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THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 2005/378 J.R.

BETWEEN

U.L., S.L., M.L.,
AND K.L.

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 28th day of February, 2007.

1. The applicants in these proceedings are asylum seekers. They are ethnic Serbs but are natives of what is now the State of Croatia. They arrived in this State in November, 2002 seeking asylum. The first and second named applicants are husband and wife. The third and fourth named applicants are the children of the marriage. While other matters were raised in these judicial review proceedings it has now been conceded that the only issue for the determination of this Court relates to the third and fourth named respondents. The issue is simple. It is whether, in the circumstances, separate consideration should have been given to the application for asylum made by and on behalf of the third and fourth named applicants.

Background

2. It is not necessary in this case to deal with the chronology of the events in great detail. The application on behalf of the first named applicant was refused by the Refugee Applications Commissioner on 15th May, 2003. That of the second named applicant was refused on 21st May, 2003. These recommendations were affirmed by the Refugee Appeals Tribunal in a decision of 17th November, 2003.

3. The applicants had submitted that they had been forced to flee their country on a number of occasions. Most latterly, before coming to Ireland, they had gone to Norway where they also applied for asylum but were refused there.

4. Four deportation orders dated 11th October, 2004 were made in relation to the applicants. Those relating to the third and fourth named applicants are impugned in these proceedings.

5. The departmental analysis upon which these orders were made and sent to the Refugee Legal Service on request by letter dated 16th February, 2005. The applicants' present solicitors were instructed on 9th March, 2005. The following day they wrote for the medical records of the first named applicant from St. Michael's Psychiatric Unit. These records were received on 14th March, 2005. They indicated that the first named applicant was suffering from depression and also symptoms of post-traumatic stress as a result of his prior experiences in Croatia. In separate but associated proceedings, (Record No. ----------), the first named applicant seeks to challenge a determination of the respondent not to revoke a deportation order. The judgment in the instant proceedings should be read together with that judgment. The court must also in these proceedings consider whether there should be granted an extension of time within which to file amended statement of grounds.

The waiver

6. In a supplemental affidavit sworn on behalf of the applicants by their solicitor dated 28th April, 2005 it is accepted that in the course of the proceedings before the Refugee Applications Commissioner the second named applicant signed a waiver. This was a hand-written authority which was written in both the applicant's own language and in translation. It is signed by her. It is dated 1st November, 2002, the date of the interview with the Refugee Applications Commissioner. In this document the second named applicant specifically waives the need for any individual consideration by the Refugee Applications Commissioner for her children. While in the course of these proceedings it was contended that this waiver had been signed without the benefit of legal advice, it has not been submitted that any specific consequences flow from this. The court's attention has been drawn to the fact that there was no subsequent departmental analysis pertaining to the third and fourth named applicants individually.

The Applicants' Case

7. The essential case advanced by the applicants is that there is a legislative imperative upon the respondent (that is the Minister) to consider each potential deportee pursuant to s. 3(6) of the Immigration Act, 1999 which provides that the Minister shall have regard to a number of enumerated factors including age, family circumstances, etc*., so far as they appear, or are known to the Minister*".

8. It has also been submitted that the Commissioner is an entirely independent person in the exercise of his or her functions under the Act. Consequently, it is suggested that a waiver which takes place before the Commissioner does not absolve the Minister from his obligation to carry out a separate assessment of the position of the third and fourth named applicants and that the role of the Minister is to carry out an entirely separate consideration of each of the applicants pursuant to s. 3 of the Immigration Act, 1999. It is submitted on behalf of the applicants that s. 3 of the Act of 1999 is to be interpreted strictly. Reliance is placed on the judgment in *R.B. v. The Minister for Justice* (High Court, 20th December, 2001, McKechnie J., Unreported) with reference to s. 3(3)(a) of the Immigration Act, 1999 which as in the case of s. 3(6) imposes certain duties on the Minister.

9. Section 3(3)(a) of the Act of 1999 provides as follows:

> "Subject to section (5), where the Minister proposes to make a deportation order, he or she shall notify the persons concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands."

Distinguishing Features from R.B.

10. The circumstances of that case are, however, highly relevant. The facts of R.B. arose during the transitional phase prior to the introduction of the Act of 1999. In that case the Minister sought to rely on reasons expressed in correspondence prior to that Act coming into effect as a justification for steps taken after it became law. McKechnie J. concluded in those circumstances that there was an obligation upon the Minister to express his reasons and considerations in compliance with the provisions of s. 3(3)(b) of the Act of 1999. Reliance on correspondence or considerations and reasons expressed prior to that Act coming into effect would be insufficient where there was a duty that reasons be formed in strict compliance with the section. Thus it was held that the

determination in R.B. was made without jurisdiction

Decision and Reasons
11. I am not convinced that the reasons which have been advanced on behalf of the third and fourth named applicants are sufficient to establish substantial grounds for leave. My reasons are as follows.

12. First, the court has not been furnished with any reasons as to why, on the facts, there were special or exceptional circumstances, or any distinguishing circumstances at all, which necessitated a separate consideration of the position of the third and fourth named applicants. While they were referred to, peripherally, in the course of representations made on behalf of the applicants, no distinguishing features whatever have been identified which would necessitate separate consideration. Second, this issue appears to have risen *ex post facto*. No such issues were identified during the asylum process.

13. Third, the second named applicant signed a specific waiver indicating that it was not necessary that the position of the third and fourth named applicants should be considered separately and that all applications of the family should be considered together. No reasons have been advanced as to why the absence of legal advice would in any way invalidate this waiver. Fourth, as has been previously observed in a case not dissimilar on the facts, the applicants are not to be a passive observer in these proceedings. (See the judgment of Peart J. in *Nwole & Ors. v. The Minister*, High Court, Peart J., Unreported, 26th May, 2004.)

14. In the course of that judgment that judge pointed out:

> "It follows in my view that where no such separate grounds of application had been identified by the parent in respect of any child in his/her company, that the Minister has no obligation to consider each child separately from his consideration of the parent's application, since there is in effect nothing separate to consider. No right of the child is infringed in this way, and it would defy common sense, and would ignore the two-way process involved in these applications, if for some theoretical reason devoid of any practical purpose, the Minister was obliged to require a separate form to be completed in respect of each child involving thereafter a separate questionnaire, a separate interview, and a separate consideration in circumstances where consideration has already been given to the identical grounds of application made out by the mother."

15. One cannot entirely avoid the conclusion that the issue which arises in the instant case owes more to ex post facto ingenuity than to any issue of substance, pointed out in *Caldaras v. Minister for Justice, Equality and Law Reform,* (The High Court, March, 2006, Unreported, MacMenamin J.) the obligation on the Minister is to have regard to the issues which arise under the sub-section *insofar as they appear or are known to the Minister*. The specific terms of the sub-section clearly establish that there is a primary onus upon the applicants to ensure that any distinct or relevant issue which arises in such application is brought to the attention of the Minister. *Caldaras* identifies the primary onus which exists upon applicants under the provisions of s. 3(6) of the Act of 1999, as distinct from that which arose in the context of s. 3(3)(a) of the Act of 1999 and considered by McKechnie J. in R.B. While it is clear that there must be compliance with the provisions of s. 3(6) by the respondent, the primary onus of ensuring that the Minister has sufficient information lies upon the applicant or those representing the applicant.

16. While the Minister's responsibilities are distinct from those of the Tribunal, this fact is insufficient as a basis for contending there should be a separate waiver or that any primary onus lay on the Minister. No authority has been advanced for this assertion. Nor has any evidential basis been adduced to justify it.

17. The court has not been persuaded that the applicants have established substantial grounds which are reasonable, arguable or weighty (see Illegal Immigrants (Trafficking) Act, 2000; *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125).

Extension of Time
18. The issue of the extension of time for the amendment of the statement of grounds is governed by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000 where the court is empowered if there is good and sufficient reason for extending the period within which an application should be made "to so extend the time".

19. It has been accepted that the applicants' former legal representatives, the Refugee Legal Service, advised the applicants on 3rd February, 2005 and 22nd February, 2005 that they had no case. The solicitors on record were instructed on 9th March of that year. The applicants were not aware of a potential defect in one of the orders (in relation to an issue not now pursued) until they were furnished to junior counsel on 13th April, 2005.

20. While in other circumstances a court might be inclined to extend the time, on such facts the essential issue here is that no substantial grounds have been established and consequently, no basis to extend the time for the amendment of the statement of grounds is established.

21. The court will decline to grant leave or any other ancillary relief.