Neutral Citation: [2013] IEHC 588

THE HIGH COURT

JUDICIAL REVIEW

[No. 2009/280/J.R.]

BETWEEN

T. A. AND O. J. A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T. A.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND, THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 17th day of December 2013

1. This is an application seeking leave to add a party and a new ground to these proceedings (and to extend time). The first named applicant is the mother of the second named applicant who was born in Ireland in April 2006 a few days after his mother arrived here. The party sought to be added is a Nigerian born child, born in August 2003.

2. These proceedings, seeking review of negative decisions of the Refugee Appeals Tribunal, came on for hearing on the 27th June 2013. The court noted that the Nigerian born child who had made an application for asylum on the same day as his mother was not a party to the proceedings and it was not apparent that his application for asylum had ever been assessed. In these circumstances the proceedings were adjourned to facilitate an appropriate application.

3. The mother applied for refugee status and had a s. 8 interview at the Office of the Refugee Applications Commissioner (ORAC) on 1oth April 2006. On that date she declared (by completing a short form) that she wished her Nigerian born child "to be part of' her application for refugee status. By decision of 24th June 2006, ORAC recommended that the mother be refused refugee status and this recommendation expressly included her Nigerian born child. A notice of appeal dated 31st July 2006 was sent to the Refugee Appeals Tribunal.

4. An application for refugee status was made for the Irish born chid on 6th July 2006 which was refused and was appealed to the Refugee Appeals Tribunal on 15th August 2006. The three appeals were heard together on the 14th August 2008. The Tribunal issued negative decisions dated 4th February 2009.

Submissions:

5. Counsel for the applicants claims that the Tribunal deals only with the appeals of the mother and the Irish born child but omits a consideration of the appeal by the Nigerian born child. Counsel accepted that the mother agreed that her Nigerian born child would be included in her claim but submitted that there is no explicit consideration by the Tribunal of a fear of persecution in relation to that child. She submitted that leave to amend the proceedings should be granted on the basis of the justice and merits of the case. Counsel also submitted that the mother's fears and the Nigerian born child's fears, though similar, are different. It is contended that the Nigerian born child has been overlooked by the Tribunal and that the relevant circumstances are not the minor's responsibility.

6. In relation to the extension of time, the applicants claim that they are not seeking an extension of time simply because the Nigerian born child is a minor but because of the unusual and difficult circumstances in which the minor now finds himself. In this regard it is noted that the minor is not only disadvantaged by the process but also by the approach of his lawyers. Counsel points to a decision of the Supreme Court in *Keegan v. Garda Siochana Ombudsman Commission* [2012] IESC 29 in which, it is said, the court found that in the circumstances the merits and justice of the case justified an extension of time. Counsel submits that the approach taken by the Supreme Court in that case is the correct position here and that the merits justify an extension of time in this case.

7. Counsel for the respondent submitted that the applicant requires time to be extended for a period in excess of 4 years. He notes that the issue in relation to the Nigerian born child was not raised by the applicants but by the court and suggests that the issue might never have been raised at all if the court had not done so. He says that the present application amounts to new proceedings by a new applicant many years out of time.

8. In this regard, the respondent urges the court to apply the judgment of Irvine J. in *J.A. v. Refugee Applications Commissioner & Ors* [2008] IEHC 440 in which similar arguments were raised by applicants seeking an extension of time. In that case, the respondent points out, Irvine J. refused the application and the extension of time sought was of a shorter duration than that sought in these proceedings. The respondent also notes that in that case, as in this, the Nigerian born child had the benefit of legal representation at all material times. Further, the respondent discounts any claim that his omission from the proceedings was a mistake of his solicitors and that this constitutes a good and sufficient reason for the court to allow the extension of time to amend the proceedings. In the respondent's view there is a subsisting decision and there is a Ministerial refusal of refugee status. The respondent asserts that the Nigerian child was included in the appeal, in the letters issued enclosing the decision, and in the letters from the Minister refusing him refugee status. As such, the respondent claims there are no good grounds for extending the time for the amendment of these proceedings.

9. The motion under consideration seeks not only to join the Nigerian-born child, to these proceedings, but also seeks to amend the

pleadings to enable the following allegations of illegality to be made:

> "The first named respondent's determination of the Applicant's appeals addressed only the appeals of the Applicants (T.A. and O.J.A.) herein and erroneously overlooked the appeal of the intended minor Applicant O.A. [the Nigerian-born child] and has consequently failed to consider and determine the appeal of the intended minor Applicant O.A. and failed to consider any risk of future persecution on return to Nigeria with the result that the intended minor Applicant O.A. has not yet had the benefit of the right of appeal at the Refugee Appeals Tribunal".

10. In *J.A. and D.A. v. The Refugee Applications Commissioner* (supra) Irvine J. addressed the principles which apply to an application for an extension of time, and she also addressed what is meant by the phrase "good and sufficient reason" for extending the period. I am guided by the learned judge's decision that in considering an application for an extension of time to add grounds of challenge, I must have regard to the weight of the new case which the applicant seeks to advance. I agree with the statement by Irvine J. that an applicant must establish substantial grounds to contend that the decision concerned was unlawful and because of this rule there is an onus on the party seeking an extension of time to show that if granted, this would affect the outcome of the proceedings in their favour.

11. As can be seen from the intended amendment to the statement grounding the application, it is sought to be argued on behalf of the Nigerian-born child that his application for refugee status was never independently considered and there is no decision available on his application or his appeal. It is sought to be argued that his appeal is still outstanding.

12. When the mother was making her own asylum application she was offered a form which posed questions in relation to her Nigerian-born child. The first question asked was "do you wish your child [...] to be part of your asylum application?" The applicant, by ticking the appropriate box, indicated "Yes". The second question asked was "do you wish your child [....] to make an asylum application?" The answer given to this question, again by ticking the appropriate box, was "No". (By answering yes to the first question the parent has already indicated the wish that the child make an asylum application and thus the second question seems to be redundant). Having answered these questions, the parent is invited, by filling in the blanks, to make the following statement:

> "I [ ] wish to have my child [ ] included under my application for asylum. I do not wish to have my child interviewed or considered separately from my asylum application. I understand that the decision which will be made in relation to my asylum application will also apply to my child."

13. In this instance, the mother inserted her own name and the name of her Nigerian-born child in the appropriate places. In my view she thereby confirmed that she was satisfied that her Nigerian-born child's application was to be determined by the outcome of her own application. In other words, no discrete or separate points were to be raised on behalf of her Nigerian-born child and no separate assessment of his claim would be made by protection decision makers. In view of the form completed and signed by the mother it is clear to me that it is not now open to her to seek to amend the pleadings to make complaint that there was no separate consideration of her Nigerian-born child's application nor is it open to her to allege that grounds on which the child feared a return to Nigeria were not the same as her fears.

14. I agree that application for asylum was made on behalf of the Nigerian born child and that this application was not separately assessed. Its outcome was determined by the result of the mother's application. Thus the allegations now sought to be made that his appeal was 'overlooked' or 'not determined' are misconceived. The allegation that the boy's appeal was not considered is correct in so far as this allegation means that his appeal was not separately and individually considered. But the mother agreed in writing that no such separate consideration would happen. Therefore, notwithstanding the absence of any separate consideration by the Tribunal of the Nigerian-born child's application for refugee status, this is not an appropriate case in which to extend time and broaden the proceedings to permit a complaint about these matters because that complaint is bound to fail.

15. In the present application to amend, no complaint is sought to be made by the mother or on behalf of the Nigerian born child about the circumstances in which the mother signed this form or about whether a child's asylum application can be lawfully determined by the outcome of its parent's application, even though the form to which I have been referring is one which is completed by a parent at the very early stage of the asylum process, usually without the help of a lawyer.

16. For the sake of completeness, I have noted the peculiar fact that though the mother also completed a similar form and declaration in respect of her Irish born child, his application for asylum, unlike his brother's, was separately assessed. There are two possible explanations for this. Firstly, when the form was completed for the Irish born child, a negative recommendation had already been made in respect of the mother though this was not known to her. Secondly, the Irish born child's ASYI application form by which refugee status was sought asserted his discrete fears. This did not happen on the ASYI form completed on behalf of the Nigerian born child. Again, no complaint was made in respect of these matters and thus nothing turns on these facts.

17. I refuse the applications.