Neutral Citation Number: [2009] IEHC 160

THE HIGH COURT

JUDICIAL REVIEW

2009 220 JR

BETWEEN

E.E.E., Rc.E. (AN INFANT, SUING BY HER MOTHER AND NEXT FRIEND E.E.E.) AND

Rp.E. (AN INFANT, SUING BY HIS MOTHER AND NEXT FRIEND E.E.E.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MS. JUSTICE CLARK, delivered on the 2nd day of April, 2009.

1. This is an application for an interlocutory injunction preventing the deportation of the first named applicant, pending the determination of the asylum applications of the second and third named minor applicants who are the twin son and daughter of the applicant. Mr. Paul O'Shea B.L. appeared for the applicants and Ms. Siobhán Stack B.L. appeared for the respondent. The hearing took place at the Kings Inns, Court No. 1, on the 26th March, 2009.

2. By way of background to this application for injunctory relief, the first named applicant is a national of Nigeria. She, her husband and their infant son P., who was born in Nigeria in 2004, arrived in the State and sought asylum on the 14th September, 2006. At the time the applicant was pregnant and gave birth in the State approximately 2 months later to a daughter J..

3. The first named applicant made an asylum application for herself and her son P.. She filled in a questionnaire and was interviewed by an officer of the ORAC on the 11th December, 2006, shortly after the birth of J.. The first named applicant sought legal advice and decided that J. would not be included in her mother and brother's application and thereafter an entirely separate process was conducted on J.'s behalf. The first named applicant's husband, Mr. S.E., also brought a separate and distinct application for asylum.

4. The first named applicant's asserted fear of persecution derives from a fear of the political group MASSOB. The background to this fear is that she and her husband were caught up in a bloody conflict described as a crisis between MASSOB and another group called NARTO in their home town in Nigeria. This crisis is confirmed in country of origin information (COI). It was asserted that during rioting, their house was vandalised, their business was damaged and all their stock looted. Shortly afterwards the first named applicant was kidnapped with others in a random abduction by MASSOB. When it was discovered that her husband was a man of means, a huge ransom was demanded. Her husband was unable to pay the sum but through a business relationship with someone in MASSOB her abductors released her unharmed. She and her husband were warned that members of MASSOB would seek them out to extract the ransom no matter where they hid in Nigeria so they undertook to travel to Ireland and eventually made separate applications for asylum.

5. The first named applicant's claim before the ORAC was unsuccessful and a Notice of Appeal was lodged on the 26th January, 2007 by solicitors acting on her behalf. The first named applicant indicated at that point that she did *not* wish for her Irish-born daughter J. to make an application for asylum. The first named applicant's appeal and that of her son P. was rejected by the RAT and she was informed on 22nd April, 2008 that the Minister was proposing to make a deportation order in respect of her and she was informed of all the options now open to her.

6. On 9th February, 2007, an application for asylum was made on behalf of J. claiming that it would be unsafe for her to return to Nigeria because of the problems her parents had with MASSOB. Her section 11 interview was conducted through the first named applicant on the 26th February, 2007. J.'s entire claim was based on her parent's fear of MASSOB and nothing else. It was asserted that she would be recognised as the child her mother was expecting when the latter was abducted by MASSOB in Nigeria and would be under threat as a member of the family. At no stage did J.'s mother assert that J. was under any threat of Female Genital Mutilation (FGM) or circumcision from family members or anyone else in Nigeria.

7. Neither the first named applicant, her son P., her daughter J. nor her husband was successful at first instance or on appeal in their refugee status applications. It is stated that the husband is awaiting a date for the hearing of a judicial review of his RAT decision and that hearing is listed for the end of May this year.

8. When the first named applicant was informed that the Minister intended to make deportation orders in respect of herself and her son P., extensive representations were made to the Minister. On the 12th May, 2008, a different firm of solicitors acting on their behalf wrote seeking leave to remain temporarily in the State pursuant to s. 3 of the Immigration Act 1999. No mention is made in those lengthy submissions that the applicant was approximately seven months pregnant with twins at the time or that she was pregnant at all. Submissions were made on the basis that the first named applicant, her husband and their two children all lived as a family unit in Ireland. The Minister was informed that the husband's judicial review application was ongoing and that J. was awaiting an appeal hearing. Many letters or personal recommendations were included together with extracts from COI dealing with violence in Nigeria, the difficulties faced by women and by children there and the Minister was reminded of the U.N. Convention on the Rights of the Child.

9. The events which occurred thereafter which are relevant to this application are that the first named applicant gave birth to twins on the 6th August, 2008. These infants are the second and third named applicants in these proceedings. Their birth was not notified to the Minister while he was considering the leave to remain application in respect of the family unit.

10. The first named applicant's file was examined under s. 3 of the Act of 1999, s. 5 of the Refugee Act 1996 and Article 8 of the European Convention on Human Rights, and it was recommended that deportation orders be made. The position of the infants P. and J. were considered and it was noted that the first named applicant's husband was also in the State. A deportation order was made in respect of the first named applicant and P. on 30th January, 2009, and the applicant and P. were asked to present themselves to the Garda National Immigration Bureau (GNIB) on the 17th February, 2009.

11. Contrary to what was stated in the applicant's submissions on leave to remain, no appeal to the RAT was lodged on J.'s behalf. Her file was considered and a deportation order was made in respect of J. on the 29th January, 2009, the day before the first named applicant and P. were notified that they were going to be deported. The twins who were born on 6th August 2008 were not mentioned in any deportation orders in relation to the applicant and her older children P. and J. nor, it appears, was the Minister aware of their existence.

12. Pursuant to the terms of the letter dated the 30th January, 2009, the first named applicant presented herself to the GNIB on the 15th February, 2009 and was requested to attend again on the 27th February, 2009 at 9.15 a.m. to facilitate her deportation from the State. No issue was raised as to the existence of the twin babies.

13. On the 16th February, 2009, the day after she presented to the GNIB pursuant to the deportation order, the first named applicant made an application for asylum on behalf of the twins born in Ireland, who were now six months old, through her current and third firm of solicitors. The first named applicant completed a questionnaire on behalf of the twins and they were invited to attend for their s. 11 interview on the 27th February, 2009.

14. An interim injunction restraining the deportation of the first named applicant was obtained on the 25th February, 2009. On that day, the Court was informed that the twins would be left unaccompanied in the State if their mother, the first named applicant, were to be deported and that such deportation would in effect cause them to abandon their asylum application as their mother would not be there to speak for them at their s. 11 interview. No mention was made of the fact that their father was in the State. On that basis an *ex parte* interim injunction was obtained and subsequently an undertaking was given by the State not to deport the first named applicant and her two other children until the s. 11 interviews, then scheduled for 27th February, took place.

15. It only emerged at the adjourned hearing when the full file was before the Court that the twins' father – the first named applicant's husband – is also in the State and has been present at all relevant times. As previously stated, his application for asylum was unsuccessful and his application for leave to apply for judicial review of the RAT decision is listed for the 21st May, 2009. The twins' s. 11 interview was subsequently cancelled by ORAC and re-scheduled for the 30th March, 2009.

16. Last minute injunctions to avert the operation of deportation orders are becoming increasingly common despite the extensive jurisprudence of the High and Supreme Court indicating that the Courts may interfere with such Ministerial orders only where exceptional circumstances exist.

17. *A.O. & D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 and in particular the judgment of Hardiman J., the House of Lords in *N. v. Secretary of State for the Home Department* [2005] 2 A.C. 296 and Feeney J. in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 166 are all decisions which provide guidance to Courts faced with applications for injunctive relief to prevent the deportation of parents of children born after deportation procedures are set in train . While those cases involved the deportation of failed asylum seekers with health care needs, the principles are applicable to deportation cases generally. The Court must consider the law and not the individual personal circumstances although the facts naturally give rise to sympathy. The Court must examine the legality of the deportation order and not the personal circumstances of the deportee. If an injunction delaying the deportation orders is granted in this case on the basis of sympathy, it would in effect give an advantage to every asylum seeker who has a child born in the State between the date of the notice of intention to deport and the making or the execution of the deportation order. A failed asylum seeker who conceals the fact of that birth until the eve of his/her deportation would always have an advantage over those who act with candour or who do not or cannot have children. This cannot make for the orderly application of a lawful immigration policy and cannot amount to exceptional circumstances. Legitimate deportation orders should not be frustrated simply on the basis that the parents wishes to make an application for asylum for the child. An applicant who seeks to delay the effect of a deportation order in such a case must be in a position to show that the Minister was informed of the changed circumstances relating to the pregnancy and the birth of the child and of any proposed application for asylum on behalf of that child based on his or her individual circumstances. I cannot see that any additional burden would be placed on the applicant parent by requiring that parent to indicate whether the child in question has a fear of persecution different to that claimed by the parent. I do not believe that it is appropriate to provide information at the last minute and in what has been described as a "drip feed" basis.

18. The determination of who is a refugee is a highly regulated process determined by expert statutory bodies as the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. Judicial Review of those decisions is permitted once substantial grounds for impugning the decision are established. The process by which deportations orders are made is within the power of the specialist Minister in pursuance of an ordered immigration policy. Once the Minister has been notified that a negative recommendation has been made by ORAC (and affirmed by the RAT, if appealed), the Minister's office takes over the next stage of the process. Provided that the Minister accepts the ORAC recommendation, a failed asylum seeker is notified that his/her entitlement to remain in the State has now expired and that it is the Minister who is proposing to make a deportation order. While the Minister must follow the statutory procedure in considering whether to make a deportation, set out primarily in s. 3 of the Immigration Act 1999, it is at the end of the day only the Minister for Justice, Equality and Law Reform who has the power to make a deportation order or to revoke a deportation order once made.

19. The statutory process was followed in this case. The first named applicant's application for leave to remain under s. 3 of the Immigration Act 1999 was considered and each representation made on her behalf was the subject of analysis. The consideration was contained in a 14 page analysis sent to the first named applicant in the letter informing her that the Minister had decided to make a deportation order. In that analysis the Minister considered the provisions of s. 5 of the

Refugee Act 1996 and determined that Nigeria was a safe country to return the first named applicant and her two older children. It has not been shown that the Minister failed to consider an important aspect of the submissions or that there is, in fact, any fear of refoulement. The first named applicant then had 14 days in which to challenge the making of the deportation order by way of judicial review.

20. The deportation order is not challenged and no deportation order was ever made relating to the infants Rc. and Rp.. It is therefore now a matter entirely for the Minister to decide if, when and how to deport the first named applicant and her two children P. and J.. Indeed it could be argued that the Minister has a duty entrusted to him by the government and in the interests of the common good to ensure that an effective immigration policy is in place. The only circumstances when this Court can intervene are when it can be shown that substantial new facts or circumstances have occurred which would affect the legality of such deportation orders. The appropriate path would have been for the first named applicant to notify the Minister of the pregnancy or at least the birth and to seek a revocation order on the basis of this new evidence.

21. The applicant neither sought to challenge the order nor did she make any request to revoke the order on the basis that she had given birth to twins, nor was the Minister made aware that the first named applicant asserted a fear that the twins would be at risk if returned to Nigeria. The questionnaires filled in by the first named applicant on behalf of the infants after the deportation orders were notified indicate that they face danger first from her husband's family, that they would be exposed to traditional religious rituals to determine whether they are possessed of evil spirits and if either baby is determined to be so possessed then it will be left at the shrine to starve to death. The second risk claimed was stated to be from the mother's family is that J. and Rc. will be obliged to undergo female circumcision.

22. The first notification to the Minister of the existence of the twins was by letter from Burns Kelly Corrigan solicitors, dated 24th February, 2009, the day before the intended deportation made in respect of their mother and siblings was to be effected. The purpose of the letter was stated to be:

> *"The purpose of this letter is to inform you that our second and third named clients have now applied for asylum to the Office of the Refugee Applications Commissioner and to request you to refrain from deporting our first named above client until our second and third named above clients' applications have been processed. It would clearly be impossible for our clients who are infants on their own behalf given their age."*

23. The Minister was given until noon the next day failing which the applicants' solicitors would apply for an injunction and fix the Minister with the costs. The *ex parte* application for an interim injunction was made to this Court the next day, when the plane for Nigeria was scheduled to leave.

24. In the affidavit filed by the applicant's solicitor it was stated that:

> 1. No substantive response was received to the letter to the Minister; and
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> 2. He was apprehensive that first named applicant may be deported from the State which would leave the second and third named applicants unaccompanied in the State with no alternative but to abandon their asylum applications and return to Nigeria with their mother as they would effectively have nobody to prosecute their applications.

25. The Court was informed that the twins' interviews were scheduled for the same week. On the basis that the applicant had made out an arguable case that irreparable damage would be caused if the applicant were to be deported and that she had made out a fair issue to be tried if the contents of her affidavit were established, the Court granted an interim injunction and the applicant and her two older children were not deported. It is now apparent that the interim injunction was obtained from this Court on the basis of a false averment that the twins had no other parent or guardian in the State. This lack of candour was dealt with in a later affidavit as a "mistake" for which an apology was offered. The Court is singularly unimpressed by this lack of candour and the breach of rules applicable to *ex parte* applications where utmost good faith must apply.

26. It seems to me that the first named applicant deliberately withheld information from the Minister until the last minute in an effort to frustrate the asylum system. She did not inform the Minister at the time of the s. 3 representations that she was pregnant with twins, she did not update him as to the change in her family circumstances after their birth, she did not aver that she was breast-feeding the children and intended to do so until the children were fourteen months when applying for an interim injunction and she did not make an application for asylum on behalf of the twins until the eve of the proposed enforcement of her own deportation order and she failed to mention that the father and natural guardian of the children was in the State to, if necessary, prosecute their asylum applications. The Court is not the appropriate venue for the divulging of this information which should at the appropriate time have been notified to the Minister. The desired result of a temporary delay to the deportation could have been achieved as it was within the Minister's discretion to delay the deportation pending the determination of the twins' asylum applications.

27. I do not propose to grant the injunction sought. I bear in mind that had the first named applicant genuinely feared for the safety of her new born infant twins if they were returned to Nigeria, she would have sought to protect their interests by informing the Minister of her fears at the first opportunity and not on the eve of her deportation. I also take into account that no fear of female circumcision was ever asserted on behalf of J. in her asylum application and was only raised for the first time when the claim for Rc. was made. I believe that the inherent implausibility of the asylum applications made on behalf of the twins is a matter that ought to be considered in determining whether to grant or refuse leave whether to grant an injunction. I am persuaded by the views expressed by MacMenamin J. in *Akujobi v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 19 in respect to the "drip feeding" of information in relation to applications for the revocation deportation orders:-

> *"There is now a simple question of credibility. No explanation is given as to how, or why, the two specific grounds now raised and relied upon were not submitted to the Minister earlier in the s. 3(6) application. No explanation has been given as to why, if the country of origin information was genuinely a source of concern to the applicant, it*

was not raised before the Tribunal or in any later submissions to the Minister. It is not explained how this material came to the attention of the applicants, or when, or who made it known to them. It has not been established that the material is currently relevant. A number of the reports are undated. The most recent is dated 2005. It is not shown that this information is now relevant to persons coming within the "applicant" category of former asylum seekers.

Very similar considerations apply to the medical information now relied on. It appears part of the continuing correspondence. It is not explained why it was not referred to earlier. It is not a satisfactory explanation to place blame baldly on the applicants" previous advisors. No other evidence to this effect has been adduced other than assertion. No affidavit has been filed from the applicant previous advisors, the Refugee Legal Service. It is clear that part, if not all of this evidence was within the procurement of the applicants as and from the 10th July, 2006, before the decision impugned was made.

28. I also apply the dicta of Peart J. in *Mamyko* and O'Neill J. in *Dada* on the limited power of the Court in reviewing deportation orders where the range of review is necessarily more limited than arises in the decisions of the statutory bodies.

29. The Court was urged by Mr. O'Shea B.L., counsel for the applicants, to consider that deporting the mother of the twin babies would deprive them of the right to the care and custody of their mother who is breast feeding them and that the best interests of the children should be the primary consideration. He argued that the strength or perceived credibility of the grounds on which the twins' applications for asylum were made is irrelevant and their claim for refugee status should not be prejudiced by any perceived lack of candour of their mother. The mother believes that she is better placed to speak for the children than their father at their s. 11 interview as one of the asserted fears is gender specific in that the second named applicant will be at risk of female genital mutilation (FGM) in Nigeria. This is the height of the applicant's case.

30. Counsel for the applicants relied on the decision of Finlay Geoghegan J. in the leave application of *Nwole v. The Minister for Justice, Equality and Law Reform* [2003] I.E.H.C. 72 as authority for the proposition that minor children are envisaged as applicants for a declaration of refugee status under s. 8 of the Act of 1996 and that every application by or on behalf of a minor for asylum must be processed in accordance with the statutory scheme. There is no dispute over the right of minors to make separate application for asylum status. I do not however believe that family applications where babies and very young infants are involved should be heard piecemeal and in an attenuated fashion so as to create unfair advantages in the asylum process by the putting down of roots in the delay which follows such "testing of the system". It seems to be forgotten that refugee legislation derives from international conventions intended to identify and provide protection for genuine asylum seekers and is built on a system of mutual candour. Delays created by gross dissembling and teasing out the process can and do ultimately create upset to children and communities when those children who have spent all their young lives here are then uprooted and their education disrupted should they have to return to their country of origin. If applicants are genuine asylum seekers there is every benefit in having all family members considered on the same application unless there are compelling different considerations which apply to distinguish their separate claims.

31. Ms Stack B.L., counsel for of the respondent, accepted that the children in this case have a right to apply for asylum but they do not have the right to demand that their mother remain in the State during the determination of their asylum applications. The twins are in the joint custody of their mother and father and there is no right to choose which parent, if either, is to remain in the State in order to speak for them during their s. 11 interview. The principle applicable in this case is similar to that applied by the Supreme Court in *P., B. and L. v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 where Hardiman J. held as follows at pp. 176-177:-

"It is clear that the parties' marriage took place at a time when each of them was at different stages of the procedure for applying for asylum or appealing the refusal thereof. Neither of them appears on the evidence to have taken any step to request that their applications appear together, or one after the other. The fact of their marriage within the State certainly could not have affected their individual applications for asylum. One of the matters to which the respondent must have regard under s. 3(6)(c) of the Act of 1999, is "the family and domestic circumstances of the person". There is no evidence that he did not do this and the third applicant has made no attempt at all to discharge the burden that lies on him in this regard.

In so far as it is submitted that Article 41.3.1 of the Constitution in some way precludes the respondent from deciding to deport one partner while the other's application for leave to remain is pending, I would reject that proposition. If this applicant's wife is successful in avoiding deportation she will be enabled lawfully to remain in the State but she will not therefore be obliged to do so. Only if it were thought arguable that the applicant's marital status restrained the respondent's freedom of action as a matter of law could this aspect of his circumstances avail him on the present application. The State's obligation to protect with special care the institution of marriage and protect it against attack cannot, in my view, be invoked to limit the respondent's discretion in relation to an individual applicant whose application for asylum has been refused."

32. I find this argument compelling and consider that while the best interests of children are always of paramount importance, their best interests cannot be manipulated to trump the rights of the Minister to enforce a valid deportation order. The children's interests are not without limits and can be served, perhaps not as well, but served nevertheless, by their father. As in *P., B. and L* the State's obligation to consider the best interests of children when their welfare is being considered cannot, in my view, be invoked to limit the Minister's discretion in relation to an individual applicant whose application for asylum has been refused.

33. I informed the parties that I was refusing the injunctive relief and all other reliefs when the case was argued on the day of the hearing and agreed to give my written judgment today.