Neutral Citation Number [2010] IEHC176

THE HIGH COURT

JUDICIAL REVIEW

2008 185 JR

BETWEEN

O.J. AND T.J. (MINORS SUING BY THEIR MOTHER AND NEXT FRIEND J.J.)

APPLICANTS

AND

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 on the 29th day of April, 2010.

1. When this application for leave came on for hearing before the Court on 5th February, 2010 the Court, having read the papers, including the written legal submissions, in advance and for the reasons explained in greater detail below, expressed doubts to counsel for the applicant as to whether the proceeding was properly conceived and stateable. Having heard the case opened and an outline of the supporting arguments from counsel, the Court was confirmed in its doubts and indicated that the application would be refused as misconceived and unstateable.

2. Counsel for the respondents thereupon applied for the costs of the proceeding and indicated that, as had been stated by way of warning to the applicants at an earlier hearing, an application was to be made also for an order pursuant to O. 99, r. 7 of the Rules of the Superior Courts fixing the applicants' solicitor with liability for those costs. The Court considered that such an exceptional application ought properly to be brought on a notice to the applicants, grounded on appropriate evidence by affidavit. In those circumstances the Court adjourned the consideration of costs to enable such steps to be taken. This is the Court's ruling on that application following a full hearing on the issue on 19th April, 2010.

3. The background to the circumstances in which this application comes to be made can be explained in greater detail as follows.

4. The applicants' mother arrived in Ireland in 2003 and claimed asylum. In May 2007 she was granted residency in the State under the IBCO 5 Scheme, a child having been born to her in the State since her arrival here.

5. The applicants were born respectively on 18th August, 1992 and 30th May 1994 in Nigeria. They arrived in Ireland in July 2007 to be reunited with their mother and Irish sibling. On 15th January, 2008, the mother attended at the offices of the Refugee Applications Commissioner and made (or at least was understood by the Commissioner to have made,) an application for asylum on behalf of the two children. The report of the Commissioner under s. 13 of the Refugee Act 1996 recommended that the applicants be not declared to be refugees.

6. Upon receipt of that report the applicants' mother consulted her present solicitor Sean Mulvihill, who had, according to his affidavit sworn in this proceeding on 6th April, 2010, already represented her in relation to deportation decisions and E.U. Treaty rights matters. Upon being consulted Mr. Mulvihill did two things.

7. First, he lodged a notice of appeal dated 12th February, 2008 against the s. 13 report to the Refugee Appeals Tribunal. This was clearly directed at challenging the substance of the s. 13 report as it stood; the grounds pleaded being directed at errors of fact and errors of law alleged to have been made in the report in respect of the case made by the applicants to qualify for refugee status. Furthermore, copy documentation was lodged with the notice of appeal concerning country of origin information on abuses of human rights in Nigeria.

8. On the same day Mr. Mulvihill wrote to the office of the Commissioner in the following terms:

> "We are acting under the instructions of the above clients and their mother who has residency here on the basis of the IBC Scheme. We have received 10-day appeals from your office for the above children, it is clear from the instructions of their mother that she brought these children to your office for family reunification to be added to the mother's claim. Please find enclosed letters from the applicants' mother. We would therefore request that you add the children onto their mother's case. It is clear from the applicants' mother that she went to your office for family reunification and it is clear from the interview that the applicants were looking for family reunification with their mother. If we do not hear from you within three days we have no option but to issue judicial review proceedings in this matter."

9. The letter signed by the applicants' mother which was enclosed and which was dated 5th February, 2008 was in the following

terms:

> "With due respect I wish to inform your office that my intension is not to seek asylum for my children (O. and T.J.). (sic) I only want both of them to reunite with me and that is why I have brought them to the Department of Justice for family reunification. They cannot be return to Nigeria because there is nobody to take care of them because my first son Tolulope who is taking care of them he has married and living with his wife now while my second born Babatund and my third born A.J. had got permission into the University of Ibadan and both of them are now in the campus and my husband Mr. M.J. is here with me in Ireland. For this reason I will like my application to be withdrawn for asylum seeker to family reunification. I hereby forward the application for your consideration please."

10. On 20th February, 2008, the present judicial review proceedings were initiated. Amongst the fourteen reliefs sought were the following:

> "(1) A declaration by way of application for judicial review that no asylum applications in relation to the applicants are in existence;
>
> (2) A declaration by way of an application for judicial review that a valid application for family reunification and/or residency has been made by the applicants;
>
> (3) An order of *certiorari* by way of an application for judicial review that the decisions of the first named respondent refusing to regard the perceived asylum applications of the applicants as being valid and/or withdrawn, and maintaining that the mother and next friend of the applicants 'would have no claim to family reunification' and notified to the applicants not earlier than 17th February 2008;
>
> (4) An order of *mandamus* by way of an application for judicial review directing the first named respondent to receive, consider and determine the family reunification and/or residency applications made in relation to the applicants."

11. As indicated by the title to the proceeding, it was initiated also against the Tribunal and the Minister and leave was to be sought for an injunction by way of judicial review restraining those parties from acting upon the recommendation in the s. 13 report pending the determination of the proceeding.

12. Amongst the grounds to be advanced was the argument that the Commissioner had acted *ultra vires* and contrary to fair procedures in determining the applicants' application on the basis of their being applications for asylum: - "The mother and next friend of the applicants at all times followed the instructions of the Commissioner in the belief that the applications related only to the regularisation of the applicants within the State by way of family reunification or residency."

13. The motion to seek leave duly came into the asylum list in the Court and subsequently entered the list of cases for which dates were to be fixed. It was so listed in July 2008 and then in July of the following year.

14. In July 2009 the list of some 800 cases awaiting hearing before the Court included approximately 300 in which leave was to be sought to challenge reports made by the Refugee Applications Commissioner. Following the delivery by the Supreme Court of its judgment in the *Kayode* case (Unreported, 28th January, 2009) and a number of further judgments subsequently delivered by the High Court, the Court considered that the law had been sufficiently clarified on the issue as to the circumstances which would justify its intervention by judicial review in such claims. In July 2009 directions were given by the Court to the effect that, in the light of that jurisprudence, solicitors for applicants who considered that pending cases against the RAC fell outside the conditions thus settled and should still proceed, should write to the Chief State Solicitors Office identifying those cases. An indication had been given by the Minister that in cases which were withdrawn upon the basis that they could no longer be maintained in the light of that case law, no costs would be sought against the applicants. Where cases were to proceed, the legal representatives of the applicants in question were directed to certify the issues to be considered which fell outside the case law and to furnish that certificate to the Chief State Solicitor.

15. The present proceeding was one which was not withdrawn in those circumstances and by letter dated 9th December, 2009 the applicants solicitors wrote to the Chief State Solicitor stating that the case was being certified by them as proceeding "on the basis that the applicants mother believed that she was applying for family reunification for the above applicants and not asylum". The chronology of the steps taken in the proceeding was then as follows:

> "9th November, 2009: the case was put into the list to fix dates on 14th December 2009.
>
> 9th December 2009: the above certificate was furnished to the Chief State Solicitor.
>
> 14th December 2009: the case was listed for hearing on 5th February 2010.
>
> 24th January 2010: the applicants solicitors wrote to the Refugee Appeals Tribunal stating that they wished to withdraw the appeal as against the Tribunal 'as the applicants parents never intended to apply for asylum for the applicant'.
>
> 25th January 2010 at the Monday call-over of the listed cases, it was indicated to the Court that the application would proceed to hearing on 5th February as against the Commissioner and the respondents other than the Tribunal. Counsel for those respondents questioned the basis upon which the matter might proceed and warned that recourse would be had to O. 99, r. 7 in the event that it became appropriate for the respondents to seek an order for costs of the proceeding.

16. It was in that context, accordingly, that the matter came before the Court for hearing on 5th February 2010, as indicated above. On the basis of the evidence before the Court on affidavit, the Court considered that the proceeding was misconceived. It was expressly conceded that no claim for asylum was being made on behalf of the two applicants. In effect, it was the applicants' mother who claimed to have made a mistake. She had however signed ASY-1 Forms making an application for each of them and had proceeded to interview on their behalf on that basis. Each form did show the officer recording that the applicant "is seeking asylum because she wants to be reunified with her parents and that there is no-one to look after her in Nigeria." In the asylum questionnaires the questions relating to reasons for leaving Nigeria and fear of persecution are answered "not applicable" or "none". The minors were clear in stating that they left Nigeria when, to their surprise, a woman came to get them to take them to their parents because there was no longer anyone in Nigeria to look after them. They did not therefore disguise the circumstances in which they came to the State. Nevertheless, applications for asylum had been made to the Commissioner and the Office had no option but to process and examine them.

17. The Court pointed out that the validity of the s. 13 report fell to be determined by reference to the state of information available to the authorised officer at that point. There was no evidence that there had been a mistake made by the office of the Commissioner or that it had caused any misunderstanding on the part of the applicants' mother. It was only afterwards that the applicants' mother appeared to realise that she had made a mistake. The Court pointed out that there was no basis upon which the s. 13 report could be interfered with as unlawful in those circumstances. More importantly and in any event however, as no decision had been made on foot of the report by the Minister under s. 17 (1) of the 1996 Act because of the immediate lodging of the appeal to the Tribunal, it was unnecessary to seek to quash the s. 13 report. All that was required was that a letter be written to the Minister pointing out that there had been a mistake; that no declaration as to refugee status was necessary or appropriate and that the file could be considered by the Minister as withdrawn and closed.

18. In those circumstances there can be no doubt but that the primary rule on costs must apply namely that they follow the event so that the respondents are entitled to recover an order for costs against the applicants. Are they also, however, entitled to the additional order under O. 99, r. 7 to the effect that Mr. Mulvihill indemnify his clients in respect of those costs?

19. The material part of Rule 7 reads as follows:

> "If in any case it shall appear to the Court that costs have been improperly or without any reasonable cause incurred or that by reason of any undue delay in proceeding under any judgment or order or of any misconduct or default by any solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require) why this solicitor should not repay to his clients any cost which the client may have been ordered to pay to any other person and thereupon make such order as the justice of the case may require."

20. It is clear that this rule is directed primarily at the relationship between a solicitor and his own client against whom an order for costs has been made and with disallowing his reimbursement of improperly incurred costs by his client and with ordering him to repay to any client any such costs which the client has been ordered to pay to a third party. In effect, in practical terms, it would also apply so as to require the applicants' present solicitor, Mr. Mulvihill, to reimburse the applicants costs if they were unnecessarily incurred and which they have been ordered to pay to the respondents.

21. There appears to be only one authority in which the possible application of Rule 7 has been considered by the High Court in recent times and that is the judgment of Finnegan P. (as he then was) in *Kennedy v. Killeen Corrugated Papers* [2007] 2 I.R. 561. At para. 14 of that judgment, referring to the other authorities which he mentions, the learned President said:

> "On my review of the authorities, I am satisfied that the power of the court to make an order under O. 99, r. 7 of the Rules of the Superior Courts 1986 whether as to the costs between the solicitor and his own client or an order that the solicitor personally bear the costs awarded against his own client, depends upon the solicitor being guilty of misconduct in the sense of a breach of his duty to the court or at least of gross negligence in relation to his conduct to the court."

22. This Court agrees with that approach to the application of Rule 7 and to the interpretation of the authorities upon which it is based. It is clearly, however, a jurisdiction which should be exercised sparingly and only in clear cases where it is necessary to do so in order to do justice between the parties. That is a particularly important consideration in litigation of the present kind where the administration of justice and the standing of the asylum process requires that legal representation is available to those claiming asylum and that experienced and competent practitioners should be willing to undertake that difficult work.

23. It is obvious, therefore, that the Court should be cautious not to allow a sense of dismay at the way in which a particular case has been brought or conducted to lead to a situation in which the issue of costs, which is in any event a precarious one in such cases, should impose an added burden of uncertainty upon practitioners.

24. The first duty of legal practitioners is, of course, to ensure that the legitimate interests of their clients are secured in exercising their right of access to the courts. In asylum cases their duty is to see that throughout the asylum process appropriate steps are taken to ensure that an application for asylum receives full and fair consideration and results in a lawful determination of the claim. Practitioners have also, however, a duty to the court to ensure that the right of access to the court is not abused by vexatious, wasteful or speculative litigation. There is no obligation to pursue litigation at all costs simply because it is possible to do so especially when it has no purpose other than that of prolonging the process and postponing a final determination of the asylum application.

25. Whenever the Court has good reason to conclude that there has been a failure in the discharge of this latter duty such that proceedings have been unnecessarily commenced or wastefully continued, it should be made clear that recourse will be had to O. 99, r. 7 in order to protect the integrity and effective operation of the asylum process in the interests of the proper administration of justice and of the interests of those genuinely in need of protection and whose determination is likely to be delayed by abuses of process in other cases.

26. As the Court ruled on 5th February, 2010, this was a judicial review proceeding which ought not to have been brought and which could never have succeeded. It is clear from the instructions which were given by the applicants' mother as reflected in her letter of 5th February, 2008 (see para. 9 above) that she did not require an asylum application to be made or pursued on behalf of her two daughters. It is easy to understand why. The two girls had left Nigeria not because of persecution but to join their two parents in this country because their older brother had got married in Nigeria and another had left for university so there was no-one to look after them.

27. Nevertheless, it is clear that she made an asylum application and there was no basis for believing that the office of the Commissioner had been aware of what she says was her true intention nor was there any basis for imputing any mistake on the part of the office in proceeding with a s. 8 interview and the furnishing of the s. 13 report.

28. As the Court pointed out, in those circumstances the correct and only approach available to be taken was to inform the Minister that a mistake had been made, to withdraw the asylum application and to tell the Minister that no decision on the s. 13 report and negative recommendation was required or appropriate under s. 17 (1). Although Mr. Mulvihill informed the Commissioner's office of this alleged mistake (see para. 8 above) no application for family reunification on behalf of the minor applicants was in fact made. Such applications are made to the Minister under s. 18 of the Refugee Act and not to the Commissioner but in any event can only be made by a refugee. It is difficult to understand therefore what the writer of that letter had in mind when the request was made to the Commissioner "that you add the children onto their mother's case".

29. Instead, the judicial review proceeding was commenced against both the Commissioner and the Tribunal and at the same time a statutory appeal was lodged on a basis which sought to challenge the s. 13 report on its substantive content. (See para 7 above). That appeal was clearly inconsistent with the stand adopted vis-à-vis the Commissioner and, as the alleged error was entirely on the part of the applicants' mother and there was no evidence that the Commissioner was aware of her claimed true intention, there existed no basis upon which the High Court could have been asked to rule that the report was unlawful.

30. Counsel for the applicant sought to explain that these steps had been taken at a point prior to the handing down of the judgments in the Kayode case and the other cases on the "alternative remedy" issue. As had occurred in many other cases, the appeal to the Tribunal was what he called a "holding appeal" designed to preserve that avenue of remedy while the legality of the s. 13 report was examined or tested. He submitted that as a consequence of the limitations in s. 5 of the Illegal Immigrants (Trafficking) Act 2000, judicial review was the only remedy available to challenge the existence of the s. 13 report.

31. As already indicated above, the Court considers that this view was clearly mistaken. Even if some excuse could be made for taking immediate steps to preserve the situation for the applicants in view of the short periods available for commencing proceedings or lodging an appeal, the inappropriateness or futility of those steps should have become obvious to the legal representatives very shortly thereafter had serious consideration been given to the implications of the instructions from the client.

32. Had the proceeding been withdrawn in the Spring or early Summer of 2008 before the respondents had been put to the expense of contesting the proceeding and preparing for a hearing, it would have been difficult to justify recourse to Order 99, rule 7. The gravamen of the present case, in the Court's judgment, lies in the fact that, in spite of the lapse of time between July 2008 and October 2009; of the deliberate examination of the basis of claims called for by the Court's direction to provide certificates in cases against the Commissioner; and the protests from the respondents as to the lack of purpose in the proceeding, no serious attention appears to have been given to the legal basis and practical utility of the proceeding at any stage. A decision was taken to proceed and a certificate to do so was given. A date for hearing was sought. It was only on 24th January, 2010 after that date had been fixed and the hearing was imminent, that the claim against the Tribunal was withdrawn and on the basis of a reason that could and should have been obvious from the outset.

33. In pressing the Court for the order sought under rule 7, and relying upon the approach to that rule expounded by Finnegan P. in *Kennedy v. Killeen Corrugated Products Ltd.*, counsel for the respondents emphasised that it was not suggested that there had been "gross misconduct" on the part of the solicitor in the present case. He insisted, however, that costs had been necessarily incurred by the respondents without any reasonable cause and that the costs of appearing on various dates and then at the hearing were effectively wasted in circumstances where the legal representatives of the applicant had been afforded numerous opportunities to reconsider the proceeding and to withdraw it before such costs were incurred by the respondents.

34. The Court agrees that this ought not to be characterised as a case involving gross misconduct in the sense of professional misconduct as such. There has however been a clear default in the discharge of the duty owed by legal practitioners to the Court in commencing and continuing the proceeding. No minimal consideration appears to have been given to the legal objective sought to be achieved by the proceeding. No thought appears to have been given to whether the application could have any bearing or effect upon an application for family reunification when the applicants' mother was not a refugee. No acceptable explanation has been given as to why the proceeding was commenced and especially as to why it was pursued in the light of the applicants' patent lack of a claim to be asylum seekers and thus the irrelevance of the asylum process to their situation.

35. When the relevant provisions of Rule 7 are paraphrased this can clearly be seen to be a case in which costs have been incurred by the applicants to the respondent without reasonable cause and that by reason of default on the part of a solicitor, costs have been incurred which have proved fruitless to the applicants. The respondents are entitled to an order for costs on foot of the basic rule that costs follow the event. That order will be made against the minor applicants and their next friend. In these circumstances would it be just that they should shoulder that liability towards the respondents? If they are unable to discharge the liability, is it just that the respondent should be required to bear the resulting loss when that ought not to have arisen? In the judgment of the Court the justice of the case requires that recourse be made to Rule 7 and that an order of the kind described by Finnegan P. (see para. 21 above,) be made.

36. The Court will therefore award the costs of the proceeding to the respondents as against the applicants and further order pursuant to Order 99 Rule 7 that the solicitor for the applicants indemnify them in respect of the amount of those costs when agreed with the respondent (or taxed in default of agreement,) by bearing such costs personally.