Neutral Citation Number: [2010] IEHC 392

THE HIGH COURT

JUDICIAL REVIEW

2010 734 JR

BETWEEN

O.A.O. AKPATA & Ors (FOUR MINORS AND PARENTS)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Cooke delivered the 9th day of November 2010

1. This is an application for an interlocutory injunction to restrain the Minister from implementing three deportation orders which he has made against the third, fourth and fifth named applicants, - two minor sons and their father. It is brought prior to the hearing of the application for leave to apply for judicial review of those orders, because the Minister has declined to undertake not to implement the orders prior to that hearing.

2. The background can be stated very briefly. The six applicants are a family of two parents who are nationals of Nigeria and their four minor children. The mother, (the sixth named applicant,) arrived in the State in 2003 and gave birth to the first named applicant shortly thereafter in April 2003. She had left behind her in Nigeria, her husband (the fifth named applicant,) and two sons, the third and fourth named applicants who were then two and five years old. In the absence of any contrary averment, it is fair to assume that this was an agreed and voluntary initiative by the father and mother at the time.

3. The father and his two sons remained in Nigeria until 2006. The arrived in the State in May 2006 and applied for asylum, although the father admitted at the time that he had no fear of persecution in Nigeria and had come to the State to join his wife and infant daughter. They have been here since. The asylum application was unsuccessful, both before the Office of the Refugee Applications Commissioner; in judicial review of the ORAC report and on appeal to the Refugee Appeals Tribunal. The second named applicant was born in the State to the parents on the 1st January, 2009. The first named applicant is an Irish citizen and the second named applicant may also be an Irish citizen.

4. The three deportation orders were made on the 19th May, 2010 and were notified, as is usual, to the applicants with a copy of the "Examination of File" note, (the "File Note",) prepared within the Repatriation Unit of the Department, which sets out the analysis and the assessment of the case for and against the making of a deportation order in the light of the representations made on behalf of the applicant, the matters required to be considered by the statute and the possible application in the case of the statutory prohibitions of refoulement.

5. The Court is concerned here with the application for interlocutory injunction and therefore with the issue as to the existence of the substantial ground as to the invalidity of the deportation orders only to the extent that in applying the Campus Oil test, the Court must consider whether there is raised a fair issue to be addressed at the leave application to that effect.

6. The Court considers it unnecessary to determine the present application by reference to the first limb of the Campus Oil test and is prepared to proceed on the basis that a fair issue as to the existence of the substantial ground has been made out. A variety of issues are to be raised as to the adequacy of the Minister's appreciation in the File Note of the interests, welfare and the rights of the first and second named applicants in the event of the removal from them of their father and their two brothers: the alleged failure to consider the rights of the second named applicant as an Irish citizen: the fact that the deportation orders effectively determine the custody of the remaining children; and the legal issue as to whether the orders infringe Article 13 of the Convention because there is no effective remedy. It is to be argued that judicial review is not an adequate remedy due to the High Court's inability to consider any new evidence and to adjudicate upon the merits of the Minster's decision. Whatever doubts the Court might have or as to the ultimate sustainability of such arguments, it is at least clear that they are stateable as possible grounds of substance.

7. The present application turns rather on the two other limbs of the test, namely, the questions as to whether the balance of convenience lies with granting or refusing an injunction and whether damages would adequately remedy any detriment caused to the party concerned, depending on whether the injunction is refused or granted.

8. It is perhaps useful in these circumstances to recall first the circumstances in which that test came to be laid down in 1983 in *Campus Oil v. The Minister for Industry and Commerce (No. 2).* [1983 IR 88]. The plaintiffs had challenged the compatibly with European Community law of a statutory instrument made by the defendant Minister which compelled the plaintiffs and other oil companies to take part of their supplies from the Whitegate Oil Refinery. The plaintiffs had persuaded the High Court to refer a question to the European Court of Justice for preliminary ruling as to the legality of the regime in question. The Minister counter-claimed to compel their continued participation in the off-take regime and then sought an interlocutory injunction to compel the plaintiffs, pending the trial, to continue their off take of product from the refinery, notwithstanding the issue that they had raised as to its illegality. The Supreme Court upheld the High Court interlocutory decision to compel compliance on the basis that the order in

question was on its face valid unless and until the contrary was established. The plaintiffs' defiance of it threatened the continued operation of the off take regime, so that the balance of convenience lay with the preservation of the status quo albeit by mandatory injunction.

9. It is worth noting therefore that although it involved a considerable commercial burden for the plaintiffs in being compelled to buy product they did not want, the balance of convenience was held to lie with the continued enforcement of the existing measure.

10. In the present case, the Minister has made deportation orders which, on their face, are valid. They come at the end of an asylum process which was itself of dubious bona fides having regard to the father's admission that he left Nigeria not out of any fear of persecution but in order to rejoin his wife.

11. The grounds to be raised do not require the presence of the father and the sons at the hearing of the leave application, as they depend entirely on legal argument; on the assessment of the quality or adequacy of the evaluation made in the File Note and of the proportionality of the conclusion reached in balancing the rights and interests of the State against the rights and interests of the family and particularly the interests and welfare of the first and second named minor applicants.

12. As against those considerations, the third, fourth and fifth named applicants are at present unlawfully in the State. They have no positive right to be here. They abused the asylum system to circumvent the need to apply under the Immigration Acts for a visa to visit and join the mother and child lawfully in 2006. They have been refused leave to remain.

13. An application for judicial review in these circumstances does not have any suspensive effect on the deportation orders and this is not a case in which the refusal of an injunction, (assuming the Minister decides to implement the orders,) necessarily exposes the father and the two sons to any risk of irreversible harm should they be returned to Nigeria. No question of any possible infringement of any prohibition on refoulement or of Article 3 of the European Convention on Human Rights arises in this case. The Convention rights which are possibly affected are those of private and family life under Article 8 and the constitutional rights of the Irish citizen child or children to the care and support of both parents. The refusal of an injunction does not therefore result in any change of circumstance which is incapable of being restored should the substantive application for judicial review ultimately be successful.

14. In that regard it is important to note that on the basis of the grounds to be raised, it does not follow that there will be no deportation, even if the substantive application results in those orders being quashed. It may result in the Minister being required to make a new evaluation and assessment of the impact of the deportation of the three applicants on the rights and interests of the family members who decide not to accompany the father and the two boys to Nigeria.

15. It is true that the refusal of an injunction, if followed by implementation of the orders, would alter the status quo of the family as it has obtained since the arrival of the father and the two sons in the State in 2006. That status quo has been contrived unlawfully through the illegal entry and their presence has been unlawful since the conclusion of the asylum appeal. In effect the deportation would result in the restoration of the status quo of the family as it was brought about by the parents in the three years from 2003 to 2006, when the mother voluntarily separated herself from the husband and two infant sons to come to the State.

16. In these circumstances, in the judgment of the Court, where the grant or refusal of an interlocutory injunction involves choosing between declining on the one hand to interfere with operation of a statutory decision which is, like the order in the Campus Oil case, valid until the contrary is established; and on the other hand, compelling the Minister to accept the continuation of an illegal situation; the balance of convenience lies with refusing the injunction. Allowing the existing measure to remain without interference does not bring about any irreparable or irreversible situation.

17. It is true that in practical terms the deportation of the father and the two sons may be a major inconvenience to the mother and the remaining two children, in that they must either choose to accompany them in order to stay together, or temporarily fend for themselves should they choose to stay - as the mother has apparently declared they will do. But such personal and practical inconvenience must be set against the inconvenience to the public interest of intervening to restrain the course of lawful operation of statutory decisions, thereby permitting a benefit, even temporarily, to be exploited from a situation brought about unlawfully.

18. Counsel for the applicants has strongly emphasised that the primary concern in this case is the protection of the rights and interests of the two youngest children, (the first and second named applicants,) and it is argued that they ought not to be visited with or disadvantaged by any unlawful conduct on the part of their father. Superficially attractive though that proposition may appear to be, the reality is that a child cannot either choose or disown its own family circumstances. The long term imprisonment of a convicted parent may deprive a child of the parent's company, care and support and thus interfere with its personal rights and family life, but the sentence does not become unlawful because it has the inevitable and secondary result of visiting the consequences of the parent's crime upon the innocent child.

19. Finally, it is argued that in the circumstances, damages would not adequately remedy the harm that will be done by the removal, even temporarily, of the father in the event that the deportation orders are ultimately quashed. This argument is in the Court's view unfounded.

20. As already pointed out, if the Minister decides to implement the deportation orders prior to the hearing, the effect is to return the three applicants concerned to the position they were in the years 2003 to 2006. Should the need arise the Court can by appropriate relief require the Minister to readmit them to the State. The father is not entitled to work in the State, although he may well be entitled to do so in Nigeria. Thus, the immediate losses resulting from a refusal of an injunction are likely to be confined to any expenses incurred in returning to the State and any costs they may incur in re-establishing themselves in Nigeria which they would not otherwise incur here.

21. Again, counsel for the applicants has stressed that the more important issue is the irreparable harm that may be done in the form of the emotional or psychological damage to the first and second named applicants by the sudden removal of the father and the two brothers, with whom they have lived since 2006 and in the case of the second named applicant since his birth in 2009.

22. This proposition is not in fact supported by any evidence and is based upon what counsel has suggested was an "obvious and commonsense" view. In the judgment of the Court, this apprehension is both speculative and inconsistent with the applicants' own approach to their family life. The first named applicant lived without her father until three years old at the choice and insistence of the parents and has had the company of her father only since 2006. The second named applicant is only twenty months old. Many families, for economic or other reasons cope with circumstances in which one parent may be absent for lengthy periods of time, in a foreign posting, in military service or working at sea. It does not follow as a matter of general knowledge that emotional stress or psychological damage always results.

23. Moreover, if the family places a high value on regular contact, the mother and the two youngest children will not be precluded from making visits to Nigeria, if she decides to remain a resident of the State for the foreseeable future, in the interests of the two Irish born children as she is entitled to.

24. Thus, no adequate basis is made out in the Court's judgment on which the Court could hold that irreparable harm to either child is inevitable or probable should the father be required to return to Nigeria, prior to the determination of the proceedings.

25. For all of these reasons, accordingly, the Court will refuse an interlocutory injunction.