persons concerned possess strong personal or family ties in the host country which are liable to be seriously affected by an expulsion order. Such interference is in breach of Article 8 unless it is in accordance with law, pursues one or more legitimate aims under the second paragraph of that Article, and is necessary in a democratic society in order to achieve them. In the instant case....it is not disputed that during their time in Latvia the Applicants have developed the personal, social and economic ties that make up the private life of every human being. Therefore, the Court cannot but find that the measure imposed on the Applicants constituted an interference with their private life within the meaning of Article 8(1) of the Convention. However while the Applicants clearly have an established family life in Latvia, the situation they complain of does not have the effect of breaking up that life. Moreover, the first two Applicants can no longer claim the existence of a family life with the third Applicant, who is an adult; the same is true of the ties between the three Applicants and the family's elder daughter The objective of Article 8, which deals with the right to respect for one's private and family life, is to protect the individual against arbitrary interference by the public authorities…..
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> …. the Applicants have spent all or almost all of their lives in Latvia. Although they are not of Latvian origin the fact remains that they have developed personal, social and economic ties strong enough for them to be regarded as

> sufficiently well integrated in Latvian society, even if, as the Government maintains, there are gaps in their knowledge of Latvian. In those circumstances, the Court considers that the conditions imposed on the Applicants in order to have their position regularised did not strike a fair balance between the legitimate aim of preventing disorder and the Applicants' interests in having their rights under Article 8 protected."

19. I have also considered several other *cases Abdulaziz, Cabales and Balkandali*, *Keegan*, *Berrehab and Moustaquim* involving Article 8 rights and alleged breaches. While none of the cases are similar to the facts of this application where the first applicant's two daughters are adults and parents and part of distinct and separate families and further their ties to Ireland are not the deep ties described in the cases mentioned above, I nevertheless believe on the basis of those judgments and on the basis of practice and previous decisions of the High Court on a low threshold, that G.O. and her daughters and grandchildren should be permitted to argue in more depth that her proposed deportation from the state was in breach of their family rights guaranteed under Article 8.

20. I do not see this decision to grant leave as a precedent for other deportation cases as the facts of this case are somewhat unusual. G.O.'s travelling family group have all been granted leave to reside based on their relationship to Irish born children. She is the only person in the original asylum seeking family to face deportation. I accept fully the point made by counsel for the Minister that the argument that G.O. is the principal caregiver of her three grandchildren was not the case presented for humanitarian leave to remain and that this fact may have some bearing on the Minister's decision not to revoke. Further, I am not convinced that the applicants have made out an arguable case on any of the other grounds sought. In particular, I do not accept that arguable grounds have been made out on family rights under the constitutional or on the basis of unfair procedures or on the Torture Convention and I refuse leave on those grounds.

21. This court is aware that a person who has failed to be considered as a refugee becomes an illegal immigrant and is subject to deportation. There is no dispute that the State has the right and the power to control the entry, residency, exit and repatriation of foreign nationals. There is no blanket ban in the European Convention and its protocols on the expulsion of aliens or stateless persons. Such controls on the movement of immigrants and the determination of refugee status have to be fair, subject to appeal and proportionate to the objects of immigration legislation. It seems to me the system would be rendered unworkable if the Minister were obliged to consider anew and render a discursive judgment for the decision to refuse to revoke an order to deport an illegal immigrant. However, in this case where Article 8 rights have been raised, it is arguable that there may be an obligation on the Minister to indicate that he has made an assessment of the competing rights of this family with the rights of society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others before making his decision. As I am not determining the substantive issue I will say nothing further on the adequacy of the arguments made to the Minister in the s. 3(11) application to revoke.

22. While this case is involves an applicant who has been found not credible in her asylum application or on appeal and is facing a deportation order, I nevertheless believe that the applicants have made out an arguable case in part, on ground C. The first applicant's position as the mother of an adult family group with whom she has lived for upwards of four years is facing rupture by the Minister's decision to uphold his order for deportation. I believe the applicant should be permitted to argue that the refusal to revoke her deportation order may not have been a decision arrived at following proper consideration of the competing interests of maintaining an orderly immigration process and the interest of respecting family life. This leave is in effect a restatement of ground C in the grounds claimed in the Notice of Motion. I therefore grant leave to the applicant G.O. to argue that the refusal of the Minister to revoke the deportation order was in breach of the family rights of the Third to Seventh applicants guaranteed by Article 8 of the European Convention on Human Rights on the grounds recited above. I will continue the interlocutory injunction in relation to the deportation of the first named applicant pending the hearing of the action.