Neutral Citation Number: [2010] IEHC 406

THE HIGH COURT

JUDICIAL REVIEW

2010 538 JR

BETWEEN

ADEKUNBI ADEDOJA AND SARAFINA AJIBOYCE

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 10th day of November, 2010

1. There are two matters before the Court in this case in advance of the hearing of the application for leave to apply for judicial review of the third and latest deportation order made by the respondent against the first named applicant and dated 21st September, 2010.

2. The first is an application for an interlocutory injunction pending the hearing of that leave application to restrain the execution of the deportation order. The second is a motion to amend the Statement of Grounds in order to adapt the proceeding to the fact that the previous deportation order originally challenged has since been revoked and replaced by the order of 21st September, 2010. In the absence of objection on the part of the respondent and so that the injunction application can be considered by reference to the actual context as it now stands, the Court has allowed the amendments to the Statement of Grounds sought in the notice of motion dated 12th October, 2010.

3. The proposed challenge to the deportation order is slightly unusual in that it is not, as is frequently the case, directed at the adequacy of the respondent's assessment in balancing the humanitarian considerations put forward, or the evaluation of the risk of persecution if deported. It is based on the proposition that the first named applicant is and has been lawfully resident in the State since some unspecified date in 2006, when she arrived from Nigeria, aged, (depending upon the actual date of arrival,) either sixteen or seventeen years of age, to join her mother and her mother's then husband.

4. The mother's then husband was a UK national, and on that basis, she (the second named applicant,) had been granted residence as the spouse of a UK national and Union citizen. It is said that the marriage in question broke down in 2007 and ended in a divorce obtained by the husband in Nigeria in May 2008. However, the second named applicant apparently disputes the validity of this divorce and says she knew nothing about it. No explanation is given as to how a UK national might unilaterally have obtained a divorce in Nigeria without notifying the respondent spouse in the proceedings, when both appear to have been domiciled and resident outside that country. That the marriage had broken down, however, seems perfectly clear because the second named applicant gave birth to another child in Ireland in 2007, the father of whom is identified as a man of Nigerian nationality with an address in Lagos. Although joined as a party to her daughter's challenge to the deportation order, the second named applicant has chosen not to contribute to the enlightenment of the Court on these matters by swearing an affidavit.

5. The case made as to the invalidity of the deportation order is that, notwithstanding any divorce of her mother from her EU citizen stepfather, the first named applicant was entitled to reside in the State as a "qualifying family member" for the purposes of the European Communities (Free Movement of Persons) Regulations 2006, (the "Regulations") on the basis that she is the daughter and, therefore, the descendant of a spouse of an EU citizen. (The Regulations transpose into national law the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 – the "Directive".)

6. At least until very recently, it has been accepted by the respondent that the second named applicant remains entitled to residence in her own right following the divorce, because of the length of her pre-divorce residence in the State as spouse of an EU citizen. It is said on behalf of the respondent, however, that doubts are now arising as to the *bona fides* of that marriage having regard to the fact that when the residence permit was granted for five years in February 2008, the breakdown of the marriage and the new relationship were not disclosed to the respondent.

7. Although the challenge to the order is based on the assertion of an entitlement to reside as a qualifying family member under the Regulations and that the Minister has wrongly rejected that claim, both in a letter of 1st July, 2009 and in a paragraph on page 9 of the eleven-page Examination of File memorandum enclosed with the deportation order, the applicant is forced to concede that she has never, in fact, submitted a formal application for a residence card by completing the EU No. 1 Form required for that purpose. This is in spite of the fact that on 6th August, 2009, an EU No. 1 Form had been sent to the applicants' solicitors, inviting the first named applicant to make the application if she wished to remain in the State on the basis of being a family member of a spouse of an EU national. It is not disputed that the form in question has never actually been lodged.

8. Instead, it is argued that the right to reside derives directly from the Regulations in the Directive and that a residence card is merely declaratory or evidential of the underlying right; and that a failure to comply with the obligation to apply for the card can only be penalised by a proportionate and non-discriminatory sanction and not, therefore, by deportation. It is submitted that the information the respondent required is to be found in the correspondence and that the respondent ought not, therefore, to have made a deportation order until he had at least satisfied himself that the first named applicant could not possibly be the beneficiary of a right of residence as a qualifying family member.

10. In order to injunct the implementation of a statutory order which is, on its face, valid until the contrary is established, the applicant must first demonstrate the existence of fair issue to be tried as to the entitlement to the relief to be sought when the pending application is determined. In the present case, the injunction is sought until the hearing of the application for leave so that

the fair issue to be tried is whether there would be shown a substantial ground as to the invalidity of the deportation order at that point.

12. In the judgment of the Court, the validity of the decision under s. 3 of the Act of 1999 to deport a person from the State and the reasons given for it, falls to be assessed by reference to the information put or available to the respondent at the time when the decision is made. The decision cannot be annulled by reference to facts or information which were unknown to the respondent and which are introduced only after that event.

13. Although no formal application for a residence card has been made, the respondent was clearly aware that the two applicants were apparently asserting some reliance on the family connection with the former husband of the second named applicant. As already mentioned, the file note contains, at paragraph 9, the following passage: *"Sarafina Ajiboye, the applicant's mother, was granted leave to remain in the State under EU Treaty Rights on 1 July 1999, on the basis of her marriage to British national Victor Ajiboye. An application was made for Adekunbi Emiola Adedoja to be granted permission to remain in line with the permission of her mother. However, this applicaton was rejected and the applicant's mother was informed that Adekunbi Emiola Adedoja was neither a permitted or qualifying family member of an EU national. A further invitation was issued to the applicant inviting her to make an application for EU Treaty Rights on an enclosed EU1 form. No application was received."*

14. It is not open to dispute that this was a correct statement as to what had transpired until that point. No formal application had been made nor had any challenge by way of judicial review been brought against a rejection in the letter of 1st July, 2009. It must be remembered that although the first named applicant claims to have arrived in the State on some date prior to September 2006, - a variety of dates in February and April of that year are mentioned, - no mention of any assertion of rights as a qualifying family member appears to have been made in any correspondence prior to April 2009. Even the letter of 2nd April, 2009, from Colgan & Company, merely asks that the daughter "be granted permission to remain in the State in line with their mother's permission". This 'permission to remain' phrase is redolent of the humanitarian considerations of s. 3, sub-section 6 of the 1999 Act, rather than of any assertion of the first named applicant's personal right as a family member.

15. In the judgment of the Court, there is no stateable case to the effect that the reasons given for deporting the first named applicant were unlawful because the respondent had wrongly rejected a claim to entitlement to reside as a qualifying family member. No application to that effect had been made. The information and proofs required to establish that entitlement had not, in fact, been lodged (see Schedule 2 to the Regulations). The first named applicant had not, in fact, sought lawfully to enter the European Community, (as it then was,) to join her mother and her then EU husband. She entered the State illegally, without the visa required both under Irish law and by the Directive. She has not, in fact, furnished the respondent with many of the proofs of identity, date of arrival or immigration record number which would substantiate her entitlement to a residence card.

16. Counsel for the respondent does not deny that the first named applicant might be correct in the suggested interpretation of the term 'qualifying family member' in the Regulations and, as such, be able to substantiate an entitlement to a right of residence based on her being the daughter of a spouse, or former spouse, of an EU citizen formerly resident here. Counsel says that the respondent has never been in receipt of the necessary application and proofs for that purpose and cannot make a decision on the issue.

17. It is conceded that if a formal and fully documented application was even now submitted, the first named applicant may be entitled to the rights she claims and would be entitled to remain in the country until such an application had been determined, in accordance with paragraph 3 of Regulation 7.

18. In the judgment of the Court, that approach is correct. There is no arguable case in these circumstances that the deportation order was invalid, having regard to the absence of any formal substantiated application under the Regulations. If and when such an application is lodged, the first named applicant will be entitled to apply under s. 3, sub-section 11 of the 1999 Act, to have the existing order revoked on the basis that a new fact or event has arisen which makes implementation of the existing order incompatible with the Directive and the Regulations. Furthermore, Regulation 7(3) provides that a person the subject of an application under paragraph (1)a of that regulation is entitled to remain in the State pending a decision on the application. But for that purpose the application with the particulars required by Schedule 2 must be lodged. As matters stand, however, there is no basis for the grant of an interlocutory injunction. In effect, the present application, (and possibly the judicial review proceeding) is misconceived, or at least premature. If the first named applicant is entitled to a residence card on the basis she claims, she has no need to seek to leave to remain on humanitarian grounds under s. 3 of the 1999 Act. By entering the State unlawfully and by making a bogus application for asylum as a stratagem to avoid deportation, she has placed herself in the position of a failed asylum seeker and thus created for herself the problem posed by the deportation order.

19. In circumstances where the first named applicant claimed to have an entitlement to reside under the Regulations but has failed to take the formal steps necessary to exercise that entitlement but instead has misused the asylum process, it would be a wholly improper application of the Court's equitable jurisdiction to impose a restraint by injunction on the respondent who has done nothing wrong.

22. The injunction is refused.