Neutral Citation Number: [2006] IEHC 5

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 280 J.R.]

BETWEEN

CHRISTIANA AWE
DAVID AWE
OLUWATOBI AWE
OMOSHEKE AWE

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered on the 24th day of January, 2006.

1. This is an application for leave to issue judicial review. An originating notice of motion was issued on the 15th March, 2005, following an interim order made on 14th March, 2005 and a statement of grounds filed on that day. On the 16th March, 2005, an undertaking was given to the court on behalf of the respondent not to deport the applicants pending further order. At the hearing of the application for leave on the 27th of October, I was informed by counsel for the respondents that the undertaking remained in place.

Background facts

2. The first named applicant is the mother of the second, third and fourth named applicants. They are nationals of Nigeria. They appear to have arrived in Ireland at the end of 2002. Since early 2003, the second, third and fourth named applicants have been at school at Millstreet Community School. At the time of commencement of these proceedings the second named applicant was in Transition Year and the third and fourth named applicants in Third Year and due to shortly take their Junior Certificate.

3. The applicants made an application for asylum which appears to have been rejected. Deportation orders dated the 22nd December, 2004, were made in respect of each of the applicants. These appear to have been served in February 2005, with accompanying notices under s. 3 of the Immigration Act 1999. The applicants were then required to present themselves on dates thereafter both in the Garda National Immigration Bureau, Burgh Quay, Dublin and subsequently in Cork.

4. In the meantime on the 2nd March, 2005, a letter was written on behalf of the applicants by their solicitor to the Department of Justice, Equality and Law Reform, repatriation unit indicating that they were awaiting updated medical reports in respect of the first named applicant; expressing the view that the first named respondent should not give effect to the deportation order without first having regard to the updated medical reports; stating that they were awaiting the departmental analysis which formed the basis of the decision to deport and asking that an undertaking be given not to deport pending receipt of that analysis. That letter appears to have been responded to by an official of the repatriation unit of the department by letter dated 7th March. The operative part of that letter stated:

> "Please be advised that the time for making representations in this case has now passed. Once deportation orders have been signed and served, the enforcement of same becomes an operational matter for the Gardaí. Any further enquiries should be addressed to the Garda National Immigration Bureau, 13-14 Burgh Quay, Dublin 2.

5. In the same period, on the 3rd March, 2005, Donal Moynihan TD wrote to the Minister making representations on behalf of the applicants. That letter was acknowledged to Mr. Moynihan by a letter written and signed personally by the Minister dated the 4th March, 2005, in which he stated "this matter is receiving attention in my department." That letter was forwarded to the solicitors for the applicants on behalf of Mr. Moynihan on the 10th March, 2005.

6. On the 7th March, 2005, the solicitors for the applicants wrote a further letter to the repatriation unit of the Department on behalf of the applicants. It is this letter which forms the basis of part of the application for leave. The letter enclosed medical reports in respect of persistent lower back pain and reduction in spinal and hip mobility of the first named applicant and a number of letters submitted on behalf of all the applicants from different people in the Millstreet community with regard to what is stated to be the applicants' "remarkable integration into the Irish community". It also refers to the fact that they demonstrate that the children prove to be excellent and committed students; have won a number of awards and that the first named applicant is held in high regard by her neighbours and described as a mother that "raised her children to be honourable contributors to society". The letter then makes representations as to why the Minister should not now give effect to the deportation orders and in the last paragraph a request that the deportation orders be revoked.

7. That letter was responded to on 9th March by a different official from the official who sent the letter of 7th March, 2005, and a different attitude taken which was "the correspondence is being forwarded to the relevant unit of the repatriation section dealing with your client's case for attention."

8. Thereafter all communications from the Department ceased. An interim order restraining deportation was made on 14th March. In response to the motion issued on 15th March, seeking interlocutory relief, an undertaking not to deport was given. In the application for leave to issue an application for judicial review, a short affidavit was sworn in reply by a third official of the Department on 25th October, 2005. That affidavit exhibits the letter of 7th March, 2005 from the Department in response to the letter of 2nd March, 2005. It makes no reference to the subsequent letter of the 9th March, 2005, in response to the applicants' solicitors' letter of 7th March, 2005. The affidavit also exhibits what appears to be an internal memorandum of the same official. It is not suggested that any decision contained in that internal memorandum (which is not suggested to be a decision on the application to revoke the deportation orders made in respect of the applicants herein) was communicated to the applicants or their solicitors.

Reliefs sought

9. Senior Counsel for the applicants at the hearing indicated that he was firstly pursuing an application for leave to seek an order of *certiorari* of the deportation orders as set out at paragraph (d)3 of the statements of grounds upon the ground set out at paragraph (f) 1. This ground states:

> "The deportation order does not declare or otherwise indicate the country to which the applicants are to be deported. The order is void or invalid insofar as the form of the order is determined by the Immigration Act, 1999 (Deportation) Regulations, 2002 those regulations are *ultra vires* and void."

10. However, counsel indicated that he was not asserting that the 2002 Regulations were *ultra vires* or void and advanced no other legal submission in support of the contention made at ground (f) 1.

11. The application for leave to issue judicial review seeking an order of *certiorari* of the deportation order is subject to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Accordingly the applicants must establish substantial grounds for contending that the deportation order is invalid. No such substantial grounds was established at the hearing and I am refusing that application.

12. The second substantive relief pursued by counsel for the applicants was the order of mandamus sought at paragraph (d) 4 which is in the following terms:

> "An Order of Mandamus ordering the first named respondent to consider and decide in the light of the new evidence, that materialised after the deportation issued on the applicant as to the fresh representation pursuant to the S. 3 letter dated the 7th March, 2003."

13. Leaving aside any technicality as to the precise wording of the relief sought the substance of the relief is an order of mandamus directed to the first named respondent requiring him to consider and decide upon the application made on behalf of the applicants in the letter from their solicitors of 7th March, 2003. The grounds supporting that relief as set out in paragraph 2 in the statement of grounds are in the following terms:

> "On the 7th March, 2005, the applicant's solicitor applied to have the deportation orders revoked, setting out the reasons and with accompanying references. On the 9th March, 2005, the Minister acknowledged that correspondence and stated that it would receive "attention". He also informed the applicants' TD in writing on 4th March, 2005 that the application was "receiving attention" in the Department. Thereby the applicants have a legitimate expectation that will be attended to and determined prior to any deportation being implemented."

14. The relief of mandamus sought at para. (d)3 is not subject to s. 5 of the Act of 2000. Notwithstanding, the applicants must meet the test set out in *G. v. The Director of Public Prosecutions* [1994] 1 I.R. 374 by Finlay C.J. at p. 378 which requires the applicant to establish

> "That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by judicial review; and that on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks."

Conclusion

15. The application for leave was heard by me on 27th October, 2005. The relief sought at para. (d)3, as already stated, is an Order of *Mandamus* directing the respondent to consider and determine the application made to him in the letter from the solicitors for the applicants of 7th March, 2005. No evidence was adduced on behalf of the respondent that the application contained in that letter had been substantively responded to prior to the date of the leave hearing.

16. At the hearing, there persisted confusion as to the nature of the application made in the letter of 7th March, 2005, having regard to the statutory scheme created by the Immigration Act, 1999 and in particular s. 3 thereof. The initial submission made on behalf of the applicants was that this letter contained further representations under s. 3(3)(b) of the Act of 1999, for leave to remain in the State on humanitarian grounds. Counsel on behalf of the respondent submitted, correctly in my view, that s. 3(3)(b) of the Act of 1999 only relates to representations which may be made after a notice of a proposal to deport and prior to the making of a deportation order. Deportation orders had been made in respect of the applicants herein on 22nd December, 2004 and served on the applicants in February, 2005.

17. In response to this submission counsel for the applicants then submitted that the letter of 7th March contained an application for revocation of the deportation orders; he referred to ground 2 set out above in the statement of grounds and also to the power of the respondent under s. 3(11) of the Act of 1999 to revoke deportation orders. He submitted in reliance upon the acknowledgement of 9th March, 2005 and representation that the matter was receiving attention and the applicants' right to fair procedures, that the respondent is and was under an obligation to determine the application for revocation based upon what is stated to be fresh material and in particular fresh medical evidence relating to the first named applicant.

18. The Act of 1999 does not contain any time limit or procedure in relation to an application to the respondent to exercise his power to revoke a deportation order under section 3(11) of the Act of 1999. In accordance with the decision of the Supreme Court on the Article 26 reference in *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, the applicants are entitled to have any statutory powers exercised in relation to them, exercised in accordance with the principles of constitutional justice and fair procedures.

19. I have concluded that on the facts of this case an arguable case in law has been made out that the principles of constitutional justice and fair procedures require the respondent to determine the application for revocation of the deportations orders contained in the letter of 7th March. Further, such principles require the determination to be made within a reasonable period of time and that any such reasonable period of time expired prior to the hearing of the leave application. Accordingly, it appears to me that the applicants are entitled on such facts to an order granting leave to seek the relief sought at paragraphs (d)3,7 and 8 on the ground set out at paragraphs (f)2and 4.

20. The applicants have sought at para. (d)5 a stay on the orders of deportation pursuant to Order 84, rule 20(7)(a). Unless the undertaking already given is to continue, the applicants are entitled to such an order having regard to the time which has elapsed since the application was made to revoke the deportation orders.

21. I have also concluded that it is in the interests of justice on the facts of this case that I put a stay on the order granting leave for a period of twenty-one days to enable the respondent consider this judgment and, if he considers it appropriate, make a decision on the application for revocation of the deportation orders contained in the letter of 7th March. My reason for taking this approach is the following.

22. The letter of the 7th March, 2005, is a confusing document when considered in the context of the statutory scheme to which it related and in particular s. 3 of the Immigration Act, 1999. It is headed "Further representations pursuant to s. 3 of the Immigration Act 1999 (as amended)". Having referred to new enclosed medical reports, additional material with testimonials as to the integration of the applicants and regard in which they are held in the community already referred to above, it is then stated:

> "We are of the view that the Minister for Justice, Equality and Law Reform should not give effect to the deportation order without first having regard to the above mentioned updated medical reports on Ms. Christiana Awe's condition and the fresh representation submitted on behalf of this family."

23. There are then further references to the effect of deportation on the medical condition of Mrs. Awe and the psychological effect on the children and a reference to the Convention on the Rights of the Child. Only in the final paragraph of the letter it is stated:

> "In the circumstances, we respectfully ask you to revoke the deportation orders issued against our clients and grant them humanitarian leave to remain."

24. From the replying affidavit sworn on behalf of the respondent, it appears that the officials acting on his behalf failed to understand this letter as being a request for the respondent to exercise his powers under s. 3(11) of the Act of 1999 to revoke the deportation orders made in respect of the applicants. The failure to so appreciate was, in my view, contributed to by an absence of clarity in the letter of 7th March and also by the characterisation of the letter in the statement of grounds delivered on 15th March, 2005 as being either "fresh representations pursuant to s. 3" or a "renewed humanitarian leave application". Mr. Pendred, solicitor for the applicants, who swore the grounding affidavit, also refers to the letter of 7th March as being "a fresh section 3 application". Having regard to the submissions made on behalf of the respondent at the hearing for leave, it appears that the respondent was anxious to establish that there was no entitlement to make representations under s. 3(3)(b) of the Act of 1999 after deportation orders had been made and served. As already indicated, when that point was made clearly at the hearing, counsel for the applicants did not dispute the correctness of this position or pursue the submission which had been made. He then sought to make the alternative submission based on the application for revocation which was set out in para. (f)2 of the statement of grounds.

25. If prior to the expiry of twenty-one days from the date hereof the respondent has made and issued to the applicants a decision on the application for revocation of the deportation orders contained in the letter of 7th March, 2005, then the order granting leave will be vacated and the applications herein struck out.

26. Accordingly, I am putting the matter in for mention at 10.30 a.m. on Tuesday, 21st February, when I will also deal with any application in relation to costs.