Neutral Citation Number: [2007] IEHC 393

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 1362 J.R.]

BETWEEN

C.A. AND
S.O.A. (A MINOR SUING BY HIS
MOTHER AND NEXT FRIEND C.A.)

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Patrick J. McCarthy delivered this 23rd day of November 2007

1. This is an application for leave to seek judicial review of a deportation order of the first named defendant made in the exercise by him of the power conferred upon him under the Immigration Act, 1999, and on the 23rd November, 2005. In particular, it is sought to obtain leave to seek an order of *certiorari* quashing such order, an order of prohibition restraining him, his servants or agents, from deporting the second named applicant, declarations that the deportation of the applicants would be incompatible with the provisions of Article 3, and/or Article 6, and/or Article 8 and/or Protocol 7 or Article of the European Convention on Human Rights and Fundamental Freedoms and the European Convention on Human Rights Act, 2003, that the proposed deportation of the applicants is repugnant to the provisions of the Constitution, that the regulations made pursuant to the 1999 Act are invalid having regard to the provisions of the Constitution (which two latter applications were not pursued, rightly, at the hearing, in as much as proceedings of this kind are not an appropriate vehicle for it), and that the proposed deportation violates the rights of the applicants under the United Nations Convention on the Rights of the Child, 1989 (being a relief which, even at this stage, cannot succeed in as much as that convention is not part of the domestic law and interlocutory relief to restrain deportation pending the disposition of the proceedings).

2. The grounds upon which the relief is sought, so far as they were pursued at the hearing of the application are set out below. I follow the enumeration used in the "Statement Grounding Application For Judicial Review", for ease of reference.

> 5(b) that there is no deportation order in respect of the second named applicant (and that) it is unlawful for the first named respondent, his servants or agents, to take and transport him to a foreign state without legal authority.
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> 5(c) It offends natural justice and is unlawful otherwise to compel the first named applicant to take the second named applicant to a foreign state to which she is deported, or to otherwise to have to abandon him.
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> 5(d) The first named respondent, his servants or agents, has failed and omitted to consider the applicants rights arising under the European Convention on Human Rights and Fundamental Freedoms, 1950, and where necessary, to consider and balance competing factors so as to show that the proposed measure is necessary in a democratic society and proportionate to the object to be achieved.
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> 5(e) The applicant as a mother and her infant child (and the) first named respondent, his servants or agents, have failed and omitted to have regard to their welfare and the protection due to them under the provision of Bunreacht na hÉireann, 1937.
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> 5(g) The first named respondents opinion that refoulement will not occur if the applicants are expelled or otherwise sent (to) Nigeria is irrational.
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> 5(h) There is an arguable case (and the) balance of convenience favours not deporting the applicants and deportation could cause irreparable harm which could not be compensated by damages.
>
> 5(i) The applicants are persons without means and the first named applicant is not permitted to work in the state. Their right to assert their human rights, including an effective remedy and access to justice, cannot be exercised without recourse to this honourable court.

3. The application for leave to seek judicial review was preceded by the issue of plenary proceedings on the 9th December; this followed an ex parte application on the previous day on behalf of the first named applicant for an order restraining the first named defendant, his servants or agents, from deporting the first named applicant, on foot of the deportation order, until after the 15th December, 2005, or further order; that application was made in circumstances of urgency, and on an undertaking to issue a summons and swear, or cause to be sworn, an appropriate affidavit deposing to the facts giving rise to it. That of course was an interim order and I am not furnished with the interlocutory order. I infer, however, that the first named respondent must have given an undertaking to the court not to deport the first named applicant pending the disposition of the present proceedings, or else, that an interlocutory order was made to that effect.

4. The evidence in the case is contained in the grounding affidavit of the first named applicant (sworn on the 14th December, 2005), the affidavit of the first named applicants solicitor, Mr Niall Sheerin (sworn on the 20th December, 2005) and the affidavit of Mr Cassidy, an Assistant Principal Officer of the first named respondent's department (sworn on the 21st June, 2006). These affidavits exhibit a number of relevant documents. I will seek to summarise the evidence (and the facts do not appear to be in dispute) for the purpose of this judgment, below.

5. The applicant asserts that she arrived in the State on the 21st February, 2005; in his affidavit, Mr Cassidy states that her arrival was on the 20th. I do not think that this discrepancy is material, because she made her application for asylum on the 21st February, 2005: she was informed by letter on the same date that she was to be interviewed on behalf of the Refugee Applications Commissioner on the 7th March, 2005, and of course she completed a written application for a refugee status (in the form of a questionnaire) on the 22nd February, 2005. She was afforded the benefit of the services of the Refugee Legal Service and attended at her interview on the 7th March, and on the 11th March, the Commissioner (by one of his officers) recommended that she did not qualify for refugee status. The applicant was informed of this fact on the following day and she was furnished with a copy of that officer's report (as was the Refugee Legal Service). An appeal was entered to the Refugee Appeals Tribunal on the 8th April, 2005, and documents in addition to those furnished to the Commissioner were sent to the Tribunal in support of her appeal, that ultimately

being heard on the 3rd May, 2005. Later, on the 1st June, 2005, additional documents in support of the appeal were forwarded to the Tribunal, but it is clear that this was prior to the date of its decision, being the 27th of June, 2005, and there is no suggestion that all of the documents (including those furnished on the 1st June, 2005) were not seen by the member of the Tribunal (Mr David Andrews S.C.) prior to his decision. The applicant was thereafter notified of the decision and a copy thereof was furnished to her (with, of course, notification to the Refugee Legal Service) and, further, whilst the Refugee Legal Service in Dublin had represented her up to that date, that in Cork now so represented her. The matter then passed into the hands of the Minister or his immediate officers, the recommendation of the Tribunal was approved by a Deciding Officer of the Ministerial Decisions Unit, and the Minister decided to make a deportation order having accepted the Tribunal's recommendation. The first named applicant was of course informed of this (by letter dated the 27th September, 2005) and that it was proposed to make the deportation order, she was afforded an opportunity to make representations in writing to the Minister, setting out the reasons as to why she should be allowed to remain in the State and it was pointed out to her that if no response was received within fifteen days a deportation order would be issued accordingly (a copy of that letter being sent, also, to the relevant office of the Refugee Legal Service); written representations dated the 13th October, 2005 were sent on the 14th October, 2005; even though these representations were out of time, they were considered on behalf of the Minister on the ordinary course of dealing with leave to remain applications. The representations pertained primarily to the fact of the birth in the State of the second named applicant. The Minister thereafter, ultimately, executed the deportation order in respect of the first named applicant. This succession of events appears, also, from a complete copy of the file of papers generated by or on behalf of the Minister in relation to the issue of deportation, or leave to remain. Examination of this file of papers by Ms McEntagart on behalf of the Minster took place on the 23rd November, 2005, and a Miss O'Keefe before that. References are made therein, not only to the history of the matter, but to the representations of the 17th October, 2005. The documents before the Tribunal were her notice of appeal to it, the assessment of her claims made by the Refugee Applications Commissioner, representations made pursuant to the provisions of s.11(3) of the Refugee Act, 1996 (as amended), the recommendation of the Refugee Applications Commissioner made pursuant to s. 13 of that Act, all documents and other information submitted to the Refugee Applications Commissioner in connection with this application and all country of origin documentation. Notwithstanding the absence of reference thereto, explicitly, its seems clear that all of the documents which came into existence prior to the 17th October, 2005 (including the Tribunal finding), were before Ms O'Keeffe of the first named respondent's department, as well as representations made by the first named applicant on the 17th October, 2005 (inclusive). I have not been furnished with a copy of that document, but I have no reason to suppose, having regard to the reference in Ms. O'Keeffe's report, (that of the 19th October, 2005) that she failed to consider them. All relevant material seems to have further been considered, subsequently, by Ms McEntagart who duly recommended that the Minister execute the order. Ms McEntagart, of course, also had the benefit of Ms O'Keeffe's report. There is no reference anywhere, in what I might shortly describe as the 'Departments papers' to the fact that she received a copy of a decree of divorce, dated the 2nd June, 2005; I do not know why the first named applicant exhibits this. I can only infer that it is material which was not placed before the Minister or the Tribunal. For these reasons it seems to me to be irrelevant to the validity of the Minister's decision, as a matter of principle since it was not before him. Further, it does not represent any change in circumstances since the order was made, and I cannot see, accordingly, how it could form any basis for any further step, hereafter, or otherwise, on behalf of the applicant.

6. I now turn to the circumstances immediately giving rise to the proceedings. On the 5th December, 2005, the first named applicant went to the Garda National Immigration Bureau, at Burgh Quay, Dublin, where she was told to report to Anglesea Street Garda Station, Cork, on the 8th December (for purpose of travelling out of the State). From there she was accompanied by members of an Garda Siochána, having, on her account, been detained for approximately three hours in the Garda Station, without the provision of food or drink; she was informed that she was being sent to Nigeria, she was questioned (and also on her account) subjected to verbal abuse. She was further told (on her account) that she was 'hiding' the second named applicant, her son. She says that she informed the Gardaí that the second named applicant was in the care of a friend at Kinsale Road Centre Hostel. She was then taken by Gardaí to that hostel, and was retained in the vehicle until one of the Gardaí brought the second named applicant out with her possessions (or some of them) they being also placed in the vehicles in question (a mini bus). The applicants were then taken to Dublin Airport, but before she could be flown out of the State (and I infer that she was to be so flown from Dublin) she was released, in as much as aforesaid of this Court had been granted. This sequence of events and her allegations are not contradicted. It is plain that the second named applicant, was, presumably, literally, given into her hands at the hostel, having been in the care of a friend. In strictness, however, it was a matter for her, having regard to the conclusions which I have reached below, to decide whether or not to take the second named applicant out of the jurisdiction (although it is clear that she had no real choice but to do so it being, presumably, unthinkable that she would be prepared to leave the State without her son). She was undoubtedly under arrest for some, if not, all of the period from her arrival in Anglesea Street Garda Station (at 2pm) until, certainly, her release from her close confinement at the Garda Station, if not until she left the Garda Station at Dublin airport; the test of whether or not a person is under arrest is whether that persons liberty is restricted or controlled by another, and this was undoubtedly the case here. I do not need, however, to rule upon the lawfulness of her arrest since it has become irrelevant for the purpose of the enforcement of the law pertaining to her deportation, or her duty pursuant to the order, to leave and remain outside of the State, if the deportation order is valid since she is not now in custody. It seems to me that the second named applicant, however, was not under arrest and that the mere assistance given to the first named applicant, by the fact that he was brought from the hostel to her, could not constitute such, even if she was in unlawful custody.

7. The submissions of the applicant are broken down into three parts (including a point pertaining to questions of procedure and costs) namely the European Convention on Human Rights and Fundamental Freedoms and Human Rights Act, 2003, and, secondly, the lawfulness of deportation of the second named applicant. Having regard to the form which the submissions took, I will deal with the latter aspect first.

8. It is Mr McMorrow's submission that it is not lawful to deport the second named applicant, and the fundamental point made is that there was no deportation order in force where he is concerned. He has elaborated on the provisions of the Immigration Act, 1999, as amended on the issue of whether or not powers of arrest contemplated by s. 5 of the that Act apply to minors, and he would appear to be correct that no power arises. He raises an issue about whether or not it is lawful to make a deportation order (and I do not need to decide whether or not this is the case); there is no such in force in this instance. Thus without such order, whatever else, it is not lawful to remove the second named applicant from the State pursuant to the Act of 1999, as amended, at this stage. This does not, of course, inhibit the first named applicant from removing her son from the jurisdiction upon her deportation.

9. I do not think that the second named applicant's application was treated as one with the first named applicant, or so it is asserted on behalf of the Minister. I do not think that this is relevant, one way or another, in the absence of such an order. The key point, accordingly, is whether or not it would be lawful to remove the first named applicant from the State, pursuant to the deportation order (or, indeed, to make a deportation order) having regard to the fact that, she has a dependent child within the State, and being a child born here. The provisions of the Irish Nationality and Citizenship Act, as amended by the Irish Nationality and Citizenship Act, 2004 (which entered into force on the 1st January, 2005), and in particular s. 6 A thereof are relevant here. The substantive effect of that provision is that merely because the second named plaintiff has been born here, he is not entitled to citizenship because the first named applicant has not "during the period of four years, immediately preceding (his) birth, been resident in the island of Ireland for a period of no less than three years, or periods the aggregate of which is not less than three years"; that, of course, is subject to

certain qualifications and, in particular does not apply to persons born before the commencement of the Act, or to a person born in the island of Ireland, if one of his parents was entitled, the time of birth, to reside in the State without any restriction on his or her period of residence. Manifestly, the first named applicant does not fall into this category; the other exceptions or qualifications to the general rule apply to parents, who were Irish citizens or entitled to Irish citizenship, persons entitled to reside in Northern Ireland and British citizens who are *inter alia* entitled to diplomatic immunity. It seems to me, accordingly, that there is no inhibition on the deportation of the first named applicant and that, at this juncture it is entirely a matter for her, in strictness, as to whether or not she brings the second named applicant with her. There is no suggestion whatsoever that she would not do so, and I think that the Minister is entitled to proceed on the basis that she will discharge her maternal duty to her child.

10. It is asserted on behalf of the first named respondent that the position of the second named applicant was treated "as one" with that of the first named applicant. It seems to me that any representations referring to the second named applicant were made in the context of the application of the first named applicant but whether or not the applications were treated as one (such as there might be something in the nature of a "deemed" application on the part of the second named applicant or, indeed, a "deemed" determination of any such application) does not need to be decided.

11. With respect to the issues raised pursuant to the European Convention on Human Rights and Fundamental Freedoms and the Human Rights Act, 2003, it is asserted that there is a breach of the applicant's rights under article 8 of the Convention (which protects the right to respect for private and family life, home and correspondence); there is no inhibition on the enjoyment of family life by both applicants out of the jurisdiction and in particular, in Nigeria; none of the factors allegedly affecting the first named respondent, upon which she relied for the purposes of her application for asylum, are in any sense relevant to the second applicant and the only additional factor is an assertion of hardship, vulnerability to disease or mortality in the absence of a proper scheme of social welfare. I do not see that there is an entitlement to asylum merely because of these factors, certainly, no authority has been quoted to me to support that proposition. The Minister considered whether or not children may return to countries which would have, say, inferior welfare and health services to those available in Ireland, which is effectively the assertion; thus even if the assertion is right it was addressed.

12. It is further asserted that a "necessary factor" (to be considered by the Minister) is the "best interest of the second named applicant", that the first named applicant is a law-abiding person who poses no threat to the State or any of its citizens and that she is able and willing to enter the workforce, while the second named applicant is a healthy child. It seems to me that these are issues which were considered by the respondent Minister and are solely matters for him.

13. As to the proposition which is advanced pursuant to article 3 of the Convention (that no-one shall be subjected to torture or to inhuman or degrading treatment or punishment) it is submitted, in this context, that the applicants would be killed. This is quintessentially a matter for the Refugee Applications Commissioner, the Refugee Appeals Tribunal and the Minister and full consideration has been given to this. It is submitted on the basis of *Campbell & Cosans v. United Kingdom* [1982] 4 E.H.R.R. 731 that a mere threat of inhuman or degrading treatment may itself violate article 3. Again, the issue of whether or not the applicants' rights in this regard might be infringed has been considered by the Minister on the merits, as I have said. With respect to article 2 of the Convention (the right to life), similarly, that consideration required by law to that right has been afforded by the Minister.

14. No-one could doubt that in the exercise of any powers pursuant to the Immigration Act, as amended, the European Convention on Human Rights Act, and the obligations arising under the Convention, extend thereto but it seems that there is no breach of any Convention right in and about the manner in which the Minister has acted.

15. Issues of procedural fairness have been raised with special reference to Protocol VII of article 1 of the Convention. That provision is paraphrased in his submissions by Mr. McMorrow (I think accurately) to the effect that

> "An alien lawfully resident in the territory of a State shall not be expelled there from except in pursuance of a decision reached in accordance with law and shall be allowed … (b) to have their case reviewed, and (c) to be represented for those purposes before the competent authority or a person or persons designated by that authority."

It is submitted that in the present case (and I quote from the submission):

> "There is no procedure whereby an appeal resulting in a review of their decision can be undertaken by the first named respondent and as outlined above at 3(b) the applicant received no hearing in respect of the representations which their then legal representatives made on their behalf in response to the proposal to deport them."

16. This element of the submission is somewhat ambiguous inasmuch as it could be read as a mere submission that there was a breach since there was no oral hearing on the occasion of the Minister's proposal to make a deportation order; it could further be read in a wider sense to the effect that there is no procedure whereby "an appeal" resulting in a review of the decision could be taken, in addition to the absence of a hearing (whether oral or in writing). I do not believe that the Convention is breached by the procedure prescribed by law as to the adjudication on the claim made by the first named applicant for refugee status. There is a three-stage procedure (after the initial claim for asylum) namely, an opportunity to be heard (and to make representations) before the Commissioner and, later, on appeal, before the Tribunal. The Minister is thereafter required to exercise an independent judgment, based on the evidence, and having regard to the applicable law, before he makes a decision or, ultimately, a deportation order. In the first instance, it seems to me that any right to be heard can be an entitlement to be heard in writing, and, in this instance, I do not see any factual basis for asserting that the representations made by on her behalf at all times were not properly considered by the Minister. The Minister reviewed the case, after the appeals process had been concluded with earlier oral hearings, when the first named applicant was represented; the fact of the hearing, at the very least, before the Tribunal, in my view, discharges any obligation for an oral hearing later since the Tribunal must be "a person or persons designated" by the Minister; the review conducted by the Minister is just such in any event. This is to say nothing of the fact that there is no suggestion in the protocol that there is a duty, at the review stage, to afford such oral hearing (at the risk of an element of repetition).

17. At this juncture the test for this Court on an application for judicial review is that I must be satisfied that there are "substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed". I am referred by Ms. Duggan to the decision of Clarke J. in *Kouaype v. Minister for Justice, Equality and Law Reform* (Unreported, 9th of November, 2005). In particular she relies upon a passage from that judgment which summarises the prerequisites for making a deportation order and in particular that passage which is to the effect that

> "In general terms [there] are two statutory prerequisites to the making of a deportation order:
>
> (1) the Minister is required to be satisfied that none of the conditions set out in section 5 of the Refugee Act, 1996

are present; and

(2) [he] is also required to consider the humanitarian and other factors set out in s. 3(6) of the 1999 Act insofar as they are known to him. In this latter context it obviously follows that the Minister is required, inter alia, to have regard to any representations on those matters, which are made by or on behalf of the person concerned."

Ms. Duggan further refers to *E.P.A.L. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 164 (per Hardiman J.) as follows:

> "The personal circumstances of the applicant, including the humanitarian considerations, the impersonal matters, which included the common good and considerations of national security."

She further relies on his judgment, to the effect that the Minister is entitled to "take into account the reason for the proposal to make the deportation order i.e. that the applicants were in each case failed asylum seekers" whilst, of course, having regard to s. 3(6) of the 1999 Act. It seems to me that the Minister has done this here.

18. Ms. Duggan further refers to Akujobi *and Emeka v. Minister for Justice, Equality and Law Reform* (Unreported, MacMenamin J., 11th January, 2007). This addresses the issue of the consideration which the Minister must give to an application for revocation but that does not apply here and, accordingly, I refer to the matter only for the sake of completeness. The Minister has clearly concluded that deportation is not debarred by s. 5 of the Refugee Act, 1996 and has considered the question of refoulement. He also had regard to s. 4 of the Criminal Justice (U.N. Convention Against Torture) Act, 2000.

19. Inasmuch as the decision of whether or not to make a deportation order is exclusively a matter for the Minister, the court may interfere only if it is flawed by virtue of an error of law of such substance as to divest him of jurisdiction on the basis that he acted irrationally or deprived an applicant of constitutional justice, it appears to me that, in this case, he has not fallen into legal error, or acted irrationally or breached the principles of natural justice, but discharged his obligation in accordance with the statutory obligations lawfully. I therefore hold that there is no "substantial ground" for contending that his decision is "invalid or ought to be quashed". Insofar as any issue is raised about an omission on the part of the Minister to specify the state to which deportation is to take place, it has been held in *Sibiya v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, Murray C.J., 7th February, 2006) that there is no such requirement.

20. Obviously, the order restraining deportation of the applicants must be discharged: it is a matter for the Minister to decide on the place, time and manner of deportation of the first named applicant. The deportation of the second named applicant has not arisen, as a fact, and in those circumstances I do not see a basis for any continuing restraint on deportation. I should say that leave to seek declaratory relief is also refused, or any relief by way of prohibition or declaration.