Neutral Citation [2016] IEHC 703

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 299 J.R.]

BETWEEN

K.R.A. AND B.M.A.

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND K.R.A.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 4)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 28th day of November, 2016

1. In *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016), I dismissed the applicant's judicial review proceedings challenging a refusal to revoke deportation orders. In *K.R.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 421 (Unreported, High Court, 24th June, 2016), I granted leave to appeal that decision and awarded costs to the applicants in the particular circumstances of the case. In *K.R.A. v. Minister for Justice and Equality (No. 3)* (Unreported, High Court, 3rd October, 2016), I refused the respondent leave to appeal the costs order. I now deal with the issue of whether, and if so for how long, the deportation of the applicants should be enjoined.

2. The first named applicant has been present in the State for approximately eight and a half years, of which she spent five years "on the run" from the GNIB. The second named applicant is eight and a half years old, and has been in the State throughout that period.

Whether Chigaru has modified the Okunade test
3. Ms. Rosario Boyle S.C. (with Mr. Anthony Lowry B.L.) in a very able and interesting submission for the applicant argued that the Court of Appeal decision in *Chigaru v. Minister for Justice and Equality* [2015] IECA 167 (Unreported, Court of Appeal, (Hogan J.), 27th July, 2015) has simplified the previous test for an injunction of this kind as set out in *Okunade v. Minister for Justice Equality and Law Reform* [2012] 3 I.R. 152.

4. However there are two fundamental reasons why this is not the case. Firstly and most obviously, it would be up to the Supreme Court to modify the law as laid down by that court in *Okunade* (save by reference to factors (which did not arise in *Chigaru*) such as some other Supreme Court decision not taken into account in that case or some other recognised exception to *stare decisis*); and secondly, and unsurprisingly having regard to the first reason, the Court of Appeal did not purport to do so, and indeed expressed itself very clearly in *Chigaru* as simply applying *Okunade*. Accordingly, I reject the submission that there is now some more simplified test for deportation injunctions involving children.

The Okunade test
5. As set out by the Supreme Court in *Okunade*, the first question is whether there is an arguable case, which I accept is the case here because I granted leave to appeal to the appellants.

6. The real issue is where the greatest risk of injustice would lie. It is interesting that the Supreme Court speaks in terms of both the balance of justice and the balance of convenience, although only the latter is the expression used in *Chigaru* at paras. 23 to 39. I would respectfully suggest that the expression "*balance of justice*" as used by Clarke J. at paras. 107, 112 and 121 of *Okunade* is possibly a more illuminating one, particularly in the present case, for reasons which I will set out further.

Implementation of a valid decision
7. The first issue in the balance of justice test is the need to give all appropriate weight to the orderly implementation of measures which are *prima facie* valid. In the present case this clearly strongly militates in favour of refusing a stay to the applicants.

The orderly operation of the relevant scheme
8. The second criterion is to give such weight as is appropriate to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made. Insofar as one can consider the operation of the immigration regime as a whole under this heading, this again militates in favour of refusal of a stay.

Public interest in the measure being implemented pending challenge
9. Thirdly the court must give appropriate weight to any additional factors which arise on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending the determination of the proceedings. Under this heading, I am particularly conscious that this is not a challenge to the protection process, and not even a challenge to a deportation order, but it is the sort of final throw of the dice that applicants can avail of, namely a challenge to a refusal to revoke a deportation order which itself was either unchallenged or unsuccessfully challenged at the appropriate time.

10. The fact that an injunction is sought in proceedings challenging a refusal to reopen a historic decision strongly militates in favour of refusal of an injunction (see *P.O. v. Minister for Justice and Equality* (Unreported, High Court, 3rd October, 2016) (which to avoid confusion with a Supreme Court decision of the same name I will refer to as my decision in *P.O.*). I will return to this issue under the heading of the strength of the applicants' case below.

Evasion or misconduct by the parent and whether this can be held against the child
11. A further factor is the applicants' conduct in evading the GNIB, which strongly militates in favour of refusing an injunction, unquestionably so as regards the first named applicant.

12. What are the implications of this evasion for her child? *Chigaru* says effectively that the child should not be identified with the mother in this context. However in the decision of the European Court of Human Rights in *Butt v. Norway* (Application No. 47017/09, 4th December, 2013), it is said that *"the Court has noted the general approach of the Borgarting High Court that strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children … The Court, seeing no reason for disagreeing with this general approach, observes that during a police interview on 15 November 1996 the applicants' mother conceded that she had previously given incorrect information to the police and other institutions about her own and her children's stay in Pakistan during this period"* (para. 79).

13. Thus what in Oslo and Strasbourg are considered to be "*strong immigration policy considerations*" are categorised as "*entirely unjust*" in *Chigaru*: the children "*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"* (para. 24).

14. In view of the fact that ss. 2(1) and 4(a) of the European Convention on Human Rights Act 2003 are not referred to in Chigaru, it seems to me that the implications of those provisions in the context of a judgment of the Strasbourg court upholding a particular approach, are something which I now must consider as a matter that is effectively *res integra*. On that basis, and bearing in mind that I am required to give effect to the 2003 Act, I would conclude that it would not generally be open to me to exercise a common law or in this case equitable jurisdiction in such a way as to categorise an approach approved by Strasbourg as "*entirely unjust*"; or indeed to transfer to the judicial branch matters that are legitimately characterised by Strasbourg as "*immigration policy considerations*". The court cannot adopt or operate its own immigration policy, a point I sought to make in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 (Unreported, High Court, 29th July, 2016).

15. Mr. David Conlan Smyth S.C. (with Mr. Anthony Moore B.L.) for the respondent has made available to me the relevant pages of the State's written submission to the Court of Appeal in *Chigaru* which contains the following passage at p. 11: "*The Applicants argue in their submissions that, insofar as the misbehaviour of the first and second named Applicants may attract a sanction, such a sanction should not be visited upon their children. This overlooks the fact that caselaw indicates that it is appropriate in such cases to identify children with the conduct of their parents: see, for instance, the decision of the European Court of Human Rights in* Butt v. Norway …"

16. Para. 79 of *Butt* is then quoted on p. 12 of the written submission along with other ECHR caselaw referring to the principle that "*the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act" (Antwi v. Norway* (Application No. 26940/10) para. 90).

17. However the *Butt* decision (which cannot be categorised as merely a decision on the limited rights of the precarious, as Ms. Boyle valiantly submits) is not referred to in the judgment of the court in *Chigaru*, and in the circumstances, given its significance to the point at hand, it appears to have been inadvertently overlooked.

18. Of further significance in this context is the decision of the Supreme Court in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (Unreported, Supreme Court, (McMenamin J.), 16th July, 2015) ("*P.O.*") in which the *Butt* approach is expressly approved.

19. At para. 26 of the judgment of MacMenamin J. it is stated that "*in* Butt v. Norway *(47017/09), the* [Strasbourg] *court made clear that, as a general principle, the status of children would generally be identified with the conduct of their parents, failing which, parents might exploit the situation of their children in order to secure a residence permit for themselves and for the children".*

20. At para. 35 of Charleton J.'s judgment it is stated that *"The choices made on behalf of the first named applicant/appellant by his mother and next friend, and the second named applicant/appellant were a choice exercised on behalf of them both. In* Butt v Norway *(No. 47017/09), judgment of March 4th, 2013, of the European Court of Human Rights reiterated that a State party to the Convention is entitled to control the entry of non-citizens into its territory and their residence there, and accepted that immigration policy considerations would be undermined unless children were generally identified with the conduct of their parents."*

21. *Chigaru* (which was a judgment dated 29th July, 2016) does not refer to the *P.O.* decision which was handed down by the Supreme Court on 16th July, 2016, some two weeks beforehand. Presumably what happened was that *P.O.* was handed down after argument concluded in *Chigaru*, and counsel may have either overlooked the decision or the need to draw the decision to the court's attention after judgment had been reserved but prior to the giving of judgment (a course of action supported in similar circumstances by Birmingham J. in *D.P.P. v. Murphy* [2015] IECA 300 (Court of Appeal, 5th November, 2015)).

22. Nonetheless, I must afford priority to the *P.O.* decision by the Supreme Court, as well as giving consideration to the implications of *Butt* on the grounds that, while a point not argued it is a point not decided, so also is a point that was argued but not decided. If I am to act consistently with the *P.O.* and *Butt* decisions, I would very respectfully conclude that the view that children cannot have any parental misconduct held against them is not one that can be followed. It is not unjust to generally identify children with their parents or to attribute the misconduct of parents to persons claiming through them such as minor children, such as by way of having regard to parental evasion of immigration law when considering whether the balance of justice favours child applicants remaining in the State.

23. Ms. Boyle places reliance on the *obiter* comments of MacMenamin J. in *C.C. v. Minister for Justice and Equality* [2016] IESC 48 (Unreported, Supreme Court, 28th July, 2016) in which he said that it "*would not have been difficult*" for the GNIB to locate the applicants given their interaction with other state agencies. She submits that likewise these applicants have interacted with state bodies. I would very respectfully agree with MacMenamin J. insofar as I construe his comments as suggesting that it would be desirable to facilitate the GNIB in accessing data regarding interactions with other state agencies in order to ascertain the whereabouts of persons sought for deportation purposes. I am inclined to accept the submission of Mr. Conlan Smyth which I understood to mean that data protection legislation may preclude such data sharing, at least without legal steps being taken to underpin data transfers with an appropriate legal basis. Perhaps if consideration were given to facilitating broader data sharing, the problem highlighted by MacMenamin J. would arise less frequently in future.

Consequences for the applicants

24. The next heading is that I should give all due weight to the consequences for the applicants of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful. That is central to the case.

25. As an essentially related issue the court should consider the question of whether damages could be an adequate remedy, which does not arise here.

26. Turning to the judgment in Chigaru, Hogan J. comments on the disruption factor at para. 25 as follows: "*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.*"

27. Endeavouring to discern how to apply this approach to the disruption issue to the facts of the present case, I am afraid that I have to very respectfully say that, viewed from the standpoint of the present case, it does not immediately lend itself to generalisation in a manner that would resolve the question as to whether continue the injunction in this particular application, for one simple reason.

28. The dilemma facing the Court of Appeal in the passage just quoted was whether to dislocate the applicants or leave them in Ireland. However viewed from the perspective of the present case, that is in crucial respects a false dilemma because it compares a bad outcome for the applicants, namely deportation now, with the best possible outcome, namely remaining in the State. Such an approach simply excludes the most likely outcome if a stay is granted, certainly as far as the present proceedings are concerned, namely ultimate deportation when the proceedings fail.

29. Thus, when assessing the balance of justice as regards the applicants, one of the matters I have to consider is whether the balance of justice favours deportation of the applicants now as against deportation of the applicants when their proceedings fail, as I consider is highly likely for reasons which I will discuss further below.

30. The Court of Appeal has of course inherited a significant body of pending appeals as well as having further continuous inflow and it is no surprise that it currently appears to have a reasonably busy schedule of dates assigned to appeals on its civil side up to January, 2018. I have no information as to that court's current capacity to afford a priority hearing date to a case of this kind before then, although I understand that at the last directions hearing, Ryan P. indicated he would examine the possibility of a priority date. Assuming for the sake of argument that this case did not get priority, one might postulate a hearing in early 2018 and a decision in mid-2018, at a point in time at which the second named applicant would be 10 years of age. Thus I have to ask myself, doing my best for this child and asking what is in her best interests, whether those interests are served by deportation now at the age of 8 or in perhaps a year and a half's time at the age of 10. Having regard to the general respective levels of adaptability of children of the ages concerned, the probability, all other things being equal, that children become less adaptable as they get older, and the absence of any evidence to suggest that this particular child is different from the norm, I would have to draw the conclusion that however adaptable she is at 8 years old, she will be significantly less adaptable at 10. The balance of justice (or convenience) will have no relevance when the case is over. It seems to me to be clearly in her interests to undergo the likely disruption at this point rather than at a later stage when it is even more difficult for her.

31. It is clear from the discussion earlier in this judgment, that even allowing for the prospect of some considerable disruption to the applicants, a large number of the factors on the *Okunade* test militate in favour of refusing a stay. Can it be the case that disruption to a child must in virtually every case override all of the other considerations in the *Okunade* test, as Ms. Boyle submits? If so, that would be requiring such other considerations, to adapt the language of Hogan J. in *P.S. v. Minister for Justice Equality and Law Reform* [2011] IEHC 92 (Unreported, High Court, 23rd March, 2011) at para. 23, to "*be treated as if, so to speak, they were mere discards from dummy in a game of bridge in which the* [appellate level of the judicial branch] *as declarer has nominated* [disruption to children] *as the trump suit"*. That is what the applicants' argument really amounts to.

32. Any balancing system which virtually always required priority to be given to disruption to a child applicant would be a quite different test to that as set out in *Okunade* and therefore could hardly be said to be an application of *Okunade*. Therefore I consider that that was not the intended effect of *Chigaru.* To postulate the existence of such a test, as Ms. Boyle effectively does, would mean that the appellate courts have essentially sent the High Court on a fool's errand in going through the motions of considering the elements of *Okunade* when there can really only be one result if a child is involved (albeit perhaps with extremely limited possible exceptions such as a new-born baby or a brief visitor and the like).

33. Indeed, the proposition that disruption to children is normally or even presumptively decisive is just as contrary to the reasons of immigration policy identified by the European Court of Human Rights in *Butt* and approved in *P.O*. as was the proposition that children cannot be identified with their parents.

The strength or weakness of the applicants' case on appeal

34. Finally, under the *Okunade* test, the court can place all due weight on the factor to which I have already referred, namely the strength or weaknesses of the applicant's case, apart from those cases which require detailed investigation of fact or involve conflicting questions of law.

35. At one level it is slightly uncomfortable for a court that has just given a decision to assess, not just whether the losing party should be given leave to appeal, but also what the likelihood of that appeal succeeding is. However the *Okunade* approach appears to require this, so that is what I will endeavour to do.

36. Having said that, Clarke J. in *C.C.* also noted that an assessment of the strength of the case might be possible "*in particular at the appellate level*" at para. 5.11. To that extent it is probably the case that for the purposes of any stay application, the Court of Appeal may find it easier than it is for me to assess how likely it is that my decision in the substantive case is incorrect.

37. The legal points in this case are clearly not the sort of complex points that "*call for detailed argument and mature consideration"*, *per* Lord Diplock in *American Cyanamid Co. v. Ethicon Limited* [1975] A.C. 396 at p. 407, cited by Clarke J. in *C.C.* at para. 5.6.

38. The applicants have two points they propose to advance on the appeal. The first point is that the second named applicant as a child is entitled to the benefit of the constitutional right to free primary education and is entitled to advance that as a reason not to be deported to a country with an inferior educational system. The prospects of the applicants succeeding on that point are minimal. I appreciate that prediction is difficult, especially about the future (as Niels Bohr is said to have observed), but even the most sympathetic court would hesitate to find a legal right to stay in Ireland on the basis of the educational or social provision here being better than that in an applicant's home country. To do so would essentially abolish Ireland's border with the developing world. That point is going nowhere.

39. One then turns to the applicants' second point, namely that the Minister should have in some way considered the child's application separately. For the reasons set out in my judgment in *K.R.A. (No. 1),* that point has nothing going for it except the

decision of Eagar J. in *C.O.O. v. Minister for Justice and Equality* [2015] IEHC 139 (Unreported, High Court, 4th March 2015), a decision that I found, with great respect, was not one that could be followed. Nonetheless, by granting leave to appeal on this point, I am prepared to assume that there is a possibility, however modest it might appear to me, of the applicants' making headway on this point.

40. But even if they do, where does that get them? The deportation orders are unchallenged and remain in force. Those orders are now unchallengeable. The best the applicants could hope for would be that the Minister would have to reconsider one or both of the decisions on whether to revoke those orders. But such a decision does not give the applicants any legal entitlement to be in the State. Pursuant to s. 5(2) of the Immigration Act 2004 they are illegally present here for all purposes, and that would not change even if the revocation decisions were hypothetically quashed. The fact that the Minister is seeking to discharge the injunction bodes poorly for any suggestion that she will suddenly take a more benign view of their *ad misericordiam* submissions.

41. The Supreme Court previously held in *Cosma v. Minister for Justice* (Unreported, Supreme Court (McCracken J.), 10th July, 2006) that it would be inappropriate to grant an injunction absent exceptional circumstances to restrain the enforcement of a deportation order that was not challengeable: *"If the court were to grant an injunction such as is being sought by the appellant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order".*

42. Such an approach appears consistent with the policy of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 which requires challenges to be brought promptly and not, at a later stage, collaterally or through creative legal confection. I infer from the lack of mention of the judgment that the *Cosma* decision does not appear to have been opened to the Supreme Court in *Okunade*. I note in passing that in relation to the Court of Appeal decision in *Chigaru, Cosma* was relied on in the respondents' written submissions (at pp. 6 to 7) but the decision is not mentioned in the judgment of Hogan J., possibly because it has more relevance to a s. 3(11)-type case of which *Chigaru* was not one. *Cosma* it seems to me remains a binding authority and defines a possible limit to the grant of injunctions where to do so would (as here) interfere with the enforcement of an unchallenged and unchallengeable deportation order. An approach similar to *Cosma*, and relying on the fact that applicants were making their point in the s. 3(11) context rather than a timely challenge to a deportation order, was applied by McDermott J. in *K.N. v. Minister for Justice* [2013] IEHC 566. As noted above, I took a similar view in my decision in *P.O*.

The absence of a real and substantial protection challenge
43. A further important distinction should be emphasised. The applicants in both *Okunade* and *Chigaru* were challenging aspects of the protection process, which at least gave a temporary and provisional entitlement to remain in the State. These applicants are out of that process and are challenging not even their deportation but the failure to revoke the deportation orders. That is a fundamentally different context to that prevailing in *Okunade* and *Chigaru*. The position of these applicants is wholly illegal and irregular, and it would remain wholly illegal and irregular even if the refusals to revoke the orders are quashed. An application for a stay in a case which does not involve a protection challenge is inherently less persuasive than where a real and substantial protection issue arises (see my decision in *P.O.*).

44. Apart from the fact that *Chigaru* concerned the protection process, which involved a provisional right to remain, it must also be said that the applicants' legal point in *Chigaru* was one of some weight and seriousness. In the present case, were it not for the judgment of Eagar J. in *C.O.O.*, the applicant's proceedings would have had difficulty going further in the manner sought because I would have refused leave to appeal. The main purpose of granting leave to appeal was to allow the Court of Appeal to definitively resolve the divergence between *K.R.A. (No. 1)* and the *C.O.O.* decision. Thus, leave to appeal was not an acknowledgment that the applicant's case had any particular merit or weight, but rather that recourse to an appellate court was the best and quickest way in the circumstances to bring closure to a divergence between High Court decisions.

Applicants can make their case without personal presence
45. Furthermore, the nature of the judicial review proceedings is such that the ability of the applicants to make their case would not be impaired by a refusal of the injunction, because the judicial review relates to issues of law on which their lawyers can be adequately instructed without the applicant's presence (see my decision in *P.O.*). This is a point that has been stressed on numerous occasions including in the Supreme Court decisions in *Nicolas v. Minister for Justice* (Unreported, Supreme Court, 20th February, 2007*); Zadeh v. Minister for Justice* (Unreported, Supreme Court, 2nd November, 2007). (See also the judgment of Peart J. in *O.O. v. Minister for Justice* [2007] IEHC 275 (Unreported, High Court, 3rd July, 2007).) *Nicolas* and *Zadeh* do not appear to have been opened to the court in *Okunade* or *Chigaru* and provide a further important principle to be added to those set out in the *Okunade* decision.

46. Ms. Boyle submitted that failure to grant a stay could be viewed by the respondents as supporting an argument that it render the proceedings moot (see *Harding v. Cork County Council* [2008] 4 I.R. 318 at para. 3.8). However any such argument would not be well-founded. The applicants can continue to pursue their appeal in relation to the deportation orders despite not being physically present in the State.

Conclusion
47. To summarise therefore:

(i) the appropriate test is that set out in *Okunade*, supplemented by the further principles identified by the Supreme Court decisions in *Cosma, Nicolas* and *Zadeh* which remain relevant, and which establish that:

(a). it would generally be inappropriate to grant a stay in a case where the underlying deportation order was unchallengeable (i.e., in a s. 3(11) case); and

(b). the ability of an applicant to make a legal case without physical presence in the State militates against a stay;

(ii) the propositions that disruption to children is of such weight that it is presumptively decisive or that children cannot be identified with their parents in respect of parental misconduct are inconsistent with *Butt* and *P.O.;* and insofar as it embodies or suggests either proposition, the Court of Appeal's *Chigaru* decision may be departed from by this court by reason of the fact that it did not refer to or reflect those decisions;

(iii) applying *Okunade, Cosma, Nicolas* and *Zadeh* to the present case, the factors under consideration largely weigh in favour of refusing a stay;

(iv) the main factor against refusal of a stay is the disruption to the child applicant, but I do not regard that as decisive,

in particular having regard to the public interest in enforcing the deportation orders, the very weak nature of the applicant's case, the lack of any legal basis for either of the applicants to be present in the State, the fact that that lack of legal basis will continue even if they win their appeal, the unchallenged status of the deportation order, the applicants' ability to make their case without being present in the State, the misconduct of the first named applicant, and my view that the real comparison by which the best interests of the child applicant needs to be judged is between deportation now and what seems to me to be very likely deportation when the appeal is over;

(v) on the basis of that comparison, it seems to me to be significantly more in the second named applicant's interests to change location at this point rather than when she is even more embedded in Ireland at the point when the appeal concludes;

(vi) in terms of other factors forming part of the balance of justice, it is not unjust to deport the applicants because they have no right or title to be in the State, and will not have such right or title even if they succeed in this case on appeal: thus, framing the test as the Supreme Court does in *Okunade* in terms of balance of justice may possibly be somewhat more illuminating than the traditional language of balance of convenience.

48. While the balance of justice and convenience favours lifting the injunction, a short stay on that order is appropriate in the particular circumstances of this case to enable the applicants to pursue any consequential applications and to put their affairs in order.

Order
49. For the foregoing reasons I will order as follows:

(a). that the existing injunction be discharged;

(b). that the discharge of the injunction be stayed until 20th January, 2017; and

(c). that the parties be heard on any consequential applications and all outstanding costs matters.

Postscript
50. Following further submissions in relation to whether leave to appeal was required to enable the applicants to appeal the discharge of the injunction, I came to the conclusion that leave was not so required in this case because I have already granted the applicants leave to appeal, and an additional appeal in relation to the stay would be ancillary in nature. It would remain for argument in a future case as to whether leave is required in a free-standing injunction or stay appeal which seeks to prevent the enforcement of a decision to which s. 5 applies and which is not ancillary to any appeal in which leave has been granted.

51. However, if an appellate court were to take the view that leave is in fact required in this case, I would wish to be taken as intending to retain seisin for the purpose of considering any leave to appeal application that would be made in that eventuality.