This judgment is circulated in redacted form to avoid identification of the parties

Neutral Citation Number: [2007] IEHC 289

THE HIGH COURT

Record Number: 2005 No. 1293 JR

BETWEEN

V.O.,
J.O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, V.O.)
S.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, V.O.)
P.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, V.O.)
D.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, V.O.)

APPLICANTS

AND
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL, IRELAND

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr Justice Michael Peart delivered on the 27th day of July 2007

1. The first named applicant is the mother of the remaining applicants. The second, third and fourth named applicants are her Nigerian born children, and the fifth named applicant is her Irish-born child born on the [ ] January 2005. As he was born here after 1st January 2005, he is not an Irish citizen.

2. Before the Court at the moment is an application for leave to seek a number of reliefs by way of judicial review as set forth in the Notice of Motion herein dated 29th November 2005 including to have quashed the Deportation Order made by the Minister on the 4th October 2005 in respect of the first, second, third and fourth named applicants. Certain declarations are also sought such as that the making of those deportation orders was ultra vires, that the deportation of the husband of the first named applicant was unlawful, and that the respondent has acted in breach of the applicants' constitutional and Convention rights, and has failed to have regard to the principles of natural and constitutional justice. An extension of time is sought for bringing this application, as well as damages for breach of the applicants' statutory, constitutional and Convention rights. Injunctive relief was sought at the outset, but that aspect of the case was dealt with by the giving of an undertaking not to deport pending the determination of these proceedings.

3. The Statement of Grounds as filed sets out about twenty seven grounds upon which these reliefs are sought, but by the end of the present application, it was agreed by the applicant that sixteen of these were no longer being relied upon..

4. A relevant background fact to be stated at the outset is that the husband of the first named applicant was the subject of a Deportation Order also dated 4th October 2005, and he was deported on foot of this order on the 19th October 2005. The first named applicant has stated in her grounding affidavit that some ten days following his deportation to Nigeria he was killed. His deportation is relied upon by the applicants herein on the basis that it infringed their family rights under Article 40 and 41 of the Constitution, and under Article 8 of the European Convention on Human Rights and the European Convention on Human Rights Act, 2003.

Background facts

5. The first named applicant arrived in this State with her husband and her three Nigerian born children on the 9th July 2003 whereupon each made an application of refugee status by completing the usual ASY1 form. In that regard, her husband completed a form for himself, and the first named applicant completed a form for herself. In addition she completed a form attached to her own application in which she stated that she wished to have her three Nigerian born children included in her application for asylum. She went on in that form to state that she did not wish to have these children interviewed or considered separately from her own asylum application, and stated also that she understood that the decision which will be made in relation to her application will also apply to her children. However, in her grounding affidavit she states now that she was presented with this form on the 9th July 2003 and that the consequences of her signing this form in respect of her children were not explained to her, and that she signed this form "out of fear that the family may be separated". One of the grounds set forth in the Statement of Grounds related to this averment, namely that "no or no proper consideration was given to the rights of the minor applicants by the respondent in his decision to make deportation orders relating to them, but Counsel for the applicants has confined that ground now to only the fifth named applicant who was born subsequent to the completion of the ASY1 form.

6. The applications made by the first named applicant and her husband upon their arrival here on the 9th July 2003 and which included their three Nigerian born children, were based on the fear of persecution resulting from the political activities of the husband and his father. It appears that her father in law was killed by members of the People's Democratic Party ("PDP2), and that she came here with her husband and her children because they feared that they also would be harmed or even killed because of their association with her husband's father. Both her husband and his father were members of the All Nigeria People's Party ("ANPP"). She described her husband as having been a youth leader in their area for the ANPP party. As already stated she has averred that upon his deportation to Nigeria her husband was in fact killed within a couple of weeks of his return. The respondent has sought to cast some doubt on the reliability of the evidence adduced in respect of the death of her husband, but for the purpose of this application I do not need to dwell upon that doubt.

7. At any rate, no other basis for the applications was included in the ASY1 form.

8. In February 2004 she attended for interview in relation to her application. At that Interview she was again asked to confirm that she still wished her children to be included in her application and to be considered for refugee status in this manner. She confirmed that she did. No separate issues in respect of any of these children were raised by her during the course of that interview, and it is to be noted that the need to do so during the course of the interview was brought to her attention at the commencement of the interview if she so wished. During the interview she gave more detail of a rally organised by the ANPP party for the 30th March 2003, and which was broken up by members of the PDP party. She stated that her father in law was killed and that her husband went missing for two weeks after which she heard that he had been taken to hospital. Arrangements were apparently put in place for them all to travel to Morocco and onwards to Ireland. She stated also that her husband reported these matters to the police but that they took no action, and that the police in Nigeria are corrupt.

9. Following the completion of the s. 13 report a recommendation was made dated 22nd March 2004 that she should not be declared a refugee. A Notice of Appeal against this recommendation was filed by Messrs Cathal O'Neill & Co. solicitors on the 17th May 2004.

Curiously this Notice of Appeal refers to only one child, namely the second named respondent. But nothing turns on that fact, which may have simply been an error in the completion of the Notice of Appeal.

10. Having heard this Appeal, the Tribunal Member affirmed the recommendation in a Decision dated 8th November 2004, and this decision was communicated to the first named applicant by letter dated 10th December 2004. This letter of notification refers also to "dependants included in this appeal" and lists all three Nigerian born children, namely the second, third and fourth named applicants herein.

11. No application was made at that time by way of seeking judicial review of that decision by the Tribunal. By letter dated 8th March 2005 the first named applicant was notified that the Minister had decided to refuse to give her a declaration of refugee status, and that her legal entitlement to remain here had expired, and indicated the options then available to her. It explained also that the Minister proposed to make a deportation order in respect of her and the second, third and fourth named applicants. The fifth named applicant, the child born here on [ ] January 2005 is not referred to in this letter.

12. Of the three options explained to her in this letter, the first named applicant chose to make representations to remain temporarily in the State. Accordingly, representations dated 11th March 2005 were made on behalf of the first named applicant under s. 3 of the Immigration Act, 1999 for permission to remain in the State. Those representations referred to the fact that her domestic circumstances by that date included the fact that she was now the mother of an Irish born child born on the [ ] January 2005. It was contended that she no longer had any ties with her country of origin, and that given the political situation in that country it would be a breach of her constitutional and Convention rights to return her to that country. It was submitted also that it would be in the common good if she were to be allowed to remain and that there was no reason of national security or public policy why she should not be permitted to remain here.

13. Additionally, an application to remain on the basis of parentage of an Irish born child was lodged, and the Minister's office acknowledged receipt of that application by letter dated 4th April 2005. A refusal of that application was communicated to the first named applicant by letter dated 4th August 2005, and stated that the reason for refusal was that her Irish born child, the fourth named applicant, was born after the 1st January 2005 ands could not therefore be considered under the revised arrangements announced by the Minister on the 15th January 2005.

14. The representations made by application dated 11th March 2005 under s. 3 of the Immigration Act, 1999 as amended were in due course considered both under s. 5 of the Refugee Act 1996 as amended (refoulement) and under s. 3(6) of the Immigration Act, 1999 as amended. The result of these considerations and the recommendation that the Minister sign the deportation orders is contained in a document dated 21st September 2005. Refoulement was not found to be an issue in the case, and the humanitarian considerations were found not to be such that she should not be returned to her country of origin. In addition consideration was given also to the representations made concerning the birth of the fifth named applicant. It was noted that he is not an Irish citizen, given the date of his birth after 1st January 2005, and that even if he was an Irish citizen he would even then not have an absolute right to the company and care of his parents in this country following the judgment of the Supreme Court in the I & O case referred to. It is also stated in this document that:

> "it cannot be said as a matter of law that the parents of a minor can assert a choice to reside in the State on behalf of a minor, even if that could be said to be in the best interests of the minor. This (sic) children can return to countries which would have inferior welfare and health services to those available in Ireland. This is not, in itself, a basis for allowing them to remain here. The fact that, in this instance, the child is not an Irish citizen lends further weight to the conclusion that deporting the parent, along with the child, is not contrary to our national or international obligations."

15. The document goes on then to state that "the principal issue to be considered in this case is that of the citizenship of the fifth named applicant", and the terms of s. 6A of the Irish Nationality and Citizenship Act, 1956 as inserted by s. 4 of the Irish Nationality and Citizenship Act, 2004 are then set forth. The conclusion reached is stated as follows:

> "Having considered the facts of this case, and taking into account the above, I am satisfied that although D. O. was born in the island of Ireland he does not qualify for citizenship of this state. He is, however, by virtue of his parents and according to the Nigerian constitution a citizen of Nigeria by birth. Therefore, D. O. does not have an automatic right to remain in the State as he does not have citizenship in the State. Similarly, his mother, V. O., is not entitled to separate consideration under the IBC '05 scheme as her son was born after 01/01.2005 and is therefore ineligible for inclusion in the scheme."

16. The recommendation was made therein that the Minister sign the deportation *orders*.

17. Two days later on the 23rd September 2005, an Assistant Principal Officer in the Repatriation Unit, Seán McNamara examined the file and concurred with this recommendation, ands on the 4th October 2005 these deportation orders in respect of the first, second, third and fourth named applicants were signed by the Minister. The making of these orders was communicated to these applicants by letter dated 6th October 2005 and informed them that they were required to attend at GNIB on the 13th October 2005 in order to make arrangements for their deportations from the State. The letter stated that these orders were made on the basis that they were all persons whose refugee status had been refused. In her grounding affidavit the first named applicant states that her children were never refused refugee status, but that contention appears now to be abandoned given the limitation of ground 15 of the Statement of Grounds to the fifth named applicant only.

18. The husband of the first named applicant received a similar notification dated 6th October 2005 concerning a deportation order made in relation to him also on the 4th October 2005. There is evidence that the first named applicant attended at GNIB on the 18th October 2005, but in a replying affidavit sworn by Seán McNamara of the Repatriation Unit, it is stated that it had been the intention to deport the first named applicant and her children at the same time as the deportation of her husband which took place on the 19th October 2005, but that neither she nor the children could be located at that time, and accordingly only her husband was deported.

19. By letter dated 13th October 2005, Messrs. Cathal O'Neill & Co wrote again to the Minister's office, referring to the letters dated 6th October 2005 which were received by their clients, including the husband. They stated that each of the children were applicants for a declaration of refugee status and that they were in the care of their parents. They stated also that the fifth named applicant was receiving ongoing medical attention "for a cardiac condition" and that a report from his doctor would be submitted when received. That does not appear to have been forwarded. It stated also that the first named applicant was receiving "ongoing medical treatment as a result of complications following delivery of her son D. by emergency Caesarean section", and went on to say that a report from her doctor would be submitted when received. None appears to have been submitted according to the information available on this application, except a note from a member of the Obstetric Team at Our Lady of Lourdes Hospital, Drogheda dated

10th October 2005 which simply certified that she had been delivered of a child by Caesarean section on the [ ] January 2005 and that "she was seen at the above clinic today with complaint of pelvic pain and is being followed up on out-patient basis".

20. The solicitor's letter dated 13th October 2005 went on to say that the children were entitled to remain in the State while their applications for a declaration for refugee status was considered, and that their mother was entitled to remain with them. This letter requested that the deportation orders made on the 4th October 2005 be revoked "on the basis that our infant clients, as applicants for refugee status, whose applications have yet to be investigated and decided, and their mother, are lawfully resident and entitled to remain in the State for the purpose of pursuing to a conclusion the refugee status application".

21. This letter clearly overlooked the fact, which appears now to be accepted, that the children's applications (save that of the fifth named applicant) for declarations were considered at mother's request in conjunction with her own application, and that the decision in respect of her application would cover them also.

22. By letter of the same date, the 13th October 2005, to the Office of the Refugee Applications Commissioner, the same solicitors sent an application on behalf of the fifth named applicant, the Irish born child for a declaration of refugee status, and informed that office that his mother would shortly bring that child to that office for the purpose of formally registering him with them, and requested that a Questionnaire form be sent to them. That application in due course proceeded and the decision to refuse refugee status is the subject of a separate leave application not before this Court at the present time. It appears from the replying affidavit of Mr NcNamara that in view of the new application for the fifth named applicant, a decision was taken by the Repatriation Unit not to deport the applicants at that time.

23. The request for revocation of the deportation orders contained in the first of the two letters dated 13th October 2005 referred to above was duly considered and by letter dated 17th February 2006 Messrs Cathal O'Neill & Co were informed that the outcome of the consideration of the representations received was that the Minister's earlier decision to make the deportation orders remained unchanged as there was nothing contained within the representations which would cause the Minister to alter his decision. A copy of that re-consideration was enclosed with the letter.

24. By the time the result of this re-consideration had been communicated, the first named applicant had for some undisclosed reason instructed new solicitors to act on her behalf in relation to judicial review proceedings. She signed an authority in that regard on the 26th October 2005. Certainly by the 9th November 2005 all files and correspondence in the case had been sent by Messrs. Cathal O'Neill & Co to the applicant's new solicitors, Seán Mulvihill & Co.

25. The present application for leave to seek relief by way of judicial review was commenced by Notice of Motion dated 29th November 2005.

26. This application has proceeded on two bases.

27. Firstly, it is contended that the Minister was not entitled to deport the husband of the first named applicant before the expiry of the fourteen day period within which he would have been entitled to lodge an application for judicial review, and while the position of the fifth named applicant remained unresolved, and that by doing so the family rights of the present applicants regarding family unity were breached.

28. In this regard it will be recalled that the deportation order was made on the 4th October 2005, and communicated to him by letter dated 6th October 2005, yet he was deported on the 19th October 2005. The first named applicant has stated that in fact he had the intention of filing an application for judicial review before he was deported.

29. It is now contended that the right to family unity of the applicants, as enshrined in the Constitution and in the Convention have been infringed by that deportation of her husband during the fourteen day period and while the position of the fifth named applicant had not been considered. It is submitted that the family rights of the applicants under Article 8 of the European Convention were engaged by the deportation of the husband, and that it constituted an unjustifiable interference with those rights. It is submitted that while the position of the fifth named applicant was still not resolved, there was a right to have the family unit maintained. It is submitted also that this interference could not be justified by the State not being prepared to wait the relatively short time before the fifth named applicant's application was determined. Attention is drawn to the fact that at the time of husband's deportation the Minister was on notice of the existence of the application by the fifth named application given the contents of the solicitor's letters dated 13th October 2005 already referred to.

30. It has been submitted also that in matters pertaining to rights under Article 8 of the Convention, the best interests of the child must be considered as paramount, and that these must be considered before any decision is made to deport a family member. In this regard the Court has been referred to the judgment of the ECHR *in Uner v. The Netherlands*, 18th October 2006. The facts of that case are so entirely different to the present case as to make reference thereto of limited value. Nevertheless it is stated therein at para. 57:

> "Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision ….. "

31. The passage immediately following that paragraph goes on to set out a number of criteria for the assessment of whether the expulsion was necessary in a democratic society and proportionate to the legitimate aim pursued, and made particular reference to "the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled."

32. Under the submission currently being addressed, the applicants' submission is not related to the deportation of the applicants themselves, but to the effect on them of the deportation of the husband of the first named applicant and father of the remaining applicants. They remain here for the moment, but they contend that his deportation was a breach of their Article 8 rights.

33. The Court has been referred also to the judgment of the ECHR in the case of *Lupsa v. Romania*, 8th June 2006. Again the facts of that case are so different to the present case that its relevance is very limited.

34. But in so far as the applicants seek to garner support from these cases for the proposition that the removal of a family member from the State in which they reside may potentially engage Article 8 rights by being an interference with such rights and that in such circumstances that interference must be justifiable and proportionate, and that the best interests of children must be considered, this

Court has little difficulty in accepting such general principles.

35. However, the submission in this case under this heading is unusual. It is grounded upon a contention not that the applicants' rights are interfered with through their expulsion, but rather by the fact that their father was deported.

36. In considering this submission it is important to recall the evidence of Mr McNamara in his affidavit that the deportation order made in respect of the husband and those made in respect of the first to fourth named applicants were made on the same day, the 4th October 2005, and that when the GNIB officers went to the address where the family was residing on the 19th October 2005 they found that only father was present. These applicants were not located there. He has stated that it was the intention of the authorities to deport all the members of the family on that occasion. It will also be recalled that the letter of notification which accompanied the copy deportation orders to all applicants had required them to attend GNIB headquarters on the 13th October 2005 for arrangements to be made for their deportation. It is to be presumed that they attended on that date and that on that date they were required to re-attend on the 18th October 2005, since these applicants have exhibited a letter dated 18th October 2005 from GNIB which acknowledges that they attended on that date. The first named applicant has made no averment in her grounding affidavit in relation to why she was not available for deportation at her address on the 19th October 2005. This Court is entitled to presume that she became aware of the intention to effect deportation on the 19th October 2005 and took some step to frustrate that deportation by not being locatable at the premises on the 19th October 2005. In my view it cannot now be said in such circumstances that the Minister is in breach of Article 8 of the Convention or of Article 40 and 41 of the Constitution, or any statutory obligation by deporting only the husband. It is quite clearly the first named applicant's actions which have resulted in the severing of the applicants from the husband/father. It was never the intention of the Minister that this should happen. It is also the case that the husband's application had been fully considered at all stages and that a lawful deportation order was in existence. There was no requirement that the Minister must wait until the expiration of the fourteen day period before effecting deportation, just in case the deportee might wish to lodge an application. If he/she in fact lodges one then a question may arise as to whether the deportation should take place where no injunction has been obtained. I express no further views in that regard. The judgments in the Supreme Court in *Adebayo v. Commissioner of An Garda Siochana*, unreported, 2nd March 2006 have discussed that question and it is unnecessary for me to do so now.

37. In my view no substantial grounds have been established by the applicants for relief by way of declaration, or damages or otherwise on this ground.

38. Secondly it is submitted that the Minister was not entitled to make the deportation order in respect of the first named applicant and her Nigerian born children on the 4th October 2005 without first having considered the position of the fifth named applicant. It will be recalled that at the time that mother completed her application she indicated that she wished her three Nigerian born children to be included in her application. The fifth named applicant herein had not been born at that time. It is a fact by now that there has been a separate application for refugee status lodged on the 13th October 2005 on his behalf, and that this application has been refused. An application for leave to seek judicial review has been lodged, but is not before this Court at the moment for consideration. The fact is that by virtue of being born after 1st January 2005 he is not an Irish citizen. Therefore his position creates no entitlement to reside which the other children born in Nigeria have, although his application must of course be considered as well as those of the other children and that is happening. The position of the first, second, third and fourth named applicants for the purpose of s. 3 of the Immigration Act, 1999 has been fully examined by two officers in the Minister's Department before the recommendation was made that deportation orders be signed by the Minister. At that stage no application had been lodged for the fifth named respondent, and it was presumed that when being deported with her Nigerian children mother would bring the fifth named applicant with her. His position was considered within that examination, and while it is correct to say that emphasis was placed on the fact that he was not an Irish citizen the statement in this regard made by Ms. Leonard in her examination states: "The principal issue to be considered in this case is that of the citizenship of the child, D. ……". That issue was considered and it was concluded that he did not come within the provisions of s. 6A of the Irish Nationality and Citizenship Act, 1956, as inserted by s. 4 of the Irish Nationality and Citizenship Act, 2004. It is unsurprising that the principal issue was thus described since the s. 3 representations contain only the following under the heading "Family and Domestic circumstances":

> "Details of the applicant's family and domestic circumstances are as follows: Applicant is married with three [sic] dependent children in the State including one Irish born child born in the State on the [ ] January 2005".

39. Under the heading "Details of any change in the applicant's personal circumstances since date of asylum appeal hearing" there is reference again only to the birth of the fifth named applicant.

40. There is no further reference to the position of the family by reference to the fifth named applicant or to the fifth named applicant himself.

41. It is completely unclear as to what further consideration should have been given to the position of the fifth named applicant in the absence of anything g being submitted in the representation. There are no substantial grounds made out that the Minister has failed to give proper consideration to that position in relation to the other applicants or to the fifth named applicant, particularly in circumstances where there was no application for refugee status lodged for him at that time. There are no substantial grounds for considering that the Minister was not entitled to make the deportation orders when he did. It is very clear in this case that the greatest of care was taken by those concerned in the manner in which all representations were fully considered. All necessary rights and entitlements were afforded to the applicants, and I can see no room for argument to the contrary.

42. For the sake of completeness I should just refer to the fact that in her grounding affidavit, and for the first time since she arrived in this State, the first named applicant has stated that there was no consideration given in relation to refoulement to the country of origin information which indicates that her daughter the second named applicant would face the risk of female genital mutilation in Nigeria. This matter was never raised by her on her daughter's behalf as part of her application for refugee status. She says in her affidavit that she did not raise it as the practice is commonplace in Nigeria and "was not present in the mind of your deponent herein as a human rights issue for my said daughter." While this matter was not the subject of oral submissions, it is referred to in written submissions filed. Those submissions state that the fact that mother did not raise the issue on her behalf cannot amount to a waiver by her daughter of her right to have her application considered. I want to state clearly that if this issue was not raised by mother during the course of her application as an issue for her daughter, after it was made clear that all the children at that time were being included in the application made by mother, and that she should raise then any separate issues she wished to have considered for her children, it is completely inappropriate that in a grounding affidavit some years later and at the very eleventh hour such a new issue should be raised. The Court in such circumstances is entitled in my view to regard the issue as lacking all bona fides and I would seriously question the veracity of what is stated by the first named applicant in that regard, and that in turn has the capacity to impugn the reliability of other matters which she states therein. However I have not allowed this matter to interfere in any way with my consideration of the question of whether the threshold of substantial grounds has been met in this case.

43. I refuse this leave application for the reasons stated.

44. It has been submitted that the O'Keeffe test of reviewability is too strict and that this Court should adopt the test of anxious or heightened scrutiny. Without considering exactly how these tests differ I can say that I have given the greatest care to the consideration of whether there is any possibility that there has been less than proper consideration of all relevant matters which are required to be taken into account before a deportation takes place. In my view such an approach meets the anxious test. That consideration goes beyond the O'Keeffe test, and this application still fails to meet the threshold of substantial grounds being demonstrated.

45. It is unnecessary for me to consider the issue of an extension of time for the bringing of this application, but I would just remark that I do not consider that the affidavit evidence discloses a reason which explains or excuses the delay which occurred, albeit a relatively short delay.