Neutral Citation Number: [2006] IEHC 346

THE HIGH COURT

Record No. 2006 No. 43 J.R.

BETWEEN

FOLASHADE OLUBUNMI ADIO, FUAD ADIO
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND
FOLASHADE OLUNMUNMI ADIO)
FAROUQ ADIO (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND
FOLASHADE OLUNMUNMI ADIO

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Supplementary Judgment of Ms. Justice Finlay Geoghegan of 14th November, 2006.
1. The third named applicant is a citizen of Ireland and was born in the State on 27th March, 2003. He is the son of the first named applicant who is a national of Nigeria and arrived in the State in March, 2003. The second named applicant is also a son of the first named applicant who was born in Nigeria in 2001.

2. The first named applicant is stated to have submitted an application on form IBC/05 on 26th April, 2005 which was received by the respondent on 5th May, 2005, seeking permission to remain in the State based on the parentage of her Irish citizen child.

3. By letter dated 29th November, 2005 she was informed:

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to the IBC/05 application form submitted by you in connection with the revised arrangements announced by the Minister on 15th January 2005 for the processing of applications for permission to remain in the State from the non-national parents of Irish born children born before 1st January 2005.
>
> As stated on the application form, and in the Minister's announcement, the closing date for the submission of applications for consideration under the revised arrangements was 31st March 2005. Your application, which was received by this Department on 5th May 2005, was too late for consideration. Accordingly I am to inform you that an application from you cannot be considered under the revised arrangements.
>
> The IBC/05 application form and your original supporting documents are returned herewith."

4. As appears from the above, the decision of the respondent was to refuse to consider the application under the revised arrangements.

5. Subsequent to that refusal, it appears that the applicant consulted with Sean Mulvihill & Co., Solicitors, and they then wrote on her behalf a letter dated 15th December, 2005 which was headed "Application for permission to remain on the basis of parentage of an Irish born child born before 1 January, 2005" and then the applicant's name and reference. The solicitors then stated, "Please find enclosed application for the above applicant with the following" and then enclosed twelve documents the first of which was the IBC/05 application completed on 26th April, 2005. The remaining documents were documents in support of the application for leave to remain, including certain documents which purported to confirm the residency of the first named applicant in Ireland in the period since the birth of her citizen child. The solicitors then stated:

> "As you can see there is compelling evidence that the applicant was residing in Ireland with her Irish born child, and I would ask you therefore to grant her leave to remain at your earliest."

6. In response to this application, the letter already set out above of 29th November, 2005 was re-issued on 19th December, 2005.

Leave and grounds
7. By order of the High Court of 13th February, 2006 the applicants were granted leave to apply by way of an application for judicial review for:

> 1. An order of *certiorari* by way of an application for judicial review quashing the decision of the respondent, dated 29th November, 2005 and re-issued by letter dated 19th December, 2005 refusing to consider the first named applicant's application for permission to reside in the State;
>
> 2. An order of *Mandamus* by way of an application for judicial review directing the respondent to consider the application of the first named applicant to reside in the State with the second and third named applicants.upon the grounds set out in the statement of grounds.

Related proceedings and judgment
8. These proceedings were heard immediately after the first set of five proceedings listed in the judgment delivered by me herein today in *Deborah Olarantimi Bode & Ors. v. the Minister for Justice, Equality and Law Reform* [2006 No. 102 J.R.). In the submissions the applicants relied upon the submissions made in those proceedings insofar as relevant to the reliefs and grounds in respect of which leave was granted in these proceedings.

Challenge to validity of decisions
9. As in many of the other applications in the related proceedings, the primary submission made was that each of the decisions of 19th November, 2005 and 19th December, 2005 was unlawful or invalid in that they were taken without any consideration of the personal rights of the Irish citizen child guaranteed by Article 40.3 of the Constitution and in breach of the citizen child's right to respect for his private life under article 8 of the European Convention on Human Rights as implemented in the State.

10. The essence of the submission made in response on behalf of the respondent was that having regard to the time limit specified in

IBC/05 the respondent was not under any obligation to consider the rights of the Irish citizen child either by reason of Article 40.3 of the Constitution or article 8 of the Convention. It was further submitted that the second application made by Ms. Adio's solicitors on her behalf on 15th December, 2005 should properly be construed as simply a repeat of her application under the revised arrangements on IBC/05 and should not be considered as a separate or a "free-standing" application for permission to remain in the State or residency.

Effect of time limit in IBC/05

11. For the reasons fully set out in the *Bode* judgment delivered today, I have concluded that having regard to the announcement made on 15th January, 2005 by the respondent and other documents referred to therein that the revised arrangements announced were essentially a revised procedure for the making and consideration of applications to remain in the State from parents of Irish born children born before 1st January, 2005. Further, the Minister in making that announcement committed himself to consider and determine an application for permission to remain in the State made by the parent of an Irish born child born before 1st January, 2005 on IBC/05.

12. Also, for the reasons set out in the same judgment, I have concluded that the Minister in establishing the revised arrangements which became known as the IBC/05 Scheme and in receiving, processing or considering and determining applications made on IBC/05 is exercising the inherent executive power of the State to control aliens which is now derived from Article 6 of the Constitution. Also, that subject to the obligations arising under the Constitution and s. 3 of the European Convention on Human Rights Act, 2003 applicable to the exercise of such discretionary power, that the Minister retained a discretion as to the matters to be considered and the criteria according to which such applications should be determined.

13. In the announcement of 15th January, 2005 it was stated expressly "completed applications must be submitted before the end of March, 2005". The effect of this provision appears to be the following. The Minister cannot be considered to have committed himself to consider and determine an application made on IBC/05 which was submitted after the end of March, 2005. The express commitment made having regard to the terms of the announcement on 15th January, 2005 must be considered to be limited to those applications which were submitted prior to the end of March, 2005.

14. However, there is nothing in the express terms of the revised arrangement which precludes the Minister from considering an application made on IBC/05 after the end of March, 2005.

15. As stated in the *Bode* judgment, it is common case that the inherent power of the Minister in relation to aliens includes the power in his discretion to receive, consider and determine an application for residency or leave to remain in the State from a non-national independently of any express statutory scheme such as the procedure envisaged by s. 3 of the Act of 1999. Accordingly, on receipt of an application from Ms. Adio on IBC/05 the Minister had a power in his discretion to receive, consider and determine that application. Where, as in this instance, that application was an application for permission to remain in the State by the parent of an Irish citizen child also in the State, for the reasons fully set out in the *Bode* judgment it appears to me that such discretion as to whether or not he will consider and determine the application must be exercised in accordance with the rights of the citizen child protected by the Constitution which includes having regard to the State guarantee of the personal rights of the citizen child under Article 40.3.1.

16. As I concluded in the *Bode* judgment, in relation to Mr. Bode's separate application for residency, it appears to me that such principles require, at minimum, that where the Minister receives an application for permission to remain in the State from the parent of an Irish citizen child must by a fair an proper inquiry into the circumstances of the citizen child and his or her family consider and determine whether or not the respect for and defence and vindication of the child's personal rights and in particular the right to live in the State require that he should then consider the application for permission to remain in the State. It does not appear to me, having regard to the guarantee of the personal rights of the Irish citizen child in Article 40.3, including the right to live in Ireland and the welfare rights set out in *G. v. An Bord Uchtála* [1980] I.R. 32, that it is open to the respondent, without consideration of the relevant facts and rights of the citizen child to refuse to consider the parent's application for permission to remain in the State.

17. Accordingly, I have concluded that in relation to the application submitted on 26th April, 2005 by the first named applicant, whilst the Minister was not obliged by the terms of the revised arrangements known as IBC/05 to consider that application, neither was he precluded from doing so by the terms of the IBC/05. He retained a discretion to consider and determine the IBC/05 application and having regard to the existence of that discretion he was bound in determining whether or not to consider the application to consider the personal rights of the citizen child protected by Article 40.3 and to exercise the discretion so as to respect and as far as practicable vindicate and defend the qualified right of the citizen child to live in Ireland.

18. No submission was made that any interest of the common good required the respondent to refuse to consider an application on IBC/05 submitted after the 31st March, 2005, without considering the constitutionally protected rights of the citizen child. Submissions were made as to the necessity for a time limit but not for a time limit which automatically excluded consideration of a late application where the vindication of the citizen child's constitutional right to live in Ireland so required.

19. Accordingly, I have concluded that the decisions made herein to refuse to consider the applications of the first named applicant for permission to remain in the State were invalid as they did not consider the personal rights of the citizen child and were taken in breach of the third named applicant's rights under Article 40.3 of the Constitution.

20. For the reasons set out in the Bode judgment the third named applicant also has a private life in the State within the meaning of article 8 of the Convention which demands respect from the respondent. Further, it appears to me that the principles set out in the Bode judgment in relation to article 8 apply equally to the decision taken herein to refuse to consider the application on IBC/05 as they apply to the decisions to refuse the applications on IBC/05.

21. Accordingly applying those principles to the decision taken herein I have concluded that the decision to refuse to consider the first named applicant's IBC/05 application without considering the right to private life in the sense of the constitutionally protected personal rights of the citizen child was an interference with the citizen child's right to respect for his/her private life within the meaning of article 8.1 of the Convention.

22. Counsel for the respondent made some submissions in justification of the refusal to consider the late application. However detailed submissions based on article 8(2) were not made. I am not satisfied that the respondent has established that the decision is justified under article 8.2. One reason is that such a decision must be taken *inter alia* "in accordance with law". Blake and Husain Immigration, Asylum & Human Rights (Oxford University Press, 2003) state: Domestic law is not law for the purposes of the ECHR if it is not adequately accessible and precise so that its consequences are foreseeable and a law conferring a discretion must indicate the width of that discretion (*Sliver v. United Kingdom* [1983] 5 EHRR 347). The executive discretion being exercised by the respondent herein

does not *prima facie* appear come within such a definition.

23. Accordingly it appears to me that the decision to refuse to consider the first named applicant's IBC/05 application must also be considered to have been in breach of article 8 of the Convention and hence contrary to s. 3(1) of the Act of 2003.

Relief
24. For the reasons set out above the applicants are entitled to an order of *certiorari* quashing the decision of the respondent dated the 29th November, 2005 and reissued by letter dated the 19th December, 2005, refusing to consider the first named applicant's application for permission to reside in the State and an order remitting that application for consideration and determination in accordance with law.