Neutral Citation Number: [2011] IEHC 47

THE HIGH COURT

JUDICIAL REVIEW

2010 1314 JR

BETWEEN

FANE AWA KARENE COULIBALY

(A MINOR ACTING BY HER FATHER

AND NEXT FRIEND ALOU FANE)

AND ALOU FANE

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Cooke delivered the 14th day of February 2011

1. This judicial review proceeding was commenced on 13th October 2010 with a view to seeking an order of *certiorari* quashing a deportation order made in respect of the second named applicant (the "applicant",) on 28th September 2010. The application for leave has not yet been heard but the respondent brings this motion seeking order dismissing the proceeding in its entirety pursuant to the inherent jurisdiction of the Court upon the ground that the continuation of the proceedings would constitute an abuse of process and, in alternative, upon the ground that they are frivolous, vexatious and have no reasonable prospect of success.

2. There is no doubt that the High Court has jurisdiction to make the type of order sought on this motion although it is a jurisdiction which is to be exercised with reticence and only in clear or compelling cases. *"This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the document, the court is satisfied that the plaintiffs' case must fail, then, it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant"*. (See the judgment of Costello J. in the context of a specific performance action: *Barry v. Buckley* [1981] I.R. 306 and 308).

3. The jurisdiction can be exercised not only in cases where it is apparent that the claim is without foundation and cannot succeed but also where the initiation of the proceedings amounts to an abuse of process because the claim made is frivolous, vexatious or brought for an improper purpose. (See, for example, *Re: Majory* [1955] Ch. 600 and *Quinn Group Limited v. An Bord Pleanála,* [2001] 1 I.R. 505).

4. It is equally clear that the remedy is available to a respondent in judicial review proceedings. (See the judgment of Herbert J. in *Lowes v. Coillte Teo* (Unreported, 5th March 2003)).

5. The immediate circumstance which has provoked the bringing of this motion on the part of the respondent is the fact that after the judicial review application had been commenced and the Minister had been requested and had given an undertaking not to implement the deportation prior to 29th November 2010 pending the listing of the application for leave, the applicant left the State and made an application for asylum in Belgium on 23rd October 2010. A fingerprint search alerted the Belgian Authority to prior asylum proceeding in this country and he was duly re-transferred here under the Dublin Regulation.

6. The Minister relies upon this conduct as disclosing such a degree of disregard for immigration procedures and the asylum system within the European Union as to disentitle the applicant to invoke the jurisdiction of the court. It is argued that the commencement of a judicial review application and the obtaining of an undertaking to postpone implementation of the deportation order on that basis is an abuse of process when the applicant's intention appears to have been to gain time in order to abscond from the jurisdiction. The respondent also relies upon the history of the applicant's conduct in the asylum process as further confirming the applicant's lack of any serious intention to substantiate a claim to refugee status.

7. The issue before the Court, on this motion, accordingly, is whether in the light of the grounds proposed to be relied upon by way of challenge to the legality of the deportation order, these circumstances and factors make this a case in which the Court should exercise its jurisdiction to dismiss either upon the basis that the judicial review application is clearly unfounded or because the invocation of the Court's jurisdiction amounts to an abuse of process.

8. The applicant is a native of the Ivory Coast, who arrived in the State in September 2000, with his wife and another daughter. He and his wife separated in February 2001, and have not since lived together. A second daughter, the above named minor applicant, was born in the State in March 2001 and she is an Irish citizen. The mother was granted permission to remain in the State on the basis of that parentage in January 2003. The applicant applied for asylum on arrival in the State but did not attend for the statutory interview and the application was rejected in January 2002. He also applied for residence under the IBC/05 scheme but this too was refused. In December 2007 he applied for subsidiary protection but this was also refused in August 2010. The applicant says that when he instructed the Refugee Legal Service to make the application for subsidiary protection he had also asked them to apply for permission to remain in response to a proposal made by the Minister to deport him in a letter for the purposes of s. 3 of the Immigration Act, 1999 but that the RLS, unknown to him, failed to make that application.

9. While the application for subsidiary protection clearly concentrated on the case made in respect of "serious harm" it did set out information relating to the applicant's personal and family circumstances, including the fact that he was separated from his wife but in regular contact with the two children.

10. By letter 23rd December 2009, the applicant's solicitors sent "further supporting representations" which took the form of letters of support from a number of individuals.

11. When the deportation order of 21st September 2010, was notified to the applicant, it was, as usual, accompanied by the "Examination of file under s.3" memorandum which contains, in effect, the analysis made within the Minister's department of the information and representations relating to the case, together with the assessment and the valuation of the factors, facts and circumstances considered and weighed in the balance for and against the making of the deportation order. The matters required to be considered under s.3(6) of the Act of 1999 are addressed *seriatim*; the prohibitions on refoulement are considered and the factors and circumstances relevant to the private and family life of the applicant and family members, together with the constitutional rights of the Irish born child are analysed and balanced.

12. In the statement of grounds, what might be considered to be nine fairly standard grounds are set out as the proposed basis for the arguments as to the unlawfulness of the deportation order. No specific and material error of law or fact is identified as such. The grounds take issue in general terms with the content of the "Examination of file" memorandum. The analysis is said not to "reflect the principles" of the *Oguekwe* - case; it is said not to contain "fact – specific considerations" relevant to the rights of the Irish citizen child in breach of Article 40.3 of the Constitution. The decision to deport is said to be unreasonable and to amount to an infringement of the rights of the applicant and/or his family members "both under the provisions of Irish Constitution and the European Community Treaty" (sic). Infringement of Article 8 of the ECHR is also raised.

13. In an affidavit in reply to the present motion, the applicant endeavours to explain his leaving the State and applying for asylum in Belgium by saying that when he received the letter notifying him of the deportation order and requiring him to leave the State by a given date, he panicked. He says he felt that the proceeding had had no effect upon the respondent, who was "intent on deporting me". He was terrified of being arrested, detained and sent back to the Ivory Coast and so he decided "to leave Ireland, as the respondent said was required of me, and to contact my solicitor from another country to seek her advice on how to continue with my case".

14. Accordingly, the issue before the Court is whether in these circumstances, having regard to that history and in the light of the explanation sought to be offered, this is a clear and compelling case in which the Court ought to stop this proceeding before it goes any further?

15. On balance the Court has come to the conclusion that this is not such a case. It is important to bear in mind the distinction between the approach to the pending leave application and the test that the respondent must meet on this motion. While it might be tempting in these circumstances to have considerable scepticism as to the prospect of the leave application being successful, having regard to the minimal level of representations made to the Minister; to the detail of the file memorandum and the very general character of the proposed grounds; the threshold to be met for dismissing the proceeding as unfounded at this point, is considerably greater. However slim the grounds proposed to be advanced may appear at this stage, the Court considers that it could not be concluded that they are so wholly unstatable as to justify immediate dismissal. Moreover the applicant's Irish citizen child is also a party to the proceeding and making the order as sought on behalf of the respondent would have the effect of depriving that child of an entitlement to have its arguments against the deportation considered.

16. There remains, accordingly, the argument that the judicial review application is itself an abuse of process, in that it has been commenced vexatiously or for an improper motive. Again, the Court hesitates to reach such a conclusion in the particular circumstances of the case. It is true that the history of the applicant's conduct during his years in the State, - his failure to attend the asylum interview and his flight to Belgium - indicates at the very least, a casual attitude towards his own asylum application and a disregard for the laws of the State. Nevertheless, the judicial review proceedings were presumably commenced on the basis of legal advice and while there is probably little doubt but that the applicant hoped the bringing of the proceeding would postpone his departure, the Court finds it difficult to conclude that there was any more malign motive for the commencement of the proceeding. While it is also true that the application made in Belgium could be said be abuse of the asylum process as such, it is an event occurring after the case had been commenced and the Court is inclined to give the applicant the benefit of the doubt when he says that he panicked and it does not find that there is any necessarily premeditated connection between the flight from the State and the commencement of the proceeding or the request for the undertaking not to implement the order. It is not suggested that the applicant's solicitors were aware of his flight until after it had occurred and the Court would assume that the undertaking was sought as a matter of routine in these cases, rather than as a ploy to assist the applicant in evading deportation.

17. For these reasons the Court refuses the motion.