Neutral Citation Number: [2011] IEHC 48

THE HIGH COURT

JUDICIAL REVIEW

2010 1345 JR

BETWEEN

TRACEY ODIA, ROSS OSAMUYI ODIA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND UYE ODIA) AMBER ODIA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND UYE ODIA) AND UYE ODIA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

THE ATTORNEY GENERAL, HUMAN RIGHTS COMMISSION, BLAZE ODIA and BLAIR ODIA (MINORS, ACTING BY THE HEALTH SERVICE EXECUTIVE AS NEXT FRIEND), AND GRAINNE GRENNAN AS GUARDIAN AD LITEM OF BLAZE ODIA AND BLAIR ODIA

NOTICE PARTIES

JUDGMENT of Mr. Justice Cooke delivered the 14th day of February 2011

1. The fourth and first named applicants are respectively husband and wife and the parents of the second and third named minor applicants. The first, second and third named applicants are Irish citizens. The fourth named applicant ("Mr. Odia") is a national of Nigeria.

2. In this judicial review application, the applicants seek, *inter alia*, reliefs by way of order of *certiorari* to quash the deportation order issued in respect of Mr. Odia and dated the 23rd September, 2010. In the application now before the Court, they apply for an interlocutory injunction restraining the first named respondent ("the Minister") from executing that deportation order and removing Mr. Odia from the State.

3. The background history to the case has involved very extensive correspondence by Mr. Odia and his solicitors with the Minister relating to his various attempts to regularise his presence and prospect of continued residence in the State since his arrival here. So far as relevant to the issues to be determined on this application, the salient facts and events in that history can be summarised as follows.

4. The applicant arrived in the State in July 2001, with his then Nigerian wife and they both applied for refugee status. A daughter was stillborn to them but subsequently two sons were born namely Blaze born in July 2003 and Blair born in June 2004. Mr. Odia's wife died on the 1st January, 2005.

5. Because, it is said, of Mr. Odia's distress at the death of his wife and his inability to cope, the two sons were taken into the care of the Health Service Executive (HSE) and since November 2007, they have been the subject of full care orders granted by the District Court and have been placed in foster care where they will remain until they reach the ages of eighteen. Mr. Odia has supervised access to them once every eight weeks. It was in these circumstances that the two boys and Grainne Grennan their guardian *ad litem* in the District Court care proceedings have been joined as notice parties.

6. Mr. Odia admits that when applying for asylum in 2001, subsequently when seeking leave to remain under the IBCO5 Scheme in February 2005, he had lied in claiming that he had a daughter and a son in Nigeria and that the son had been killed there. He further admits that when applying under the IBCO5 scheme he concealed the fact that he had a number of criminal convictions and outstanding charges. Moreover, in what he says was desperation, he presented a forged letter purporting to come from the Minister and granting him residence to the Garda National Immigration Bureau. The application for leave to remain under the IBCO5 Scheme was refused on the basis that the Minister was not satisfied that Mr. Odia was a person of good character. The letter of refusal also demanded an explanation as to how Mr. Odia had come to be in possession of the forged letter of permission to remain. He also admits that although not permitted by law to do so, he managed to obtain employment and worked for four years.

7. On the 28th August, 2005, that is after residency had been refused to him, Mr. Odia married the first named applicant. In September 2006, an application was made for leave to remain and to reside in the State on the basis of that marriage to an Irish citizen. A judicial review proceeding to compel the making of a decision on that application was subsequently initiated, but was compromised in April 2008.

8. The application for residency was refused and a letter proposing deportation under s. 3 of the Immigration Act 1999, was issued in April 2008. The second named applicant was born on the 23rd June, 2007 and the third named on the 7th February, 2009. On the 9th January, 2009, the Minister decided, as an exceptional measure, to grant Mr. Odia temporary permission to remain in the State until the 9th January, 2010, under "Stamp 3" conditions. This decision was apparently taken to enable Mr. Odia to take up the access provisions of the District Court care order in respect of the two older boys, but was subject to the explicit condition that Mr. Odia should obey the laws of the State and not get involved in any criminal activity.

9. On the 8th January, 2010, solicitors on Mr. Odia's behalf applied for a renewal or extension of the permission to remain, but by letters of the 12th February, and the 30th March 2010, were informed that the Minister was proposing not to renew that permission because of Mr. Odia's failure to comply with the condition, it having been reported to the Minister that Mr. Odia had been convicted of an offence under s. 9 of the Firearms and Offensive Weapons Act 1990, on the 26th January, 2010, and sentenced to 150 hours community service or six months imprisonment.

10. The proposal letter invited submissions as to why the temporary permission to remain ought to be renewed. Representations in that regard were subsequently made, but following consideration, the Minister decided not to renew the permission on the 28th June, 2010. That letter also contained notification of a proposal to deport Mr. Odia in accordance with s. 3 of the Act of 1999, and outlined the options available to him. In response to the invitation to make representations, no new narrative representations as such were put forward, but by letter of the 16th July, 2010, Mr. Odia's solicitors relied upon representations which had previously been made and forwarded a letter dated the 8th April, 2010, from the first named applicant.

11. On the 21st September, 2010, the deportation order was made and forwarded under cover of a letter dated the 23rd September 2010, to the applicant together with the "consideration of file" memorandum and a further memorandum dated the 21st September, 2010, from the Repatriation Unit. These memoranda contained, in effect, the statement of the Minister's reasons for making the deportation order and the former note dated 16/09/2010 in particular, sets out in 44 pages a very extensive consideration of Mr. Odia's history, his family circumstances and the evaluation and balancing of the factors relevant to whether the deportation should take place.

12. It is in this context, accordingly, that the judicial review proceeding was commenced and the present application for an interlocutory injunction has been brought. In the latter regard the test to be applied by the Court is well settled. Is a fair issue for determination by the Court raised in the case to be made by the applicant? If no injunction is granted will damages be an adequate remedy for the applicants if the judicial review reliefs are eventually obtained? Where does the balance of convenience lie?

13. The application for leave in this case has not yet been heard. That being so the first question is whether, upon the basis of the statement of grounds and the matters put forward on affidavit, there is a fair issue to be tried at the hearing of the leave application as to the existence of a substantial ground for the grant of leave in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

14. In s. 5 of the statement, the proposed grounds are set out in eight numbered paragraphs which, in the view of the Court, can be fairly categorised as comprising general assertions of failure and omission directed at "the decision to issue a deportation order" without any specific error of law or mistake of fact being identified. The grounds can be summarised thus:-

> (1) The deportation would be in breach of constitutional and legal rights of the applicants under Articles 40, 41 of the Constitution and Article 8 of the ECHR as well as the rights of the first, second and third named applicants as EU citizens under the European Treaty and the Charter of Fundamental Rights;
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> (2) The decision to deport is disproportionate in its effects on the applicant's individually and collectively in the light of their circumstances;
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> (3) The Minister took into account irrelevant considerations or failed to take account of relevant considerations and failed to weigh the facts fairly or proportionately;
>
> (4) No consideration was given by the respondent to the birthright and entitlement of the second and third named applicants as citizens under Article 2 of the Constitution;
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> (5) There is a failure to have proper regard and give sufficient weight to the rights of the minor applicant's citizen children under Article 40 of the Constitution;
>
> (6) No fair or adequate assessment was made of the submissions on behalf of the applicants;
>
> (7) The respondent acts in violation of the ECHR and the European Convention on Human Rights Act 2003;
>
> (8) The respondent has acted *ultra vires* and/or unreasonably and/or unfairly and the decision is *ultra vires*, irrational, unreasonable and unlawful.

15. It will be noted that all of the matters thus advanced as a basis for seeking to quash the deportation order relate to the applicants named in the proceedings. It is their rights, entitlements and interests which are said to be infringed or inadequately considered. The only place in which Mr. Odia's two other children Blaze and Blair are mentioned is as one of the sets of circumstances listed for the purpose of ground (2) above: "The fourth named applicant has two children, Blaze and Blair, by his first wife who are in care in the State and in respect of whom is vital that he maintain his contact".

16. In the grounding affidavit, apart from the references to their births and the circumstances of their being taken into care under the District Court order, the only mention the two boys receive is in para. 36 of the affidavit explaining the delay in the commencement of the proceedings. Mr Odia avers: "I say that having regard to all the circumstances including the fact that the proceedings relate *inter alia* to two Irish citizen children applicants, as well as also relating to my two children in foster care, Blair and Blaze, the delay is not excessive and the respondent will not be prejudiced".

17. Thus, although personal and family rights under both the Constitution and the Convention are invoked in the grounds, no evidential basis is laid as regards the quality of any family life or the practical reality of any relationship between Mr. Odia and his two eldest sons.

18. By contrast, in moving the application for an injunction, the argument concentrated almost exclusively upon the proposition that irreparable harm would be caused to Blair and Blaze by the removal of Mr. Odia pending the determination of the proceedings. Great emphasis was placed upon the fact that Mr. Odia is the only parent the boys have within the jurisdiction and if he is to be deported, their only contact with their natural father will effectively be ended until they reach at least eighteen years of age. It is in this context that the HSE and Ms. Grennan as guardian *ad litem* to the two sons have been joined as notice parties and an affidavit has been sworn and filed by Laura Gallagher who is the child and family social worker allocated to Blair and Blaze and who has been responsible for supervision of their foster care since 23rd November, 2010.

19. In her affidavit she describes the history of the boys since the death of their mother and particularly their relationship with their father since first taken into care in 2005. She says that in the early stages, the access visits with the father were not a positive experiences for the boys and concerns were expressed about Mr. Odia's behaviour, it being necessary on one occasion to call the Gardaí. She says that since 2007, the position has improved and the current long term family placement has been "extremely successful". The boy's relationship with their father has become much healthier since the full care order was made and they have got to know their father's new family. They are said to be upset by the prospect of his deportation and she expresses her professional

opinion "that it is their best interest that their access to their father be maintained". She adds: "in the light of what I have said above, it will of course be very damaging and upsetting for Blair and Blaze should their father be deported. However, if their father were to be deported without notice, without proper preparation, without them all being given a reasonable opportunity to say goodbye, it is my view that this would be significantly more damaging for the boys".

20. In the light of that summary of the existing state of the present proceedings, two important considerations emerge in the view of the Court. The first relates to the question as to whether a fair issue has been made out; the second relates to the significance of the material introduced in relation to Blaze and Blair in the affidavit of the social worker.

21. In the judgment of the Court, no fair issue or *prima facie* case has been made out as to the existence of substantial ground as to why the deportation order ought to be quashed. On the face of it, a careful perusal of the two memoranda mentioned above demonstrates clearly that the Minister has gone about the making of his decision in precisely the manner required by s. 3 of the Act of 1999 and the guidelines in this regard given by the Supreme Court in cases such as *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 including particularly the "non exhaustive list" of relevant matters to be considered set out at para. 85 of the judgment of Denham J. The Minister has addressed *seriatim* the matters required to be considered under s. 3(6) of the Act; he has considered the circumstances of the case in a fair and proper manner including the factual matrix of the family. He has considered the circumstances of the individual members of the family and, so far as was put before him in the representations on file, has considered the rights and interests of the family members, both individually and collectively. He has expressly included all four Irish citizen children in this consideration and in the balancing of the rights and interests of the children and of the family against the interest of the State. So far as Blaze and Blair are concerned their particular circumstances in foster care are considered in the light of correspondence from the HSE social worker allocated to them at the time.

22. The Minister has, in particular, identified a substantial reason associated with the common good which requires deportation of Mr. Odia namely the interest of the State in preventing disorder and crime and ensuring the economic well being of the country.

23. As against the reasons, analysis and evaluation made in the memoranda, the grounds summarised above amount in effect to a disagreement with the assessment made by the Minister. It is simply asserted that the conclusion reached is unreasonable, irrational, disproportionate or inadequate. In the judgment of the Court such an assertion does not amount to a substantial ground upon which an order of *certiorari* could be based. More importantly, however, to reach such a conclusion the Court would have to be satisfied that the assessment made by the Minister was unreasonable and irrational in law in the sense reaffirmed by the judgments of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform,* namely that it is plainly and unambiguously contrary to common sense. In the judgment of the Court it is quite impossible to reach such a conclusion in this case because of the outstanding feature namely the catalogue of 45 criminal convictions which Mr. Odia has accumulated in the State between 2002 and 2010 a number of which are a directly related abuse of the asylum process and his temporary entitlement to residence in the State. As already mentioned above, in the asylum application and subsequent application for residency under the IBCO5 Scheme, Mr. Odia lied about having a son and daughter in Nigeria. Although not entitled to work, Mr. Odia attempted to obtain employment using a fraudulent driving licence and PPS number. He attempted to obtain a GNIB card using a forged letter from the Minister as already indicated. In addition, he has acquired seven convictions for theft; nine convictions for driving offences and nine for handling stolen property; in the light of all of these factors the Court is satisfied that it could not be concluded that there was any basis for asserting that the assessment made by the Minister as the basis for the decision was in any sense unreasonable or contrary to common sense. . Not only does this history make it impossible to conclude that the Minister's decision not flow from the premise upon which it is based and is contrary to commonsense, it constitutes in itself a strong reason why the Court should exercise its discretion to decline to grant injunctive relief.

24. As regards the significance of the material put before the Court in the affidavit of Ms. Grennon, it must be pointed out that this is new information which was not put to the Minister prior to the making of the deportation decision. The validity of the decision falls to be assessed by reference to the facts and circumstances made known to the Minister at the time. If Mr. Odia wishes the Minister to consider the nature and quality of his relationship with Blaze and Blair including their claimed dependence upon the continuation of access to him, that is a matter that can only be dealt with by the Minister in the context of an application to revoke the existing order under s. 3(11) of the Act. Whether or not it amounts to material which would justify revocation is a matter for the Minister to consider. Having regard to the view expressed by Ms. Grennon that the impact of the deportation upon Blaze and Blair might be mitigated by the departure of being carefully prepared so far as they were concerned, that too is a matter for consideration by the Minister as regards the circumstances and timing of implementation of the order.

25. For all of these reasons, the Court is satisfied first, that no fair issue is raised to the effect that implementation of the order in these circumstances would be unlawful; and secondly, that the history of Mr Odia's continual disregard for the laws of the State during his years living here and his abuse of the asylum and immigration system constitute a compelling reason for refusing to exercise its jurisdiction in his favour.

26. Accordingly, the application for an interlocutory injunction must be refused.