Neutral Citation Number: [2010] IEHC 306

THE HIGH COURT

JUDICIAL REVIEW

2007 925 JR

BETWEEN

M. I. AND P. E. M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND M. I.)

APPLICANTS

AND

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

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Cooke delivered the 27th day of July, 2010.

1. By order of 3rd December, 2009, (Clark J.) the Court granted leave to the applicants to seek an order of *certiorari* by way of judicial review to quash four decisions (the "Contested Decisions",) adverse to them as follows:

> (1) A report dated 23rd March 2006 made under s. 13 of the Refugee Act 1996 with a negative recommendation on their asylum applications;
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> (2) A decision of the Refugee Appeals Tribunal dated 13th July, 2006, rejecting an appeal against that report;
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> (3) A decision of the Minister of 21st August, 2006, refusing them refugee status under s. 17 of the 1996 Act; and
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> (4) A further decision of the respondent Minister dated 27th June, 2007 refusing their application for subsidiary protection.

2. The present judicial review proceeding was initiated on 17th July, 2007 and was therefore over a year after the section 13 report and the appeal decision. Although leave was granted by the order of 3rd December, 2009, the question as to whether good and sufficient reason had been established for extending the time for the judicial review application pursuant to s. 5 (2) a) of the Illegal Immigrants (Trafficking) Act 2000 was expressly left over to be addressed at the substantive hearing.

> The two grounds for which leave was granted were as follows:
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> 1. "The manner in which the first named Respondent procured the purported inclusion of the second named Applicant in the asylum application of the first named Applicant was void *ab initio*, the same having been in breach of fair procedures and/or the purported ASY 1 form and the Notice including the second named Applicant in the first named Applicant's asylum application and both dated 16th March, 2006 having resulted from coercion and/or were obtained *in terrorum* of the first named Applicant."
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> 2. "By reason of the foregoing, the second and third named Respondents lacked jurisdiction to make the impugned decisions in respect of the second named Applicant."

3. Whatever reservations might be expressed about the grant of leave without extending time where the fourteen day period has been exceeded, it is clear that this Court could not entertain the substantive application for judicial review of the first three of the four above decisions unless and until the time extension issue has been resolved. Section 5, (2) (a) does not apply to the subsidiary protection refusal.

4. The background to the proceeding and to the particular circumstances of this year long delay in bringing the judicial review application can be summarised as follows. The first named applicant, ("the mother",) claims to have fled Nigeria in September 2005 and to have arrived in the State on 3rd November, 2005. She was pregnant at the time and her son the second named applicant was born here on 22nd December, 2005. She applied for asylum on 3rd November, 2005 and attended for a s. 11 interview at the offices of the Refugee Applications Commissioner on 9th March, 2006. According to her affidavit, as appears to be confirmed by an entry on page 3 A of the s. 11 interview report, she was asked by the authorised officer what she wished to do about her child and she said she wanted to have a separate application made. For this purpose she was told to return on 16th March. She did so and on that date an ASY 1 form was completed in respect of the child and the same reference number as on the mother's file was attributed to it with the addition of the letter "c" thus, 69/2405/05C.

5. The ASY 1 form records under the heading "Additional Information Collected during the Section 8 Interview" the following: "This child applicant is attached to his mother's file. Child's DOB used for arrival and departure date from country of origin." No separate s. 11 interview took place before the s. 13 report issued on 23rd March, 2006. In the heading to the report the son is identified as "dependant applicant covered by this application". A notice of appeal dated 21st April, 2006 was lodged by the Cork branch of the Refugee Legal Service ("RLS"). Only the first named applicant is named in its title but the son is included under the heading "Details of all Family Members Spouse and Children living in the State" and his file reference number 69/2405/05C is given.

6. The appeal hearing took place on 22nd May, 2006. The appeal decision of the Tribunal dated 13th July, 2006 contains the

statement "It was indicated to the Tribunal that the applicant wanted her child's case considered with her application. The appeal reference number in that case is 69/2405/05C, the child is male and was born on 22nd December, 2005". The applicant was represented at the hearing by counsel instructed by the RLS.

7. Following rejection of the appeal the Minister wrote on 21st August, 2006 refusing a declaration of refugee status under s. 17 of the 1996 Act in a letter which was addressed to both mother and child. This letter outlined the "options open to you and your child" which included, "…making representations to the Minister setting out reasons as to why you and your child should be allowed to remain temporarily in the State". By letter of 4th September, 2006 new solicitors retained by the mother, Messrs. Sean Mulvihill & Co., made such representations calling them "Humanitarian Leave to Remain Appeal". In the course of those representations the solicitor said "The applicant will also be applying for asylum for her Irish born child as she told the interviewer that she was to apply for separate asylum for her child and I am rather surprised therefore that the applicant's child's name is included in the application for leave to remain". (Presumably this reference to "the application" is not to Mr. Mulvihill's own letter but to the Minister's letter of 21st August, 2006, inviting representations.) The letter concludes: "I would ask you therefore to grant the applicant and her Irish born child leave to remain on the basis of what I have outlined".

8. The European Communities (Eligibility for Protection) Regulations 2006 came into operation in October 2006 and by letter dated 14th December, 2006, the Repatriation Unit of the Department wrote to both applicants informing them that before deciding their application for leave to remain they were invited to apply for subsidiary protection and also to update their current representations for leave to remain. On 28th December, 2006, Mr. Mulvihill sent the Unit the two forms for subsidiary protection and updating representations. The child was not separately named in the subsidiary application although it stated that the mother "also fears for the safety of her child". The subsidiary protection application was refused in a letter dated 27th June, 2007, addressed to both applicants which enclosed a memorandum setting out the analysis of the application in the heading to which the son is identified as "Dependent included in this Application". Supplemental representations for leave to remain sent by letter of 2nd December, 2006, included a letter from Temple Street Children's Hospital fixing an appointment for the son on 9th January, 2007 in its Craniofacial Clinic.

9. It is in those circumstances that the argument for quashing the Contested Decisions as reflected in the grounds for which leave was granted arises namely that the mother never intended her son's application to be considered with and as part of her own. She claimed to have expressly asked for and to have understood that she would get a separate asylum process for her infant son. The four Contested Decisions are thus claimed to have been made *ultra vires* the powers of the respective decision makers so far as the son is concerned.

10. The immediate issue before this Court however is whether there is good and sufficient reason to extend the time to enable such a claim to be entertained. The extension required is substantial being over a year for the s. 13 report in the appeal decision and eleven months for the s. 17 decision of the Minister. The law in this regard is not in doubt. While the discretion of the Court can be exercised generously having regard to the short period of fourteen days required by the section. There must nevertheless be some basis in evidence upon which the discretion can be exercised in that there must be some acceptable explanation for the delay involved and some justifiable excuse for it. (See the judgments of the Supreme Court in *D. & Another v. Minster for Justice* of 31st January, 2003.) The apparent merits or strength of the case to be made may also be relevant in that good and sufficient reason for extending the period of fourteen days may lie in an injustice that could be caused to an applicant if a refusal precludes access to the Court for the determination of an issue of a serious nature with important consequences for the applicant (see the judgment of Hardiman J. in *G.K. v. The Minister* [2002] 2 I.R. at 418).

11. In this case the Court is satisfied that no full explanation or convincing excuse has been put before the Court for the year long delay. On the contrary, the evidence available points strongly to the conclusion that any possibility of seeking judicial review at an earlier stage, if considered, was rejected in favour of the alternative and perfectly understandable courses of seeking humanitarian leave to remain and then subsidiary protection. The evidence also strongly implies that there was at least an acquiescence in the inclusion of the son's application in the consideration of the mother's application as from the receipt of the s. 13 report.

12. The following points illustrate why these conclusions appear to the Court to be inevitable.

> (i) The notice of appeal against the s. 13 report included the son as a dependent with his distinct file reference number being given.
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> (ii) The Tribunal decision expressly included the son's case but no exception or challenge was taken to it at the time.
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> (iii) On 28th July, 2006, the mother had been advised in writing by her solicitors that the solicitor had "looked carefully at the decision and I do not believe that there are grounds to bring judicial review proceedings".
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> (iv) Although the representations of 4th September, 2006 express surprise at the Minister's letter being addressed to both applicants, they nevertheless explicitly sought leave to remain for both applicants.
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> (v) The representations also claimed that the mother "will also be applying for asylum for her Irish born child" but no separate application was in fact made.
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> (vi) If Mr. Mulvihill had been told prior to 4th September, 2006, by the mother of her request to the authorised officer for a separate application for her son; if he was surprised at the absence of such an application and had instructions to pursue such an asylum claim he was then in a position to advise the mother at that point as to the possible alternative legal remedies but only that of leave to remain was pursued.

13. Thus the apparent explanation for the one year delay is this. At first the mother was advised that judicial review was not possible and that appears to have been accepted. After receipt of the Minister's s. 17 decision the applicant was given Mr. Mulvihill's name and, whatever his surprise at the absence of a separate application for the son, a decision was taken to apply for humanitarian leave to remain for both. When later the possibility of applying for subsidiary protection was opened up it was availed of. Although Mr. Mulvihill was already alive to the allegedly separate position of the son, no point was raised as to the fact that the letter of 14th December, 2006, which was addressed to both and a single application for subsidiary protection was lodged notwithstanding the fact that it was clear from the Minister's letter that no separate application for the son could be considered after the expiry of fifteen days. In those circumstances the only rational conclusion that can be drawn is that the application was intended to respond to the invitation as made and to cover both mother and son. Given that this opportunity to claim subsidiary protection gave the applicants a renewed possibility of advancing any claim on behalf of the son which might have been the basis for a separate claim for asylum, the Court can only conclude that in the absence of any distinct asylum claim as implied in the representations of 4th September, 2006

and of any challenge to the inclusion of the son in the appeal decision, the subsidiary protection application was opted for instead of pursuing any belated challenge to the Tribunal decision.

14. In an affidavit Mr. Mulvihil has said that the judicial review proceedings were not opted for in 2006 because he did not then appreciate the significance of the *ex debito justitiae* principle until reading the judgment of Mr. Justice McCarthy in the case of Oloo Omee & Others v. RAT. Quite apart from the discrepancy that this judgment was delivered on 31st March, 2009, while the present proceeding was actually commenced in July 2007, it is questionable whether the principle *ex debito justitiae* has any relevance in the context of a failure to comply with specific statutory conditions for access to *certiorari* by way of judicial review such as those prescribed by s. 5 (2) a) of the Act of 2000. Leaving aside cases in which the impugned measure is a criminal conviction, *certiorari* is a remedy of the discretion of the court in respect of measures of civil administrative jurisdiction in the sense that an applicant may establish the unlawfulness of the impugned measure and yet be refused the order because of some factor in the applicant's conduct such as lack of candour or full disclosure, bad faith or delay. The judgments of the Supreme Court in *de Roiste v. Minister for Defence* [2001] 1 I.R. 190 strongly suggest that in such cases the remedy is always to be treated as discretionary. Whatever the law may be as regards any lingering possibility of the principle of *ex debito justitiae* applying to challenges to civil administrative measures, it seems to this Court that it cannot apply in a case where there has been a clear and substantial failure to meet the statutory limitation period of section 5 (2). The Court has no jurisdiction to entertain the application in such a case unless it is first satisfied on appropriate evidence that there is in fact good and sufficient reason to extend the time. An applicant cannot be said to be entitled to an order of *certiorari* as of right because the ground invoked asserts that the decision is made without jurisdiction if the statutory condition for access to the remedy has not been met.

15. Finally, so far as the merits of the proposed case are concerned, the Court is not satisfied that a refusal to extend the time in this instance has the effect of excluding consideration of any serious claim to asylum or subsidiary protection on the part of the child. It is notable that at no stage prior to July 2007, was any distinct claim to a fear of persecution or risk of serious harm made on behalf of the child. The mother's claim had been specific and personal. She feared her father-in-law, a member of the Ogboni society, would perform some ritual on her endangering her life. It appears that it was only in the mother's affidavit sworn in this proceeding on 18th November, 2009, that the suggestion was raised for the first time that the son would be at risk of persecution in Nigeria by virtue of the fact that he had been born with a misshapen head and a burn-like mark in the centre of his head for which he had received treatment in the Craniofacial Clinic of Temple Street Hospital. No medical evidence has been placed before the Court as to the nature, significance or future effects of this condition. Apart from some references in country of origin information to the position of persons with disabilities in Nigeria, it is not at all clear that the condition would be classified as a "disability" and of a gravity which might in future place the child at risk of such discrimination or disadvantage as would come within the definition of persecution in the 1996 Act or the Convention or of serious harm in the sense of Regulation 2(1) of the 2006 Regulations. As mentioned, the child's appointment with the Craniofacial Clinic was mentioned in the supplemental representations for leave to remain in December, 2006 but no particular significance was attached to it much less was the condition invoked as the basis for a fear of persecution or a risk of serious harm.

16. In the judgment of the Court therefore, no good and sufficient reason has been shown for extending the time to permit the first three of the four Contested Decisions outlined in para. 1 of this judgment to be judicially reviewed.

17. There remains the issue as to the challenge raised to the legality of the inclusion of the child in the fourth of the decisions, the determination of the application for subsidiary protection. It effectively follows from the reasons already given as to the absence of a reason for extending time in respect of the challenges to the three other decisions that no arguable case has been made out in this respect. As pointed out, although the mother's legal advisers were apparently alive in September 2006 to the issue as to her requirement that the son's case be subject to a separate application and consideration, the invitation to submit an application for subsidiary protection was addressed to both and was responded to by a single application form on 28th December, 2006. If there had been any genuine intention of seeking separate treatment for the son it is extraordinary that at that stage or in the succeeding weeks no separate application form for the son was actually lodged. As already mentioned the only reasonable conclusion that can be drawn is that a decision was made to rely exclusively on the application for subsidiary protection as the best available remedy and to do so on behalf of both mother and son. Furthermore, it must be questionable whether any purpose could be served by an order of *certiorari* in respect of the subsidiary protection refusal given that no new application on behalf of the son could now be made.

18. In the judgment of the Court therefore, the ground for which leave was granted in respect of the subsidiary protection refusal has not been made out. It follows that the application for judicial review must be refused.