Neutral Citation Number: [2009] IEHC 125

THE HIGH COURT

JUDICIAL REVIEW

2008 1182 JR

BETWEEN

FL. K. – M. AND FA. K. – M. (A MINOR SUING BY HIS MOTHER

AND NEXT FRIEND FL. K. - M)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Charleton delivered on the 16th day of March, 2009

1. The first named applicant came from Nigeria to Ireland in May, 2005 making a claim that she was a refugee. A few weeks later she gave birth to the second named applicant. It cannot be assumed that a parent who claims refugee status wishes to have any or all of their children included in their claim. It can happen that a child might be under a different threat to a parent. When the first named applicant applied to the Refugee Applications Commissioner, however, she indicated an affirmative response to the question as to whether she wished to have her child, the second named applicant, included as part of her asylum application. This happened. In addition, the first named applicant had a number of other children in Nigeria. These she left behind on coming to Ireland. One child arrived here later and claimed refugee status. All of these applications were rejected before the statutory bodies and, as regards these applicants, a deportation order was made by the respondent Minister in September, 2008. The first and second named applicants seek leave to commence a judicial review challenge to these orders.

Separate Consideration

2. The applicants claim that they were given no separate consideration as regards the various threats which the first named applicant, as mother, and the second named applicant, as an infant, would meet if returned to Nigeria. The first named applicant had previously brought a different judicial review application to an earlier deportation order. This was compromised and it resulted in a second analysis being conducted in relation to her deportation prior to the Minister signing that order. The second named applicant, a child of three years of age, has brought no challenge to the various analyses conducted on behalf of the Minister and by the statutory bodies up to this present application. The child seeks to do so now and, in that regard, requires an extension of the period of fourteen days within which such a review must be commenced, as set out in s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended. The delay involved in the second named applicant's case is very substantial. Since the child was included in the claim for refugee status before the Refugee Applications Commissioner, and since the Commissioner decided that case on the 23rd November, 2005, against both applicants, the delay exceeds three years. Both applicants appealed to the Refugee Appeals Tribunal and that statutory body decided against the applicants on the 31st March, 2006, a delay of just under three years at the time of judgment. The delay following upon the notification of the deportation order in September, 2008 does not meet the time limits, but it is far less substantial. I will return to the delay point.

3. The principle of family unity operates in favour of those who are declared to be refugees by the relevant statutory bodies. It does not operate against them. In consequence, when one member of a family is entitled to refugee status, the principle of family unity may, depending on the circumstances, allow for the reunification of that family in its nuclear make-up of mother, father and dependent minor children. Looking at it the other way, however, the converse is not correct as a matter of law. Because a mother or a father is not entitled to refugee status, that does not automatically mean that a child can never be entitled to refugee status. A child may, for instance, be the subject of a particular kind of peril independent of its parents. This was put in the following way by Finnegan J. in A.N. & Ors v. Minister for Justice, Equality and Law Reform & Ors [2007] IESC 44 at p. 8:-

> *"Taking guidance from the [UNHCR] Handbook I am satisfied that on an application by a parent of a minor child the Minister under the non-statutory regime could deal with that application without having regard to the minor. If the application succeeds the minor should be given refugee status. If the application is unsuccessful then the minor is entitled to apply for refugee status based on his own circumstances and reasons. The [UNHCR] Handbook does not envisage the parent's application as being also an application on behalf of the minor nor that on failure of the parent's application the status of the minor should be determined without regard to his individual circumstances or reasons. Thus the Minister was in error in treating the next friend application as being one on behalf of the minors also. The next friend's application was not an application by the minors but if successful, applying the principle of family unity, would benefit them. In the present case there was no application by or on behalf of the minors. Accordingly on the central issue on the application for judicial review there had been no application by or on behalf of the minors and the Immigration Act 1999 section 3(2)(f) did not apply to them: the basis upon which the Minister purported to make deportation orders in relation to the minors did not exist."*

4. Here, the situation was different. The first named applicant, as mother, made an application for refugee status on behalf of her child. Reading through the entire of the circumstances which she alleged as constituting persecution, within the meaning of s. 2 of the Refugee Act 1996, as amended, it is clearly apparent that no separate case was made, or

could be made, on behalf of her child. It is argued that there was only one reference to the second named applicant in the course of the analyses conducted by the statutory bodies. That is correct. It is also correct to say that if there was credibility in what she alleged as persecution, that this might possibly extend to the second named applicant, or to one of her other children. If there was no credibility in that claim, this allegation could not possibly be made. In terms of what she asserted to be the truth, there was no separate focus of persecution as between her and her children made out in terms of what had allegedly happened to her in Nigeria, or in terms of the obligation of the statutory bodies to consider the test as to what might happen in the future. Her credibility, was therefore, central.

Credibility

5. A person may be a refugee because they have been persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; Refugee Act 1996, s. 2, as amended. That persecution may take various forms. At its most obvious, the treatment of the Armenians in the Ottoman Empire in 1917, or the treatment of the Jews, Slavs, homosexuals, Gypsies, handicapped people and dissidents in Nazi-occupied Europe are clear examples. Persecution can take place through the State engineering surrogates, as with the Interahamwe militia in Rwanda in 1994, or it can be disguised through practical indifference. It is very hard, however, to see private disputes between neighbours as coming within the definition of persecution. Disguised persecution, in that context, would have to be made out as a continuing process, involving a genuine forward looking fear of recurrence, where the country of origin is shown to have a deliberate policy of non-intervention because it treats a particular group in a discriminatory manner. Where within a country of origin, a person has a fear of serious violence due to random occurrence, then an absence of state protection is also a required component in that kind of case requiring subsidiary protection. The first duty on any alleged refugee claiming persecution or serious random violence is to relocate themselves within their country of origin before they seek international protection in the form of refugee status or subsidiary protection; FR. N. v. the Minister for Justice, Equality and Law Reform [2008] IEHC 107 at para. 33.

6. The first named applicant did not come within the category of a person entitled to refugee status, or otherwise entitled to subsidiary protection. Regrettably, she also presented to the statutory bodies as a person without credibility. I will now briefly refer to her claim.

7. The plaintiff claimed to come from a Christian family. She entered into marriage with a young man who came from a Muslim family. Her parents in law were unhappy with this mixed marriage situation. However, from the time of her marriage in November, 2001, through to the time of her alleged flight in May, 2005, she was left in peace. She had a number of children. She did not provide a satisfactory account of how she travelled to Ireland. The Refugee Applications Commissioner described this as "highly questionable". In addition, she had no passport or other reliable means of identification. Whereas it can be expected that a person who flees across borders in consequence of persecution may have no reliable forms of identification, it is difficult to see how a private dispute could have left the applicant without the ability to apply to her embassy in Ireland with a view to proving, at the very least, that she was applying to the statutory bodies under a correct name. Instead, an account was given of a benefactor who had paid for a trafficker, and who used a false passport that the applicant never saw. She arrived in Ireland through various international borders without anyone picking up on these obvious facts. I am not saying that this can never happen in genuine cases. The statutory bodies were entitled to have regard to s. 11B of the Refugee Act 1996, as amended. An applicant for refugee status, or for subsidiary protection, has a very basic duty to furnish relevant facts in a genuine way. The statutory scheme allows the statutory bodies to test credibility against a number of basic principles. On some of these, and in many other ways, the applicant failed to establish credibility. In addition to what has been mentioned, there was the following:-

1. The applicant claimed that she moved to Ireland, rather than another part of Nigeria, because "she had been confused and depressed at the time".

2. She claimed that she had no input into the decision to travel to Ireland because everything had been done for her "by her church".

3. It was unexplained how she was able to live peacefully with her husband for a period of four years and have several children, notwithstanding threats from her in-laws of a different religious persuasion.

4. She did not seek to relocate herself within Nigeria, notwithstanding good qualifications at third level possessed by herself and by her husband.

8. Finally, the tribunal made the following point:-

> *"In view of the above it would appear that the applicant's efforts to seek the protection of the authorities in her country against the alleged threats were half-hearted at best. Being unable or unwilling to avail herself of the protection of her country implies circumstances that are beyond the will of the person concerned. What constitutes a refusal of protection must be determined according to the circumstances of the case. It appears to me that in this case, bearing in mind the educational background of the applicant and that of her husband that the attempts made to seek the protection of the Nigerian State were not characterised by commitment and perseverance and accordingly, I feel that the underlying intention was questionable."*

9. In the two analyses conducted on behalf of the Minister, prior to the deportation order being made against the first and second named applicants, much of what I have recited is mentioned. In addition, there are a number of references to her child. The questions of her right to a private life, and family life, under Article 8 of the European Convention of Human Rights, and to be free from inhuman and degrading treatment under Article 3 of the Convention, are also considered.

10. The basic problem on behalf of both applicants is the lack of credibility of the first named applicant. If what she said does not have credibility, she cannot qualify under any of the criteria laid down for any form of temporary international protection. What was asserted as true on her behalf was also clearly said on behalf of the infant child, then less than a year old. It is impossible to conclude that the child could have some form of credibility in relation to persecution, or the need for international protection, when no credible case was made out on behalf of the family unit of which that child is a member. Further, it was reasonable on behalf of the statutory bodies to approach that issue in the manner in which they did.

11. The international Convention on the Rights of the Child, which was adopted by the General Assembly of the United Nations in 1989, forms part of the international obligations of the State. It is has not been given statutory force. Therefore, it is only in the case of an ambiguity in the construction of a statute that I am entitled to have regard to Article 3 of the Convention, which provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Since there is no ambiguity in any of the provisions to which I have had regard, I am not entitled, as a matter of law, to enforce it. Were I to do so, the issues as to the first named applicant's identity, her credibility and her means might come very much to the fore.

Health

12. In reviewing the deportation order I am bound by what was said by Murray J. in A.O. and D.L. v. Minister for Justice, Equality and Law Reform [2003] 1 I.R. 1 at p. 86:

> *"It is an inherent and fundamental right of the State to control and regulate immigration. Its right, and even its duty to do so, arises in the interests of the common good which includes the maintaining of true social order within its territory and concord in its relations with other nations."*

13. In making the deportation order as against the applicants, the respondent Minister followed the statutory procedure set out under the Immigration Act 1999, s. 3, as amended. In addition, the prohibition on refoulement in s. 5 of the Refugee Act 1996, was also considered in detail. The principles set out by Clarke J. in Kouaype v. Minister for Justice Equality and Law Reform [2005] IEHC 380 are persuasive authority on the court. In addition, I am persuaded that I should have regard to what Clarke J. decided in Kozhukarov v. Minister for Justice, Equality and Law Reform [2005] IEHC 424, in granting leave to seek judicial review. There, he held that there were arguable grounds that the European Convention on Human Rights might give persons within the jurisdiction, who were foreign nationals, rights which should be weighed in the balance as against the right of the State to control its immigration policy. He put it in this way:-

> *"It seems to me that there are strong grounds for arguing (more than sufficient to establish the threshold of substantial grounds required at this stage) that, in addition to the matters identified in Kouaype, it is also, in principle and provided that the appropriate facts can be established, open to a party to seek to challenge the making of a deportation order (or in an appropriate case a refusal to revoke a deportation order) where it can be shown that there are substantial grounds for arguing that the making of (or refusal to revoke) such an order would be in breach of any other legal obligation on the part of the Minister (that is to say an obligation other than those imposed by s. 5 of the 1996 Act or s. 3(6) of the 1999 Act. For example, a number of cases have come before the courts where reliance is placed on the Criminal Justice (United Nations Convention Against Torture) Act, 2000. While in most cases it will, as a matter of practice, be the case that a person who has been properly refused refugee status will be unable to establish an entitlement to prevent the Minister from making a deportation order under that Act, there is the possibility that there may be some cases where the facts establish a possibility that a person might be subjected to torture on being returned to a country where that risk could not be said to be for a convention reason sufficient to justify conferring refugee status. It is, therefore, possible that there may be cases where a person would, quite properly, be refused refugee status but would nonetheless be entitled to require the Minister to refrain from deporting them under s. 4 of the 2000 Act. Should a case to that effect be made to the Minister then the Minister must, of course, fully and properly consider any such case and may not, in those unusual circumstances, be entitled, in so considering, to place the same weight that would otherwise attach to the failure of the same applicant to succeed in persuading the relevant statutory bodies as to his or her entitlement to refugee status. Similar considerations may apply in respect of family or other rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). It seems to me that it is arguable, sufficient for the purposes of leave that, in principle, an independent ground for seeking to challenge a deportation order (that is to say a ground independent of any contention that the Minister failed to properly consider s. 3(6) of the 1999 Act) may be to the effect that the making of a deportation order by the Minister in all the circumstances of the case concerned would amount to an impermissible infringement of the rights which the party concerned might have under the Convention. While, as I pointed out in Kouaype, the weighting of the various matters specified in s. 3(6) of the 1999 Act, is, in accordance with the authorities cited in that case and as a matter of pure domestic law, entirely a matter for the Minister, that does not mean that there are not cases where, in order that he act in a manner sufficient to ensure that the State comply with its obligations under the Convention as brought into effect in domestic law, the Minister may be obliged, as a matter of Irish law, to refrain from making the deportation order concerned or, in appropriate cases may be obliged to revoke such an order."*

In Agbonlahor v. Minister for Justice, Equality and Law Reform [2007] IEHC 166, Feeney J. emphasised the distinction between removing a person seeking international protection from the State to a place that they were at risk of being subject to torture or inhuman or degrading treatment, and a situation where it was necessary to balance the rights of an applicant who, by reason of his or her medical or family circumstances, was seeking to remain in Ireland as against the entitlement of the State to control its immigration policy. Extreme circumstances or ill health could mean that the balancing of the rights of the State, as against those of the individual under the European Convention on Human Rights, might lead to the prohibition on a deportation order; D. v. United Kingdom (1997) 24 EHRR 423. In Agbonlahor, however, Feeney J. noted that it was only in the most extreme of circumstances that the State would be prohibited from deporting an individual on the basis of their ill health. Having analysed the relevant authorities from the European Court of Human Rights he held:-

> *"[A] correct interpretation of the Strasbourg authorities imposes an obligation on States not to interfere with the private life of individuals by their own actions. The authorities identify that there is an extension of that principle in relation to extradition type cases but that that extension is extremely limited and exceptional and only arises where there is a genuine and true risk that the authorities in the receiving State would commit acts upon an individual which would breach that person's rights under the Convention in the event that he is removed to that country."*

14. None of the authorities from the European Court of Human Rights, and none of the authorities from countries which are parties to the Convention, establish that it was the purpose of the Convention to draw into the territory of any of the contracting states, persons who thereby would receive better health care than in their country of origin.

15. In addition, the applicant continues to have the basic problem of credibility. I will not describe her illness, save to say that it is not currently life threatening. The medical report furnished on her behalf indicates that she had a previous bout of the illness some twelve years ago. From this, she recovered. She now seeks to claim that she may become seriously ill if returned to Nigeria, and she may be unable to pay for medication. The statutory bodies were not in a position to assess this claim, because it was not made to them. The Minister was not in a position to assess this claim as having any credibility given the first named applicant's basic lack of credibility from the account which she gave. Nor was she ever in the position of such extreme ill-health as to invoke the aid of Article 3 of the Convention.

16. There was, therefore, nothing incorrect in the manner in which the respondent Minister approached this matter.

Precedent and Delay
17. This case was delayed pending the delivery by Irvine J. of her judgment in J.A. & Anor v. the Refugee Applications Commissioner & Anor [2008] IEHC 440. As a matter of principle, it is important to seek to follow the decisions of other judges of the High Court unless there is a strong reason for not doing so. That judgment considered the issue of an extension of time sought by a child applicant when no claim had been made against any decision by any of the statutory bodies in the context of an application for refugee status by its parent. In the course of her judgment refusing to extend time for the making of a judicial review application, Irvine J. stated the following, with which I respectfully agree:-

> *"In my view, the potential challenge does not demonstrate substantial grounds upon which these decisions can be challenged principally because the first named applicant in her affidavit does not set out what facts she would have given to the interviewer or to the Tribunal had she been specifically asked to address the issue of D.A's fear of persecution should he be returned to Nigeria. She does not disclose any facts which are different from those which she relied upon herself to support her own application for refugee status that would have or could have altered the decision of the Commissioner or indeed the Tribunal in respect of the second named applicant's application for refugee status.*
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> *In any case where an extension of time is sought there is an onus on the party seeking it to show how that extension of time, if granted, will effect the ultimate outcome of the proceedings on their merits. Such applicant should be in a position to demonstrate that justice would not be done if the extension of time was not granted having regard to the potential strength of his or her case. The opposite scenario presents in the present case. The second named applicant seeks an extraordinarily lengthy extension of time. J.A., on his behalf, criticises two decisions made within the statutory asylum process. She seeks to have those decisions quashed so that her son may recommence his application for refugee status. However, she makes this application without telling the Court what facts she would have presented to the Commissioner or the Tribunal, had they conducted the type of inquiry she suggests was mandated. She reveals no facts to demonstrate that there was any likelihood of either the Commissioner or the Tribunal coming to the view that D.A. could have a well founded fear of persecution even if they had conducted further or more extensive inquiries.*
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> *The facts in the within case are reasonably on all fours with those in E (B.V.) v. E (O.N.) v. Minister for Justice and Refugee Applications Commissioner [2008] I.E.H.C. 230. In that case a mother agreed to the incorporation of her daughter's asylum claim within her own. No specific fears or concerns for her daughter were advanced by the adult applicant. In her affidavit sworn for the purposes of the judicial review proceedings the infant's mother indicated for the first time that she would have wished to advance fears in relation to the genital mutilation of her daughter and also her concern that the Nigerian police would not have been able to offer effective protection to her daughter, had she been permitted to do so in the course of her interview. In that case, the infant's position was significantly stronger than the position of the second named applicant in the present case. The minor applicant's mother placed on affidavit those facts which she states she would have brought to the attention of the Commissioner had he conducted a separate investigation into whether her daughter had a well founded fear of persecution in the event of her returning to Nigeria. Further, the nature of the persecution feared by her daughter was based on facts which were somewhat different from those which supported her own fear of persecution in the event of her being returned to Nigeria. In the present case no such affidavit has been sworn setting out the basis for the second named applicant having a well founded fear of persecution should he be returned to Nigeria and the grounding affidavit does not set out any facts which would support him having a fear based upon matters and circumstances which were in any way different from those which supported the first named applicant's claim for refugee status."*

Result
18. In the result, I am refusing to extend the time in favour of the second named applicant for the bringing of an application to seek leave to commence judicial review proceedings. In addition, there is insufficient persuasive weight in any of the points raised in this application for judicial review that were ably argued on behalf of the first and second named applicants.