THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 670 J.R.]

BETWEEN

A AND E (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND V.T.A.) AND V.T.A.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 16th day of February, 2017

Issues
1. The application herein is for an order for *certiorari* to quash the decision of the respondent of the 23rd September, 2015 wherein the respondent refused to grant the first named applicant a join parent visa. Leave was afforded on 21st December, 2015 enabling the applicant to seek an order for *certiorari* in respect of the decision together with if necessary an order of *mandamus*

to compel the respondent to determine the applicant's application for a join parent visa according to law. At the hearing of the action notwithstanding that there was no application for declaratory relief nevertheless the applicants did suggest that within the discretion of the Court remained capacity notwithstanding a failure to include same within the grounds, to afford certain declaratory relief.

Background
2. The first named applicant is a national of Nigeria and was born apparently in 1998. The second named applicant is an Irish national and asserts herself to be the mother of the first named applicant. An initial application for a join parent visa was maintained in or about December, 2004 which was refused on various grounds on 20th January, 2015. An appeal was maintained bearing date 11th March, 2015 and the ultimate decision on appeal of 26th March, 2015 was to refuse the appeal. A second application for a join parent visa was maintained on 17th June, 2015 and this application was rejected on 8th July, 2015. The decision was appealed by letter of 28th August, 2015 and ultimately by decision of 23rd of September, 2015 the refusal of a visa was upheld. The respondent throughout maintains that there were several inconsistencies in the various applications made on behalf of the second named applicant within the State and there was insufficient evidence to demonstrate an ongoing relationship between the applicants. In the second visa application aforesaid the applicant submitted DNA evidence to establish a parent/son relationship however the respondent did not accept this as evidence as the respondent had not partaken in the securing of the DNA evidence. The applicant offered to undergo a DNA test to establish her parentage of the first named applicant within the respondent's procedures and part of the complaint in the statement of grounds is that there is no reference in the impugned appeal to this offer.

Policy document on non EEA family reunification
3. Both parties accept that this document guides the respondent in her decision making on family reunification in applications for visas in the instant type circumstances. The applicant complained that the policy document was not adhered to whereas the respondent asserts that it was. The following references have been made to the policy document:-

> (i) The respondent refers to p. 6 thereof where it is stated:-
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> "The onus of proof as to the genuineness of the family relationship rests squarely with the applicant and sponsor whether that person is an Irish national or non-EEA national."
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> (ii) At para. 13.4 at p. 37 it is stated:-
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> "The onus will be on the applicants for family reunification to satisfy the immigration authorities that the familial relationship is as claimed. This is particularly important where children are involved. In certain cases where reasonable doubt exists, the parties may be asked to provide DNA evidence in support of the claimed relationship. Guidelines regarding DNA evidence and the circumstances in which it might be used are set out in appendix A."
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> (iii) Paragraph 14 of the document deals with the meaning of "dependency" which consists of financial support and social dependency between the two parties this dependency must pre-exist the application for family reunification.
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> (iv) Appendix A at p. 69 has been referred to by both parties and it states that the provision of DNA evidence may be proposed by either party it is not a mandatory requirement. If it is not available a decision will be based on other evidence of parentage supplied with no negative inference being drawn merely from the fact that an applicant does not wish to undergo DNA testing. A positive DNA result will be accepted by the INIS as proof of natural parentage however this would need to be assessed against the question of legal parentage. Advanced approval by INIS is required in respect of the testing.
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> (v) In appendix B contained at p. 70 the first paragraph provides that in order to avoid child abduction it must be clearly established that both parents consent to the movement of their child and in the instant type circumstances the consent of the other parent (the non-applicant parent) must be obtained and furnished in support of the application for family reunification.

4. The consent of the non-applicant parent was considered by Humphreys J. in *Olakunori v. Minister for Justice and Equality* [2016] IEHC 473 being a judgment of 29th July, 2016. At para. 22 thereof one of the grounds for refusing the relevant visa was that the applicant had provided neither the consent of the father in question nor a court order awarding her sole guardianship as a basis for the visa application. The Court noted that the need for this documentation was clearly stated on the INIS website. Insofar as the complaint that a court order was irrational the Court held that this submission was wholly without merit. At para. 28 the court states:-

> "28. The requirement by the Minister for a court order making clear that the consent of the father was unnecessary, in the absence of such consent being produced positively, was neither unfair nor irrational. Indeed, it was absolutely necessary. The mother's failure to comply with that requirement was fatal to her application, and therefore to the present judicial review."

Impugned decision
5. The decision comprises six pages with various headings. Under these various headings the decision identifies issues surrounding the authenticity of documents produced as well as contradictions and inconsistencies in information supplied. At p. 4 under the heading "No clear link to reference have been shown" it is stated:-

> "Because of the concern set out above and having reviewed the material submitted on appeal the appeals officer agrees with the finding in the original decision that a clear link to the reference has not been shown."

6. Thereafter there is a further heading called "Relationship history" and under this heading the visa officer was not satisfied that there was evidence of an ongoing relationship demonstrated. The appeals officer remained satisfied that there was no evidence of a sustained parental relationship.

7. Under the heading "Conclusion" it is stated:-

> "Having considered all information submitted and all representations made the appeals officer is satisfied that this application ought to be refused as a family link to V.A. has not been demonstrated and also because the uncertainty regarding the identity of Mr. A's father means that the visa officer cannot be satisfied with the parental travel consent provided to date."

8. Thereafter the appeals officer was satisfied that a refusal would not engage the rights under Article 8 of the European Convention on Human Rights or under the Constitution.

Submissions
9. The applicants herein condemn the decision on the basis of its failure to engage in the constitutional and Article 8 rights and further on the basis that there is no reference to the second named applicant's tender of DNA evidence in conjunction with the respondent. It is asserted that insofar as the decision incorporates a statement to the effect that before DNA testing would be conducted it would be necessary to demonstrate with compelling evidence a sustained ongoing family relationship, it is asserted that this was irrational, disproportionate and or *ultra vires* and or in breach of constitutional law.

10. The applicants further assert that even if proof of a blood relationship between the applicants was not dispositive of an entitlement to a visa the decision should be condemned because the decision effectively conflated the blood relationship with a legal relationship (as per the terminology of policy document) under the heading "No clear link to reference has been shown" therefore the failure to deal with the offer by the second named applicant of DNA evidence in conjunction with the respondent contaminated the findings in relation to legal parentage. Similarly under the heading of "Conclusion" the blood and legal relationship is again conflated when it was indicated that the appeals officer was satisfied that the application ought to be refused as a family link has not been demonstrated.

11. When it was indicated to the applicants that even if that portion of the decision (a) as to the family link between the applicant and

(b) as to the constitutional and Article 8 considerations were argued successfully by the applicant to be contrary to constitutional and/or natural justice and/or in breach of fair procedures and/or irrational and/or disproportionate nevertheless the second conclusion of the relevant decision was not impugned and therefore would stand, (namely, that visa officer could not be satisfied with the parental travel consent provided to date) which in and of itself would be sufficient stand alone ground to refuse the visa, the applicants requested the Court to exercise its discretion to make declaratory orders as to the complaints herein before outlined with respect to the decision relative to the DNA status and Article 8 and or constitutional rights status in a similar manner to that which was undertaken by Cooke J. in *A.B. v. R.A.T. & Ors*. [2011] IEHC 412.

12. At para. 26 of that judgment the Court noted that it was not possible to quash the decision because of the definitive finding where the validity of that finding was not before the Court. The Court expressed concern that on a future application the decision may be influenced by the previous examination and the court considered that it was just and appropriate for it to exercise its discretion to grant the applicant declaratory relief in order to dispel the implication that the final outcome was based on a consideration that the exclusion clause of Article 1F of the Geneva Convention applied to the applicant.

Conclusion
13. In this matter it is clearly the case that even if the applicants were successful in respect of all grounds advanced to the court nevertheless this would not result in a quashing of the decision impugned on the basis that there remained the valid stand alone ground that parental consent had not been adequately demonstrated so that the decision would survive the instant attack by the applicants.

14. With due deference to Cooke. J., having considered the matter, I do not feel it appropriate to make declaratory orders in respect of issues which were not fully ventilated before the court – a status which arose because of the fact that it was clear that the decision would survive whether applicants were entirely successful or not on the argument they presented to the Court or not.

15. In the circumstances the application for *certiorari* is refused.