THE COURT OF APPEAL

Appeal No. 2014/445

[Article 64 Transfer]

Kelly J.
Irvine J.
Hogan J.

BETWEEN/

CLEMENT CHIGARU, ANGELA PETERS, CHLOE CAROLINE CHIGARU (AN INFANT SUING BY HER FATHER AND NEXT FRIEND CLEMENT CHIGARU) AND CLARKE CHIGARU (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND CLEMENT CHIGARU)
APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of July 2015

1. The applicants in these proceedings are all nationals of Malawi who have unsuccessfully sought asylum in this State. Applications for asylum were rejected by the Refugee Appeals Tribunal on 19th November 2009. The applicants then made applications for subsidiary protection which were rejected by the Minister for Justice by letter dated 12th May 2011. The Minister then proceeded to make deportation orders in respect of all four applicants under s. 3 of the Immigration Act 1999 on 11th August 2011.

2. The applicants then applied to the High Court seeking leave to challenge the validity of the orders refusing subsidiary protection and the making of the deportation orders. These applications were dismissed by the High Court (Cooke J.) by decision dated 19th April 2012. The applicants then appealed to the Supreme Court by a notice of appeal dated 9th May 2012. This appeal was then subsequently transferred to this Court pursuant to Article 64 of the Constitution by order of the Chief Justice (and the concurrence of the other members of the Supreme Court) dated 29th October 2014 following the establishment of this Court on that day.

3. Although deportation orders in respect of all four applicants were made by the Minister as long as August 2011, this family have managed through subterfuge on the part of the adult applicants thus far to avoid the deportation process in circumstances I will presently describe. It was only following lengthy correspondence with their solicitors that the respondents learnt in April 2015 of their present whereabouts in the State. The Minister now seeks to give effect to the earlier deportation orders, but the applicants have now issued a motion seeking an interlocutory injunction restraining their deportation pending the outcome of an appeal to this Court.

4. The first two applicants are the parents of the third and fourth applicants respectively. The third applicant, Chloe Chigaru, ("the daughter") was born in Malawi on 2nd March 2007 so that she is now almost eight and a half years old. The daughter arrived in Ireland with her mother in April 2008 when she was just one year old, but she has lived in the State since that date. The fourth applicant, Clarke Chigaru, ("the son") was born in the State on 23rd July 2008, but he is not an Irish citizen. He is now just seven years old.

The criteria regarding the grant of an interlocutory injunction in asylum cases

5. The criteria regarding the grant of interlocutory relief in immigration cases of this kind was fully explored by the Supreme Court in *Okunade v. Minister for Justice and Equality* [2012] IESC 49, [2012] 3 I.R. 152. It is clear from that judgment that, absent special or particular features, the courts should not generally grant a stay restraining the enforcement of a deportation order. As Clarke J. pointed out in his judgment in that case, any decision regarding the circumstances in which a foreign national should be permitted to remain in the State is, in principle, an executive decision for the purposes of Article 28.2 of the Constitution. As with any decision of this kind, there is a presumption that any such decision is regular and valid.

6. In order, therefore, for an applicant in a case of this kind to obtain a stay on a deportation order, it would be necessary to show, first, that he or she had established a fair or arguable case and, second, that the balance of convenience favoured the granting of such relief. While the issue of the adequacy of damages as a remedy is of considerable importance in many applications for an interlocutory injunction, it is, as Clarke J. recognised in *Okunade,* of somewhat lesser importance is a case of this kind. It is against this general background that I turn to the first question, namely, whether the applicants have established a fair, arguable case.

Whether the applicants can demonstrate the existence of a fair, arguable case

7. The issue of whether the applicants can establish a fair, arguable case is inextricably bound up with the decision of the Court of Justice in Case C-277/11 *MM v. Minister for Justice* [2012] E.C.R. I-000. The applicant in that case was a Rwandan of Tutsi ethnicity who claimed that he would suffer persecution if he were returned to his country of origin in part by reason of the research which he carried out into the 1994 Rwandan genocide.

8. Mr. M had been originally arrived in Ireland on a student visa, but shortly after his visa had expired, he sought asylum. Although this application was refused in December 2008. Mr. M. then applied for subsidiary protection. That application was rejected by the Minister in September 2010 and in that decision the Minister relied to a large extent on the adverse credibility findings contained in earlier asylum decision of the Refugee Appeals Tribunal from 2008.

9. At that point the applicant sought judicial review of the Minister's subsidiary protection decision. As it happens, those proceedings came before me as a judge of the High Court in May 2011. That application presented a single issue of European Union law, namely, whether the requirement contained in Article 4(1) of Directive 2004/84/EC that Member States must co-operate with applicants for international protection meant that an applicant for subsidiary protection must be informed that it was minded to reject that

application so that he or she was given an opportunity to respond before any final decision was taken. This was the specific question which I referred to the Court of Justice pursuant to Article 267 TFEU.

10. The Court answered that question adversely to the applicant, saying that there was no such obligation on the part of Member States: see paragraph 74 of the judgment. Critically, however, the Court of Justice continued by stating (at paragraph 75) that the case raised "more generally the question of the right of a foreign national to be heard" in respect of the subsidiary protection application when that application was made following the rejection of the original refugee status application.

11. Following an analysis of the right to be heard under EU law the Court then concluded (at paragraphs 90-94) of the judgment as follows:

> "90. In that regard, the Court cannot accept the view put forward by the referring court and Ireland that, where – as in Ireland – an application for subsidiary protection is dealt with in a separate procedure, necessarily after the rejection of an asylum application upon conclusion of an examination in which the applicant has been heard, it is not necessary for the applicant to be heard again for the purpose of considering his application for subsidiary protection because the formality of a hearing in a sense replicates the hearing which he has already had in a largely similar context.
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> 91. Rather, when a Member State has chosen to establish two separate procedures, one following upon the other, for examining asylum applications and applications for subsidiary protection, it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.
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> 92. Furthermore, that interpretation is all the more justified in a situation such as that of the case in the main proceedings since, according to the information provided by the referring court itself, the competent national authority, when stating the grounds for its decision to reject the application for subsidiary protection, referred to a large extent to the reasons it had already relied on in support of its rejection of the asylum application, although, under Directive 2004/83, the conditions which must be fulfilled for the grant of refugee status and for the awarding of subsidiary protection status are different, as is the nature of the rights attaching to each of them.
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> 93. It should be added that, according to the Court's settled case-law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law (see Joined Cases C-411/10 and C-493/10 N.S. and Others [2011] ECR I-0000, paragraph 77).
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> 94. It is in the light of that guidance as to the interpretation of EU law that it will be for the referring court to determine whether the procedure followed in the examination of Mr M.'s application for subsidiary protection was compatible with the requirements of EU law and, should it find that Mr M.'s right to be heard was infringed, to draw all the necessary inferences therefrom.
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> 95. In the light of all the foregoing considerations, the answer to the question referred is that:-
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> ☐ the requirement that the Member State concerned cooperate with an applicant for asylum, as stated in the second sentence of Article 4(1) of Directive 2004/83, cannot be interpreted as meaning that, where a foreign national requests subsidiary protection status after he has been refused refugee status and the competent national authority is minded to reject that second application as well, the authority is on that basis obliged – before adopting its decision – to inform the applicant that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard;
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> ☐ however, in the case of a system such as that established by the national legislation at issue in the main proceedings, a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance, in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection."

12. It is perhaps idle at this juncture to deny that the reasoning of the Court of Justice on this second question – which, it must be recalled, was not actually asked by the referring Court – is not without its own difficulties. In particular, it is not, with respect, entirely clear what the Court of Justice had in mind so far as its comments regarding the future interaction of the asylum subsidiary protection and asylum systems in this State was concerned. I endeavoured to address these questions in my judgment in the High Court in *MM. v. Minister for Justice and Equality* (No.3) [2013] IEHC 9, [2013] 1 I.R. 370.

13. There is probably little point for the purposes of this judgment in re-visiting these issues. It is sufficient to say that, based on what the Court of Justice had decided on the second question, I ultimately quashed the Minister's decision on the subsidiary protection decision insofar as it had relied on the adverse credibility findings contained in the earlier asylum application decision.

14. The Minister duly appealed that decision to the Supreme Court. That Court in turn decided to make a further reference to the Court of Justice arising from the earlier *MM* decision in November 2014: see Case C-560/14. We were informed at the hearing of this application for an interlocutory injunction that no date has been assigned by the Court of Justice for the hearing of this reference which might take the best part of a further year.

15. It is against this general background that the issue of whether of the applicants have established a fair case falls to be evaluated. For my part, having regard to the comments of the Court of Justice in *MM*, it seems to me that it inevitably follows that the applicants have established such a fair case. It is true that the notice of appeal which the applicants had originally filed with the Supreme Court refers only in the most general terms to the first question which was the subject of the reference in *MM*. This notice of appeal was, however, filed on the 9th May 2012 and one can scarcely fault the applicants for failing to anticipate that the Court of Justice would subsequently proceed to answer a question which was in addition to the actual question referred by the High Court in *MM.*

16. In any event, given that the Court of Justice has, in fact, pronounced on the second question this Court is now duty bound to

apply EU law in the manner determined by that Court. So far as the merits of the point are concerned, it must be acknowledged that there is much to suggest that the subsidiary protection decisions which are under challenge relied heavily on the credibility analysis which had been conducted in the earlier asylum application, so that the adverse conclusions drawn from the latter process might be thought to have infected the subsidiary protection decision itself.

17. In the present case the central contention made by the parents during the asylum case was that the wife's father had consulted a local witchdoctor in Malawi in respect of this HIV status. The witchdoctor is said to have informed him that in order to be cured he needed to have sexual intercourse with a virgin from his own bloodline. The father then threatened to violate his granddaughter for this purpose, thus causing the family to flee. The Tribunal rejected this claim on credibility grounds, saying that police protection was available and that the parents (who, it is accepted, are highly educated) could internally locate within Malawi:

> "Notwithstanding the applicant's advanced level of education, the applicant professed to have had no knowledge of any other agencies available to assist her and her daughter in Malawi. While the applicant claimed that her father was a big businessman and a loan shark, he was uneducated. However, the applicant's profile and high level of education simply does not fit that which she claims caused her to flee Malawi in fear of her life and that of her infant daughter."

18. The Tribunal further stated:-

> "The applicant's husband, in the course of his hearing, was asked why the family had not chosen to relocate elsewhere in Malawi. He told the Tribunal that given his wife was some six months pregnant, he did not want her to experience any pressure in re-locating. The applicant left for Europe and came to a country unknown to the applicant when six months pregnant. Neither account is acceptable to the Tribunal".

19. It is clear that the subsequent decision in respect of the subsidiary protection relied heavily on the "inconsistencies and credibility issues" of this kind identified in the decision of the Refugee Appeals Tribunal in respect of the asylum application. Thus, for example, the executive officer with responsibility for preparing the memorandum in the case of Ms. Peters (the mother) and Chloe (the daughter) stated that "because of the many doubts surrounding her credibility the applicant does not warrant the benefit of the doubt." The Assistant Principal who actually took the decision in their case noted in hand on the margin of the decision: "Agreed. I have major doubts as regards the *bona fides* of Ms. Peters given the level of the credibility issues."

20. It is, perhaps, not altogether surprising that the officials took the approach which they had. The High Court had, after all, for many years proceeded on the basis that as the subsidiary protection procedure was just one further step in our system of international protection, it followed an adverse credibility finding which had been made in the asylum phase could be relied on by the Minister in arriving at a decision refusing subsidiary protection at a later stage of the process: see, *e.g.,* the decision of Cooke J. in *Debisi v. Minister for Justice and Law Reform* [2012] IEHC 44, a decision which pre-dated by a few months the decision of the Court of Justice in *MM*.

21. As I pointed out in the High Court in *MM (No.3),* the reasoning of Cooke J. in *Debisi* must, however, be now regarded as having been superseded by the judgment of the Court of Justice in *MM*, precisely because that Court commenced the analysis contained in the second part of the judgment from an entirely different perspective, namely, that in a bi-furcated system of international protection such as ours, subsidiary protection must be evaluated separately and distinctly from the determination on the asylum application. It was, therefore, for those reasons that I concluded in *MM (No.3)* that:

> "In these circumstances, in the light of the guidance given by the Court of Justice on the reference, I must hold that the Minister failed to afford the applicant an effective hearing at subsidiary protection stage*, precisely* because he relied *completely* on the adverse credibility findings which had been made by the Tribunal in respect of the contention that Mr. M. would come to harm if he were returned to Rwanda by reason of his involvement in the office of military prosecutor and because he made no *independent and separate adjudication* on these claims.
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> In order for the hearing before the Minister to be effective in the sense understood by the Court of Justice in such circumstances, such a hearing would, at a minimum, involve a procedure whereby (i) the applicant was invited to comment on any adverse credibility findings made by the Refugee Appeals Tribunal; (ii) the applicant was given a completely fresh opportunity to revisit all matters bearing on the claim for subsidiary protection and (iii) involve a completely fresh assessment of the applicant's credibility in circumstances where the mere fact that the Tribunal had ruled adversely to this question would not in itself suffice and would not even be directly relevant to this fresh credibility assessment."

22. Much the same could be said of the subsidiary protections decisions at issue in the present case. Applying, therefore, by analogy my own reasoning in *MM. (No.3)* I find myself obliged to hold that the applicants have established a fair case to be tried.

Where does the balance of convenience lie?

23. I can now turn to the question of the balance of convenience. It is plain that both the father and the mother have each engaged in wholescale abuse of the asylum system. In the period since the deportation orders were first made in against them in August 2011 they have each worked illegally and have also avoided their reporting obligations with the Garda National Immigration Bureau. If one looked at the cases of the parents in isolation, their applications for interlocutory relief would have little to commend them given that both of them have deliberately and contumeliously thwarted and evaded their obligations under the immigration system.

24. One nevertheless cannot look at the position of the parents in isolation from that of the children. It is true that the children are not Irish citizens, but they have known nothing other than this country. As has been noted, the girl is eight and a half years of age and the boy is just seven years of age. They, however, are completely innocent of the various deceptions which their parents have practised and it would be entirely unjust to visit them with the consequences of their parents' wrongdoing.

25. There is no doubt but that the dislocation which the two children would suffer if they were suddenly wrenched from the only environment which they have known or experienced would be significant. It would mean a massive dislocation from home, friends and school with the State forcibly transporting these young children to a distant country. One can only imagine the distress which these 8 and 7 year old children would suffer if they were deported in this fashion.

26. It is significant that in *Okunade* the Supreme Court thought that this was a very important factor, as in his judgment Clarke J. stated:

> "However, I feel that it is not possible, on the facts of this case, to overlook the fact that one of the applicants is a child

> of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial lapse of time involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and sufficient resources. As pointed out earlier a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in favour of the granting of a stay or an injunction.
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> On the facts of this case I have come to the view that the trial judge was wrong in failing to afford sufficient weight to that factor and was, therefore, wrong in failing to grant an injunction restraining deportation until the hearing of the application for leave."

27. Here the case is if, anything, even stronger, as the children are considerably older (8 and 7 respectively, as compared with the child of four years of age in *Okunade*) and are integrated to an even greater extent into Irish society. Given that they have already established at least an arguable case regarding the validity of the subsidiary protection decision it follows that in the light of the Supreme Court decision in *Okunade* it is plain that the balance of convenience very strongly supports the granting of an interlocutory injunction restraining the deportation of the two children.

Re-assessing the position of the parents in the light of the position of the children

28. Whatever the parents' other faults vis-à-vis the flouting of our immigration laws, it has not been suggested that they have not been good parents to these two children. Quite the contrary, as the evidence shows that they have been solicitous of the welfare of the two children, including attending to a medical condition which affects their son. So far as can be judged, the children's education and welfare needs have been fully attended to by the parents within the limits of their resources.

29. It is clear that the right of children to the care and company of their parents is a core constitutional value which is inherent in the entire structure of Article 41, Article 42 and Article 42A of the Constitution. This point has been repeatedly by the Supreme Court even before the enactment of the new Article 42A : see, *e.g., Re JH (an infant)* [1985] I.R. 375, 394-395, *per* Finlay C.J.

30. As I pointed out as a judge of the High Court in *AO v. Minister for Justice (No.2)* [2012] IEHC 79 (again, a decision which pre-dated the insertion of the new Article 42A of the Constitution):

> "Article 42.1 of the Constitution envisages that it is the "right and duty" of the parents of a child to provide for its education, welfare and upbringing. Insofar as the Constitution speaks of it being the "duty" of parents, it is because that the child enjoys -presumptively, at least- the right to have both of its parents engaged in that vital and responsible task. This is because, as O'Donnell J. put it in *Nottinghamshire C. C. v. B.* [2011] IESC 48, [2012] 2 I.L.R.M. 170, 217:
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> "...the Articles [41 and 42] at least in general terms, state propositions that are by no means eccentric, uniquely Irish or necessarily outdated: there is a working assumption that a family with married parents is believed to have been shown by experience to be a desirable location for the upbringing of children; that as such the family created by marriage is an essential unit in society; that accordingly, marriage and family based upon it is to be supported by the State. Consequently the State's position is one which does not seek to pre-empt the family, but rather seeks to supplement its position so that the State will only interfere when a family is not functioning and providing the benefits to its members (and thus the benefits to society) which the Constitution contemplates. In that case, the State may be entitled to intervene in discharge of its own duty under the Constitution and to protect the rights of the individuals involved.' I would merely add that the active involvement of both parents in child-rearing is also inherently desirable from the child's perspective, even if the parents are not married, assuming always that this is feasible and practicable."

31. *In AO (No.2)* I granted an interlocutory injunction restraining the deportation of a Nigerian national who was the father of an Irish citizen. He had entered the State by deception and had, indeed, engaged in passport fraud. I took the view, however, that the substance of the child's constitutional right to the care and company of his father would be infringed if he were deported to Nigeria, since it was likely that in such circumstances the child would never see his father again.

32. I adopted a similar approach in *EA v. Minister for Justice* [2012] IEHC 371 where I granted an interlocutory injunction restraining the deportation of another Nigerian father who had also engaged in duplicitous behaviour in circumstances where I concluded that his son would otherwise be deprived of any meaningful contact with his father for the duration of his childhood:

> "A practical consideration in the present case is that Mr. A. – whatever about his other failings – has sought to take an active role in the rearing of his son. How, then, would be P. be affected if his father were to be deported? In all likelihood the Ms. O. and P. would remain indefinitely in Ireland and it is not clear to me how father and son could continue to have any meaningful contact if Mr. A. were deported. After all, the very fact that Ms. O. were granted refugee status in itself provides that clearest possible indicator that she could not be expected to travel to Nigeria, even assuming that the family could afford to make such a trip or that Ms. O. would otherwise to do so. In all probability, therefore, if Mr. A. were to be deported, it would mean that P. would never see him again during his minority. In these circumstances, I am therefore coerced to the conclusion that there abundant grounds for suggesting that the substance of P's constitutional right to the care and company of his father would be denied were his father to be deported. This would ordinarily be sufficient in itself to justify the grant of an interlocutory injunction restraining the deportation of Mr. A., his disreputable and egregious conduct notwithstanding. It is obvious that damages are not an adequate remedy and the balance of convenience suggests that the child's right to the care and company must be accorded due weight and protection. But before reaching this conclusion, it is necessary to examine the submissions of counsel with regard to the weight of precedent on this issue."

33. The same considerations essentially hold true by analogy to the present case as well. If the balance of convenience favours permitting the children (who, it must be recalled, are not Irish citizens) to remain in the State, then it is plain that they have a compelling interest in having their parents look after them. Indeed, it would scarcely be realistic to expect the children to remain in the State – otherwise than in care – if their parents are to be deported. It is accordingly necessary to grant an interlocutory injunction to restrain the deportation of the parents as otherwise the substance of the children's constitutional right to the care and company of their parents would be compromised.

Conclusions

34. In summary, therefore, I would conclude as follows:

35. First, in the light of the decision of the Court of Justice in *MM*, the applicants can all establish the existence of a fair case to demonstrate that the decision refusing to grant them subsidiary protection is each case invalid inasmuch as the decision-maker relied

on the adverse credibility findings made in the asylum process without having given them an opportunity at least of disputing those findings.

36. Second, if the position of the parents was looked at in isolation, I would not have been in favour of granting them any discretionary relief in view of their calculated and contumelious efforts to thwart the immigration process.

37. Third, the situation of the children is entirely different. They have lived all (or, in the case of the daughter, effectively all) of their lives in this State. The deportation of these children to Malawi would be massively disruptive for them, as it would have huge implications for their schooling, friendships and family structures. In the light of the Supreme Court's decision in *Okunade* this is a factor which weighs heavily when determining where the balance of convenience lies.

38. Fourth, given that the balance of convenience favours the children remaining in this State for these reasons, I would accordingly grant an interlocutory injunction restraining their deportation pending the outcome of this appeal.

39. Fifth, in view of the fact that the balance of convenience favours the granting of such relief *vis-à-vis* the children, it is plain that this has implications for the position of the otherwise undeserving parents. The children have a constitutional right derived from Article 41, Article 42 and Article 42A.1 of the Constitution to the care and company of their parents. The substance of that right would otherwise be compromised if this Court were not to grant an interlocutory injunction restraining the deportation of the parents on this ground as well.

40. Finally, it follows that for the reasons stated, I would grant an interlocutory injunction restraining the deportation of the applicants.