Neutral Citation Number: [2011] IEHC 102

THE HIGH COURT

2009 511 JR

BETWEEN

FREDERICK STANLEY OBOH

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND STANLEY

EFFIONG OBOH), AND

HARRIS STANLEY OBOH

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND STANLEY

EFFIONG OBOH) AND

STANLEY EFFIONG OBOH AND

PRISCA STANLEY OBOH

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 2nd March, 2011

1. This judgment is supplementary to the judgments which I have already delivered in *Efe v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 25th February, 2011) and *Alli-Balugon v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 1st March, 2011). For reasons I will presently set out, I have concluded that the applicants should be granted leave to apply for judicial review on limited grounds.

2. While the principal issues in this case are very similar to those which arose in *Efe* and *Alli-Balugon*, there is one important difference in that it is not now disputed but that the third and fourth applicants both swore false affidavits in the course of the proceedings. One of the principal issues which arises in this case is, therefore, whether this acknowledged deceit should deprive the applicants of their entitlement to seek relief by way of judicial review. I will address this question shortly, but it is first necessary to set out the background facts of the case.

3. The first applicant is the son of the third and fourth applicants. He is an Irish citizen by virtue of his birth here on 11th May, 2003, his mother, Ms. Oboh, having arrived here some weeks previously on 17th April, 2003. The second applicant was also born in the State on 29th September, 2006, but he would not appear to be an Irish citizen in view of the provisions of the Irish Nationality and Citizenship Act 2004. The third applicant, Ms. Oboh, is married to the fourth applicant, Mr. Oboh, and they are the parents of the two children. In 2005 Ms. Oboh was granted permission to reside in the State pursuant to the terms of the IBC 05 Scheme. She had previously unsuccessfully sought asylum and not unnaturally faced deportation, but this was overtaken by the terms of the permission which the Minister had generously given her under that scheme. Both of her two sons have lived here all their lives.

4. Mr. Oboh is a Nigerian national who initially claimed in his first affidavit to have arrived here on 20th February, 2006, but whom, as we shall presently see, actually arrived some months earlier in November, 2005. He subsequently made a claim for asylum which was rejected by the Refugee Appeals Tribunal on 16th September, 2008. The Minister for Justice, Equality and Law Reform subsequently made an order providing for the deportation of Mr. Oboh on 9th April, 2009. The applicants now challenge the validity of that deportation order on the familiar grounds that to do so would effectively break up and separate the family and thus effect a disproportionate interference with the guarantees contained in both Article 41 of the Constitution and Article 8 ECHR. I propose to return to this question presently.

The falsehoods contained in the applicants' asylum application and in his grounding affidavit

5. In his asylum application, Mr. Oboh claimed to have been a member of a vigilante group known as the "Bakassi Boys." He claimed that he was first induced to have become involved with this group because it sought to protect local residents from attacks from marauders from neighbouring Cameroon. He contended that he subsequently left this group because it was assaulting local people. He later claimed that his grandmother's house was set alight by Cameroonians and that both his grandmother and his daughter, Stephanie, perished in the fire on 6th August, 2003.

6. Mr. Oboh also claimed that he was attacked and left for dead by members of the Bakassi Boys (or their surrogates) in Lagos on 2nd February, 2006, and that it was this attack which prompted him to leave and to seek asylum in Ireland. To this end he furnished what purported to be a medical report from a medical centre in Lagos attesting to his injuries.

7. It is not now disputed but that this account is an entire fiction. While the medical report is supposed to be on the headed paper of the medical centre in question, the fact that no telephone number is given would excite the suspicion even of the naïve and the gullible. The report is further littered with a host of linguistic errors (*e.g.*, "….he was alleged to have being bitten up by a group of hooligans"), such that it is doubtful that it could ever have been signed by any self-respecting medical doctor. While the report uses some technical medical terms in order to give it an air of verisimilitude, yet it seems quite improbable that - as this report purports to narrate - a patient could be in a deep coma following such a life threatening assault of this gravity, yet start to improve "after four days of intensive management" and be discharged home after two weeks.

8. Of course, the very implausibility of this account is undermined by the fact that Mr. Oboh is the father of the second applicant who was born on 29th September, 2006. As his mother was resident in the State for the previous nine months, then it was impossible for Mr. Oboh to have been assaulted in Lagos in Nigeria in February, 2006 though this false claim was a central part of his asylum application.

9. Mr. Oboh has now apologised for these blatant untruths. He belatedly filed a supplementary affidavit on 22nd November, 2010, when he said:-

> "I had been afraid to provide the correct information as to the true date of my arrival for fear it would involve me in difficulties and I now understand the seriousness of what I have done and deeply regret what I have brought about by my actions."

10. Ms. Oboh is also complicit in this. She originally filed an affidavit endorsing the facts set out in her husband's affidavit (including the date of his arrival in the State), but has now sworn a supplemental affidavit deeply regretting this deceit.

11. This brings us directly to the question of whether Mr. Oboh is accordingly disentitled to any relief by way of judicial review having regard to these untruths and his general lack of candour. It is, of course, absolutely plain that a litigant can forfeit his or her right to discretionary relief by reason of a lack of candour: see, *e.g.*, *The State (Vozza) v. O'Floinn* [1957] I.R. 227 at 249-252, per Kingsmill Moore J.

12. But while this is so, it is equally clear that the lack of candour must be *relevant* to the question of relief. In other words, the mere fact that a litigant has been guilty of lack of candour cannot *in itself* disentitle an applicant to relief. Discretionary relief is not withheld on this ground as a form of punishment or because judges are personally offended or feel slighted by such contumelious behaviour on the part of the litigant in question. It is rather that the court, being desirous to uphold the integrity of the system of administration of justice may withhold relief where it is satisfied that the litigant has told an untruth which, if it had been otherwise accepted by the court, would have materially influenced the disposition of the proceedings.

13. This is illustrated in its own way by the facts of *Vozza*, a case where the applicant sought to quash a conviction for larceny. The applicant himself was an Italian of humble origins with little education, but who had been living in this State for some period. While Mr. Vozza had been originally charged with attempting to steal a purse from a lady's handbag and although he had been informed of his right to seek a jury trial on this charge, he consented to summary trial. During the course of the hearing on that charge, however, the District Judge formed the view that the evidence would in fact support a charge of stealing. The judge thereupon amended the charge from one of attempted stealing to that of larceny. Mr. Vozza was not, however, informed by the District Judge of his right to jury trial in respect of that amended charge and he was later convicted of this offence.

14. While different judges took different views of the matter, Mr. Vozza had quite possibly concealed the extent of his knowledge of English in the affidavits presented in judicial review proceedings in the High Court: see, *e.g.*, the discussion of this in the judgment of Davitt P., [1957] I.R. 227 at 233-234. While that may well have been so, it is implicit in the various judgments of the Supreme Court that this was ultimately irrelevant to the question of whether the District Court had informed him of his right to jury trial on this indictable charge. As Kingsmill Moore J. put it ([1957] I.R. 227 at 240:-

> "On the really important matter - the failure to comply with the provisions of the Criminal Justice Act, 1951, I can find no evidence of lack of candour, exaggeration or error."

15. Since his ensuing conviction was held to be bad in law by reason of such a failure on the part of the District Judge in question, it was quashed by the Supreme Court which held - if only by implication - that he was not be deprived of his right to relief by reason of an alleged lack of candour in relation to an issue which was not central to the ground on which he has succeeded.

16. In this regard, I fully agree with counsel for the Minister, Mr. Conlan Smyth, who submitted that the conduct of the applicant in the present case was far more egregious than that of the applicant in *Vozza*. Unlike that case, the applicant swore to a statement in his grounding affidavit filed in this Court as to the residency which was plainly untrue and it was, moreover, one which he knew to be untrue. This statement was presumably made to ensure consistency with an account given to the Refugee Appeals Tribunal to which the fictitious medical report had been submitted. Such is acknowledged by Ms. Oboh in her supplemental affidavit when she stated that both herself and her husband "were fearful that he would encounter difficulty if he were to admit to having arrived earlier than he had stated in his asylum claim." Of course, as Mr. Conlan Smyth pointed out, it is an offence for any individual to make a misleading statement of this kind in support of an asylum application: see s. 20(2) of the Refugee Act 1996.

17. I further agree that if one were to look at this matter solely from the standpoint of Mr. Oboh, there would be a good deal to be said in support of the contention that, subject to the question of relevancy, his deceitful conduct and flagrant abuse of the asylum system should *per se* disentitle him to any relief from this Court. This would be especially so where the untruths went to the core of the case which he was making. Save, perhaps, in quite exceptional circumstances, the Court, for example, could not have been asked by Mr. Oboh to quash the decision of the Refugee Appeals Tribunal rejecting his asylum application in circumstances where he admitted that a key document submitted in support of that application was fraudulent.

18. The present case does not, however, come into that category for two main reasons. First, these untruths - while deplorable and inexcusable - are not central to the fundamental case now made regarding the potential break-up of the family. The exact date on which the applicant entered the State is not directly relevant to the resolution of these issues. Second, it is plain that, for the reasons adumbrated by me in my judgments in *K.I. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66 *and Efe v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 25th February, 2011), I must rather view this matter from the standpoint of the innocent children applicants who must, where possible, be shielded from the consequences of the behaviour of their parent or parents.

19. In this regard, I respectfully agree with the analysis of this issue contained in the judgment of Finlay Geoghegan J. in *GD v.*

Minister for Justice, Equality and Law Reform [2006] IEHC 344, another case arising out of the IBC 05 scheme. Here the question was whether an adult applicant in that case should be disentitled to relief by way of judicial review by reason of a false statement in an affidavit as to the length of her residency in the State. While the applicant was held to be *prima facie* entitled to such relief, the question arose as to whether she had forfeited any entitlement to relief by reason of such untruths.

20. As Finlay Geoghegan J. explained in rejecting this submission:-

> "Nevertheless, counsel for the respondent submits, that by reason of untruths stated by the second named applicant in relation to her period of residency in this country, particularly in the first affidavit sworn in these proceedings, that those reliefs should be refused.
>
> The granting of reliefs by way of judicial review is a matter of discretion. Even where the illegality of a decision is determined it does not follow that the court is bound to grant an order of *certiorari*. There may be exceptional circumstances in which the court will refuse to exercise its discretion in favour of granting such relief.
>
> The swearing by an applicant of a false affidavit is undoubtedly potentially such an exceptional circumstance. It is an extremely serious matter and one which might well disentitle an applicant to a relief to which he or she might otherwise be entitled. However, I have decided on the facts herein that I should not exercise my discretion to refuse to all three applicants the relief sought, namely the order of *certiorari* quashing the decisions of the respondent dated 16th August, 2005, in respect of the second and third named applicants.
>
> My reason for so deciding is that, as appears from the *Bode* judgment, the primary ground upon which I have determined that the decision taken by the respondent on those dates under the IBC/05 Scheme were invalid, is by reason of a breach of the first named applicant's rights guaranteed by Article 40.3 of the Constitution and by reason of a breach of the respondent's obligations under s. 3 of the European Convention on Human Rights Act of 2003, having regard to the State's obligations under Article 8 of the Convention in relation to the first named applicant's right to respect for his private life. Accordingly, notwithstanding the very serious breach by the second named applicant of her obligations to this court and having regard to the apology tendered, it does not appear to me that I should deprive, in particular the first named applicant, of relief in relation to a matter which is of concern to him and which I have determined by reason of a breach of his rights guaranteed by Article 40.3 of the Constitution and Article 8 of the Convention."

21. In effect, therefore, Finlay Geoghegan J. was prepared to overlook these untrue averments since to do otherwise would be effectively to penalise the child. The child's constitutional right to the care and company of his parents principally exists for the benefit of that child. The unspoken premise of Article 41 is that children will fare best when looked after by their parents who will be present to rear, nurture, comfort, guide and advise them as they seek to surmount the various challenges with which life confronts them: see, *e.g.*, the comments of Hardiman J. on this topic in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374 at 501-502. This is why the State's role of active intervention to override parental choices is confined by Article 42.5 to those special cases where the parents objectively failed in their duty, but even then such intervention must be with due regard to the natural and imprescriptible rights of the child in question

22. It is for these reasons that I have concluded that the applicants are not dis-entitled to the relief sought, the contumelious behaviour of both Mr. Oboh and Ms. Oboh in swearing to untrue statements notwithstanding.

The Substantive Issues

23. If we turn now to the substantive issues, it will be appreciated that this application for leave to apply for judicial review raises many of the same issues as were dealt with by me in my recent judgments in *K.I. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66, *Efe* and *Alli-Balugon*.

24. Before dealing with those substantive issues, I should again record that in these proceedings, just as in *Efe* and *Alli-Balugon*, the applicants also originally sought a declaration of incompatibility pursuant to s. 5(1) of the European Court of Human Rights Act 2003, that aspects of the common law rules of judicial review failed to provide an effective remedy, contrary to Article 13 ECHR. When this case first opened, I queried whether the applicants were entitled to seek such a declaration on a free standing basis, without having first sought to challenge the constitutionality of these rules. Similar issues arose in a number of other pending cases and, following an application brought by the applicants in this and the other cases, I ultimately acceded to their applicants to allow the pleadings to be amended to enable them to raise this constitutional question. The reasons for that conclusion are to be bound in my judgment in the companion case of *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31. It was then agreed that I would proceed to give judgment in this case (and a number of other companion cases raising the effective remedy issue), while leaving over the question over for the moment the question of the constitutionality of these rules.

The Section 3 File Assessment

25. Returning now to the substantive issues, the file assessment carried out on behalf of the Minister for the purposes of s. 3(6) of the Immigration Act 1999 ("the 1999 Act") prior to the making of the deportation order followed the standard pattern in such cases and amounted to a comprehensive review of the factual circumstances of the applicants, including an assessment of the impact of the making of such an order on their constitutional rights and their rights under Article 8 of the European Convention of Human Rights. Just as with *Efe* and *Alli-Balugon* - but unlike the assessment in *K.I.* - one particular aspect of the assessment does, however, call for further comment.

26. As I pointed out in my judgment in *K.I.*:-

> "…it is perfectly obvious from the language of Article 41 and Article 42 of the Constitution that [an Irish citizen child] has the right to the care and company of her parents, a point which, in any event, is attested by four powerful Supreme Court decisions, *G. v. An Bord Uchtala* [1980] I.R. 32, *Re JH* [1985] I.R. 375, *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 470 and *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795."

27. On this point the file analysis commented:

> "The nature and history of this family is that Mr. Oboh's Irish citizen son was born in the State on 11/05/2003 and did not have the care and company of his father for a period of two years and nine months prior to Mr Oboh arriving in the State. Therefore, if Mr. Oboh's wife were to decide to stay in Ireland with their children, the disruption to their family life would not have the same impact as it would had they been living as a family unit for a much longer time."

28. As I pointed out in my judgments in *Efe* and *Alli-Balugon* - where similar statements are to be found in the file analysis - many will find this reasoning to be less than compelling. The applicants' submissions attest to the fact that the boys have hugely benefited from having a father figure in their lives. While the Minister would be justly entitled to be wary of potentially self-serving declarations of this kind, there has been no suggestion that this does not reflect the reality of their lives.

29. If this is so, then there is no denying but that the impact of the deportation order would nonetheless be considerable. If one leaves to one side cases of neglectful parents who have played no meaningful role in the lives of their children, the reality is that it is often difficult to measure the value of a parent's love and affection purely in terms of duration. If this is so, then it is hard not to accept that the deportation of the father in such circumstances would not have a major impact on these boys.

30. These considerations notwithstanding, as I pointed out in my judgment in *KI*, the established case-law of this Court - which I consider that, for the reasons set out in that judgment, I am bound to follow - demonstrates that the Minister can proceed to deport the non-national parent of an Irish citizen child for a substantial reason, even if that means the child may in practice be deprived permanently of the care and company of that parent by virtue of the fact that the parents have decided that it is best interests of that child that he or she should remain in Ireland with the other parent who is resident here. As Clark J. put it in her judgment in *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595:-

> "Such a deportation will be lawful once the Minister has considered all relevant factors and has identified a substantial reason for the deportation. It is not the law that the Minister can only deport the father of a citizen child in exceptional circumstances. The law is that notwithstanding the very important status of citizenship, the Minister can deport such a father in pursuit of an orderly and fair restrictive immigration policy in the common good provided that a full and fair assessment of the particular child and particular family situation has been balanced against the State's interests and the decision is not disproportionate in the circumstances."

31. The key words here are "full and fair assessment of the…particular family situation." This is critical to the question of whether the decision is proportionate in the circumstances.

32. In my view, the applicants have, however, established substantial grounds for contending that the Minister did not conduct a full and fair assessment of their case having regard to the quite specific factor which I have just mentioned. I accept that even if the assessment of the impact of the deportation on these boys had been fully and completely considered, the Minister might nonetheless have proceeded to deport their father. Indeed, based on the reasoning contained in decisions such as *Alli* and *Ofobuike v. Minister for Justice, Equality and Law Reform* [2010] IEHC 89, it would seem that the deportation of the third applicant in those circumstances would be perfectly lawful.

33. At the same time, however, the applicants are entitled to have that type of assessment conducted by the Minister and, as I have just stated, they have established substantial grounds for contending that this did not occur.

Conclusions
34. For the reasons stated, I have concluded that the applicants have established substantial grounds within the meaning of s. 5(2) of the 2000 Act and I propose to discuss the precise form of order regarding the grant of leave with counsel.