Neutral Citation Number: [2009] IEHC 394

THE HIGH COURT

2009 402 JR

BETWEEN/

P.I., P.O. AND O.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND P.I.) AND H.O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND P.I.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL, IRELAND AND THE HUMAN RIGHTS COMMISSION

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 31st day of July 2009

1. In the originating papers lodged in this matter on the 16th April, 2009, it was proposed to apply to this Court for leave to seek reliefs by way of judicial review on behalf of all the applicants named in the proceeding including, in particular, an order of *certiorari* to quash a decision of the respondent Minister making orders under s. 3 of the Immigration Act 1999 for the deportation of all the applicants. Separate orders had been made in respect of each applicant on 12th March, 2009. In addition, notice was given of an intention to seek to apply for orders of *certiorari* quashing:-

> 1) The decision of the respondent Tribunal of 23rd September, 2008 insofar as it rejected an appeal by the third and fourth named applicants against a Section 13 Report and recommendation of the Refugee Applications Commissioner on an application for asylum by all applicants; and
>
> 2) A decision of the respondent Minister refusing applications for subsidiary protection made on behalf of the third and fourth named applicants.

2. The first named applicant is from Nigeria and fled that country in 2005. She arrived in the State on 18th October, 2005 and applied for asylum. That application was initially made on her own behalf. The third named applicant was born in the State on 1st December, 2005. On the 4th January, 2006 the first named applicant completed an asylum application form on behalf of her newly born son, O., together with the form asking for his application to be included with her own and confirming that she understood that the decision made would apply to both her and the child.

3. The Section 11 interview took place on 4th January, 2006 and a Section 13 Report of the Refugee Applications Commissioner was made on 5th January, 2006 which recommended that refugee status be refused. A notice of appeal against that report was lodged by the first named applicant's solicitors on 23rd January, 2006, covering both mother and son.

4. The second named applicant is also from Nigeria. He arrived in the State on 9th October, 2006 and claimed asylum. He claimed to be the partner of the first named applicant and the father of the third named applicant. His applications for asylum, subsidiary protection and leave to remain were subsequently unsuccessful.

5. The fourth named applicant, H., was born in the State on 29th April, 2007.

6. A hearing on the appeal initiated by the first named applicant was held on 29th July, 2008 and by a decision of 23rd September, 2008 it was rejected and the Section 13 Report and negative recommendation were affirmed. This decision purported to determine the appeals of the first named applicant and of both of her dependent children, O. and H., as is clear from the Tribunal's covering letter of 2nd October, 2008 forwarding the text of the decision.

7. According to her affidavit, when the first named applicant subsequently received a letter of the 28th October, 2008 from the Minister notifying her of his proposal to make deportation orders against her and the two children, she consulted the Refugee Legal Service and in response to an invitation to that effect in the letter, representations were made on their behalf for leave to remain, together with an application for subsidiary protection. By letter of 3rd March, 2009, the Minister informed the first named applicant of the rejection of her application for subsidiary protection. Similar, separate decisions of rejection were made in respect of each child. It was in these circumstances that the Minister made the four deportation orders of 12th March, 2009.

8. When the matter was opened to the Court, counsel for the applicants informed the Court that the issues canvassed in the papers as lodged were to be reduced to a net issue directed at the validity of the deportation order of 12th March, 2009 made in respect of the fourth named applicant, H., and the validity of the RAT appeal decision of 23rd September, 2008 insofar as it purported to apply to that minor applicant. The application for leave to seek any reliefs in respect of the first named applicant in her own right or in respect of the second and third named applicants was withdrawn and was not proceeded with.

9. In these circumstances it is clear that the only necessary party to the proceeding as it is now before the Court is H.O., a minor, suing by her mother and next friend, P.I.

10. Thus, the net issue proposed to be raised if leave is granted is directed at the proposition that because the fourth

named applicant was never included in the asylum application or at any rate not included until after the Section 13 Report had been given and the investigation stage of the procedure concluded, the Tribunal had no jurisdiction to include her claim in its decision and to purport to determine an asylum application in respect of her. She could not therefore be considered to be a failed asylum seeker; and, as a result, she is not a person in respect of whom the Minister had the power to make a deportation order under s. 3(2) (f) of the 1999 Act.

11. As a matter of fact, an asylum application form had been completed and lodged for and on behalf of H. on 4th July, 2007 and the same form as had been completed for her brother in January 2006 was signed by the first named applicant on the same day requesting that her claim be included in her mother's application. It is argued, however, that this is immaterial because jurisdiction could not be conferred on the Tribunal by consent when no investigation of her claim to asylum had been carried out by the Commissioner and no Section 13 Report and recommendation had been made in respect of her application. Reliance was placed in particular in the submissions on the fact that in an ex tempore judgment of 31st March, 2009 in a very similar case of *Oloo Omee v. Refugee Appeals Tribunal,* leave had been granted on this ground by McCarthy J.

12. A further issue arises, however, in that, if leave is to be granted as now sought, it can only be done if the Court is satisfied that there is good and sufficient reason to grant the necessary extensions of time for the purpose under s. 5 (2) (a) of the Illegal Immigrants (Trafficking) Act 2000. If leave is to be granted for a judicial review of the deportation order, the extension necessary is five days; and if the decision of the Tribunal of 23rd September, 2008 is to be impugned, a considerably longer extension of six months is needed.

13. The law in this regard is well settled and does not need to be reiterated here. The 14-day limit is short compared with the limits in O. 84 of the Rules of the Superior Courts, but has been considered not unduly onerous and compatible with the Constitution by the Supreme Court in its judgment on the article 29 reference of the Bill because the High Court jurisdiction to extend is said to be "generous and extensive". The court said in that judgment:

> "It must be assumed that factors such as language difficulties, absence of official documentation, impecuniosity, unfamiliarity with the legal system, illness and a host of similar considerations would in an appropriate case justify the court granting an extension of time."

14. It would clearly be consistent with that approach in this case to grant an extension of five days, especially where the applicant is a minor. The position is, however, materially different in respect of the longer extension sought to challenge the appeal decision. To extend time, there must be an evidential basis upon which the court can make a finding that there is a good and sufficient reason to do so because the actual delay has been explained by reference to acceptable reasons which serve to excuse it.

15. When questioned on this point, counsel candidly admitted on behalf of the applicant that the only excuse and explanation offered in this case was that set out at para. 12 of the first named applicant's affidavit, where the applicant avers:

> "I say that on receipt of the deportation decisions my partner, the second named applicant and I immediately contacted the Refugee Legal Service and were informed that we should immediately contact a private solicitor if we wished to challenge the deportation decisions. We immediately contacted our present solicitor and he then sought our files. […] I am informed and believe that a brief was prepared for counsel on receipt of our files. I am advised and believe that an extension of time is required to enable the herein minor applicants to bring proceedings in relation to the decision of the Refugee Appeals Tribunal. I say that I have no knowledge of the legal rules governing such matters and I pray that my ignorance and omissions will not be held against the said minor applicant."

16. This however refers only to the short delay in moving to seek review of the deportation orders and offers no explanation as to why the challenge now proposed to be made against the Tribunal decision was not brought six months earlier. The only evidence in that regard is that found in paras. 5, 6 and 7 of the affidavit.

17. There, the first named applicant acknowledges that the Tribunal decision was received by her with the letter of 2nd October, 2008 but nothing more is said. The applicant was represented at that stage by solicitors, Messrs. Synnott and Co., who were on record for her with the Tribunal; and it can be assumed that if normal practice was followed, that decision was also sent to that firm. Nothing, however, is said as to whether any contact with that firm took place at that point. Instead, para. 6 of the affidavit refers to the letter of proposal to make deportation orders from the Minister of 28th October, 2008 and to the applicant immediately seeking the assistance of the Refugee Legal Service. In para. 7 she deals only with the lodging by the Refugee Legal Service of representations for leave to remain and the application for subsidiary protection.

18. The Court considers that this affords no basis for the exercise of the Court's discretionary jurisdiction to grant such a lengthy extension of time. An applicant who seeks such an extension bears the burden of providing the Court with a full and candid explanation as to what happened during and after the period of 14 days from receipt of the decision sought to be challenged; what steps were taken and what caused the delay in commencing the intended proceedings. That has not been done here. More importantly, however, it is clear from what little is said that at some point, either before or after the change of representation to the Refugee Legal Service, a decision was effectively taken not to seek judicial review but to take the perfectly reasonable alternative course of applying for leave to remain and for subsidiary protection. When legal representatives respond to a letter such as that of 28th October, 2008 by lodging representations and an application for subsidiary protection, the Minister and the Tribunal are entitled, if the 14-day period has already expired, to proceed on the basis that the validity of the appeal decision has been accepted. That being so, the questions as to why delay occurred and who is to blame for it do not arise so as to act as an excuse for extending time in the present case.

19. This position is not altered by the fact that the applicant now in need of the extension is a two-year old infant. The applicants were legally represented at all material times and clearly acted on the basis of their advice. This is not a case of a parent neglecting to take available steps on behalf of a child in the child's interest. The fourth named applicant was sought to be included in the existing procedure in July 2007 and the steps taken by the Refugee Legal Service in the autumn of 2008 were taken on the instructions and on behalf of all applicants. Nor is it a case in which difficulties arise

such as illness or delay in obtaining access to a file or in having documents translated. A minor applicant is equally constrained by the requirements of s. 5 that good and sufficient reason for the extension be shown. To ignore that requirement for the sole reason that an applicant is a minor would, in the Court's view, be to distort the legislative intention of that provision. In this regard the Court agrees entirely with the approach adopted by Irvine J. in her judgment of 3rd December, 2008 in the case of *J.A. & D.A. v. The Refugee Appeals Tribunal*. The Court cannot accordingly extend the time in respect of an application for leave to seek judicial review of the R.A.T. decision of 23rd September, 2008.

20. The issue that remains therefore is whether substantial grounds have been put forward for the grant of leave to the fourth named applicant to seek judicial review of the deportation order made in respect of her on 12th March, 2009. With some hesitation, the Court considers that the threshold in that regard has been reached and that leave should be granted to that limited extent. That being so, it is inappropriate for the Court to say anything further at this stage in respect of the arguments advanced in support of that proposition. It is sufficient to remark that as the issue has been raised both in this case and in the case of *Oloo Omee* before McCarthy J., and as the substantive application in the latter case has apparently been since compromised, it is desirable that the question be definitively answered in order to clarify the position for the Tribunal in the future, as the circumstances can obviously recur.

21. As has already been noted, an ASY1 form of application for asylum was lodged in this case on behalf of the fourth named applicant and a form of request for her inclusion in the procedure was signed and lodged before any hearing before the Tribunal took place. Unlike the position considered in the judgment of MacMenamin J. of 31st January, 2006 in the *Dada* case under the somewhat different asylum procedure in operation at the relevant time, this is not a case in which there is a dispute of fact as to whether the fourth named applicant had been sought or agreed to be included in the parent's application. The issue that arises here is whether, on a correct construction of the 1996 Act, it is competent for the Tribunal to adjudicate by way of appeal on an individual asylum application which has been joined with one or more other existing applications under appeal but which has not been the subject of an investigation by the Commissioner or been covered by a Section 13 Report and recommendation nor included in a notice of appeal.

22. It is unnecessary, obviously, to make clear that the Court is now holding only that this issue raises a ground of sufficient weight and arguability to warrant that it be examined fully on a substantive application for relief. The Court expresses no view on a number of cogent and serious arguments to the contrary raised by the respondents and which will be required to be addressed in due course on that application. These include obviously:-

1) Whether the ground thus raised against the deportation order involves an indirect or collateral challenge to the validity of the appeal decision so as to be in any event precluded by s. 5 of the 1999 Act;

2) Whether there is any reason why the jurisdiction of the Tribunal might not be conferred or enlarged by consent in the case of a minor who had not been born when the Section 13 Report was completed, particularly if no different basis for refugee status is asserted on behalf of the minor when compared with that considered in the Section 13 Report; and

3) Whether the concept of an entitlement to *certiorari, ex debito justitiae*, has any application to a claim made on the basis of s. 5 of the 1999 Act.

23. For all of these reasons, an order will be made on this application in the following terms:

1. Leave will be granted to the fourth named applicant (suing by her mother and next friend, P.I.,) to apply for a judicial review of the decision of the respondent Minister to make a deportation order in respect of the fourth named applicant;

2. For that purpose, time will be extended under s. 5 (2) of the Illegal Immigrants (Trafficking) Act 2000 until 20th April, 2009;

3. Leave will be granted to apply for the following reliefs:

(a) An order of certiorari to quash the deportation order of 12th March, 2009 made in respect of the fourth named applicant;

(b) Such further and other reliefs or orders as may be considered appropriate by the Court; and

(c) Costs.

(The other reliefs by way of declaration and injunction are unnecessary.)

4. Those reliefs may be applied for on the basis of the following single ground: "The respondent Minister lacked power to make the said deportation order in respect of the fourth named applicant because the applicant was not a person whose application for asylum had been lawfully refused within the meaning of s. 3 (2)(f) of the Immigration Act 1999, there having been no investigation of her claim to refugee status by the Commissioner and no report and recommendation in respect of her claim under s. 13 of the Refugee Act 1996."