Neutral Citation Number: [2008] IEHC 314

THE HIGH COURT

2006 1237 JR

BETWEEN

K. A. AND A. A. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, K. A.)

APPLICANTS

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

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice Hedigan, delivered on the 16th day of October, 2008.

1. The first named applicant is a national of Nigeria and a member of the Yoruba tribe. The second named applicant is her son, who was born in Ireland. They are seeking leave to apply for judicial review of the decision of the Office of the Refugee Applications Commissioner ("ORAC") to recommend that they should not be declared refugees, and of the subsequent decision of the Refugee Appeals Tribunal ("RAT") to refuse their appeal from the impugned ORAC decision.

Factual Background

2. The first named applicant had two children with her first partner, who she met in 1993 and separated from in 1999. In 2001, she had twins with another man, who she married in 2003. She says that in 2005, his family objected to their marriage and when she fell pregnant again, they told her that she would have to undergo female genital mutilation (FGM) and that the child, once born, would be subjected to tribal rituals. The applicant says that her husband supported the wishes of his family. She did not report these matters to the police as she thought they would tell her to settle such matters herself. Instead, she fled Nigeria with her unborn child.

Procedural Background

3. The first named applicant arrived in the State on 11th October, 2005, having travelled via France. She indicated that her unborn child should be included under her asylum application. She gave birth to a son - the second named applicant - on 4th November, 2005. In her ORAC questionnaire and interview, she claimed to fear that she would be subjected to FGM and that her son would be subjected to tribal rituals. She was very non-specific as to what such rituals might involve, suggesting only that he might be immersed under water in a river for confirmation of his parentage.

4. A section 13 report was compiled and in a decision dated 6th March, 2006, the ORAC officer recommended that the applicants should not be declared refugees. Negative credibility findings were drawn and it was found that state protection and internal relocation might reasonably have been available to the applicants. The applicants' appeal to the RAT was rejected by decision dated 18th September, 2006. The Tribunal Member found that the first named applicant lacked credibility and that internal relocation was available to the applicants.

Extension of Time

5. The Notice of Motion in the present case was filed on 19th October, 2006. The ORAC decision was notified to the applicants by letter dated 9th March, 2006 and the RAT decision by letter dated 20th September, 2006. Thus, the applicants are well outside of the 14 day time-limit allowed by section 5 of the Illegal Immigrants (Trafficking) Act 2000; some seven months in respect of the ORAC decision and 12 days in respect of the RAT decision. It therefore falls to the Court to decide whether or not there is good and sufficient reason for extending time.

6. It is accepted on behalf of the applicants that there has been a considerable period of delay but it is submitted that time should be extended in the light of the tender years of the second named applicant, who is not yet three years old. Reliance is placed on the decision of *Ojuade v The Refugee Applications Commissioner* (unreported, High Court, Peart J., 2nd May, 2008). The respondents oppose the extension of time. They contend that *Ojuade* is not authority for the proposition that an extension of time should not be denied to minor applicants in any circumstances.

The Court's Assessment as to the Extension of Time

7. The applicants in *Ojuade* were a Nigerian mother and her Irish-born daughter whose joint application for asylum was rejected by ORAC and the RAT. As in the present case, the applicants sought to challenge both decisions on the basis that no individual assessment was made as to the minor applicant's fears. They were out of time by more than six months in respect of the ORAC decision and more than four months in respective of the RAT decision. Peart J. refused to grant the mother an extension of time on the basis that she had not adequately explained the delay. He went on, however, to grant an extension of time to the daughter, stating as follows:-

> "In my view, since the second named applicant is a minor, and one of very tender years, she ought not to be refused an extension of time simply because the court is satisfied that her mother, the first named applicant, did not act in time to seek to challenge decisions made which affect her also."

8. I would adopt the approach taken by Peart J. in *Ojuade* without any hesitation. Peart J. was influenced by the fact that the daughter had no act or part in the delay herself. I would strongly concur that a minor applicant, who can really only speak through his or her parents, should not be penalised for that parent's failure to act with all due expedition. That notwithstanding, it is clear that *Ojuade* is not authority for the proposition that an extension of time should be granted to minor applicants as a matter of course. To the above statement Peart J. was careful to add the following caveat:-

> "That is not to be taken as expressing the view that in every case of delay by a parent in pursuing judicial review proceedings on behalf of his/her minor child an extension of time must always be granted in respect of that minor's application. There must always be room for deciding that in a particular case, the grounds being put forward … are so unstatable that it would be unjust to permit the application to be made out of time."

9. Thus, the Court retains the discretion to grant or refuse an extension of time, and the exercise of that discretion may be influenced by the Court's assessment of the strength of the grounds advanced for challenging the relevant decision. I turn, therefore,

to the applicants' arguments in the present case.

The Grounds Advanced by the Applicants
10. The applicants complain that the ORAC officer failed to specifically and individually address the fears advanced on behalf of the second named applicant by his mother. It is accepted that those fears were expressed in a somewhat vague manner, but it is contended that they nevertheless merited specific consideration. The respondents contend that the fears advanced on behalf of the minor applicant were considered repeatedly and in a specific and precise manner.

11. At its highest, the fear advanced on behalf of the second named applicant is that if returned, he might be submerged in water. No evidence has been provided to substantiate what fear, if any, could arise from such a ritual. On its face, it appears an innocent ritual similar to traditional baptism. As noted by the RAT in its decision, no country of origin information was submitted nor could any be found to suggest that such practices actually occur. Thus, the first named applicant has failed to discharge the burden of proof and in my judgment, it is no surprise that both ORAC and RAT have not accepted the applicants' claims.

12. Moreover, I have read through the ORAC decision and I have noted numerous references to the position of the second named applicant. At paragraph 1, the officer states that the applicant fears persecution due to her refusal to be circumcised and to allow her son to undergo some unknown ritual after his birth. At paragraph 3.1, it is reiterated that her partner's family wanted her child to undergo an unknown ritual in their village, when born. In the same paragraph, the officer again notes that the first named applicant was informed that following the birth of her child he would have to undergo some ritual of confirmation probably involving a local river in their local village. At paragraph 3.4, the officer states "[t]he applicant's claims involve alleged violations and possible future violations of fundamental human rights of her son and herself." Reference to a fear of persecution of "the applicant and her son" is made at paragraph 4.1. At paragraph 4.2, her alleged fear of "an unknown tribal ritual being performed on her son" is again recorded. At paragraph 4.6, the officer finds that state protection would have been available to the first named applicant and her son and, at paragraph 4.13, the officer finds that she and her child could internally relocate.

13. In the light of these explicit references, I am satisfied that the ORAC officer was fully aware of and gave specific consideration to the fears advanced on behalf of the minor applicant. The nature of the consideration given to the minor applicant's position seems to me to be analogous to that given by the ORAC officer to the minor applicant's position in *Ojuade*. In that case, Peart J. refused to grant leave to the minor applicant to seek judicial review of the ORAC decision on the following basis:-

> "In my view, having considered the entire contents of the s.13 report and recommendation …, it is clear that the second named applicant was separately considered. There are frequent references therein to both the first named applicant and the second named applicant, and it is not the case that the first named respondent simply dealt with the second named applicant by dealing only with the first named applicant. Each was considered."

14. Peart J. went on to grant leave in respect of the RAT decision, because:-

> "In my view having read carefully the decision of the Tribunal, there is only one reference, and an oblique one at that, to the second named applicant. […] There is no reference specifically to the second named applicant."

15. The consideration given by the ORAC officer in the present case to the minor applicant's position is of an entirely different nature to that given by the Tribunal Member to the minor applicant's position in *Ojuade*. The criticisms levied by Peart J. at the RAT decision in *Ojuade* do not therefore apply in the present case.

Conclusion
16. In the light of the foregoing, I am of the view that in contrast to the situation in *Ojuade*, the grounds advanced by the applicants in the present case are so unstatable that it would be futile to permit the application to be made out of time. The Court must bear in mind the utility of granting an extension of time; I would be prepared to extend time for a minor applicant if there was good and sufficient reason to do so. In the circumstances, however, I am not satisfied that there are good and sufficient reasons for extending time and accordingly, I must refuse to do so.