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Neutral Citation Number [2007] IEHC 237

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 999 J.R.]

BETWEEN

F. O.
Y. O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND F. O.
A. O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND)

APPLICANTS

AND

MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, THE REFUGEE APPLICATIONS COMMISSIONER, ATTORNEY GENERAL, IRELAND

RESPONDENTS

Judgment of Mr. Justice McGovern delivered on the 16th day of May, 2007.

1. This is an application by the third named applicant for leave to apply for judicial review and for an order of *certiorari* quashing the decision of the second named respondent recommending that the third named applicant be refused asylum status. The notice of motion grounding the application also seeks an order extending the time for making the application in so far as is necessary and for an order amending the Statement of Grounds.

2. No argument was made on behalf of the respondents that the application was out of time and it was not a matter which assumed any significance in the hearing before me. I am satisfied that there was no delay in bringing this application. The application was submitted on the 9th. August 2006. He was informed of the decision to refuse him Refugee Status on the 7th. September 2006 and the Notice of Motion for leave to apply for Judicial Review is dated 18th September 2006 and appears to have been issued on that date.

3. The first named applicant was born in Nigeria and is the mother of the second and third named applicants. The third named applicant was born in Ireland on 5th August, 2005. An asylum application by the first named applicant was refused by the Refugee Applications Commissioner and then on appeal. The decision of the Refugee Appeals Tribunal was given on 4th August, 2005. In September, 2005 the first named applicant was informed that the first named respondent had made deportation orders relating to her and the second named applicant. By letters dated 9th August, 2006 individual asylum applications were submitted on behalf of the second and third named applicants to the second named respondent. The second named respondent was informed that his application was disallowed in the absence of consent by the Minister and by letter of 15th August, 2006 the Minister refused permission to the first and second named applicants to re-enter the asylum process. The third named applicant's application for refugee status has been refused by the second named respondent. No appeal has been made to the Refugee Appeals Tribunal.

4. At the commencement of the hearing counsel for the applicant informed the court that leave was being sought in relation to reliefs no. 7, 17, 18, 19, and 20 of the amended statement of grounds and on the grounds no. 11, 12, 17, 28, 31 and 32 of the amended statement of grounds.

5. The provisions of s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 provides that leave to apply for judicial review shall not be granted unless the court is satisfied that there are "substantial grounds" for contending that the decision on the determination, recommendation, refusal or order is invalid or ought to be quashed.

6. Having considered the affidavits and exhibits in this matter and the submissions of counsel I am satisfied that there is only one challenge to the s. 13 Report of the Refugee Applications Commissioner which might come within the definition of "substantial grounds" as provided for in s. 5 of the 2000 Act. That is the argument that the Commissioner made a fundamental error of law and fact in stating that Nigeria had been designated a "safe country of origin" by the first named Respondent.

7. In the report of the Commissioner , under the heading "Legal Basis for assessment the following passage appears:

> "The Minister for Justice, Equality and Law Reform has designated the country which the applicant states to be a national of, and/or has a right of residence in, to be a safe country of origin. In accordance with s. 11A of the Refugee Act, 1996 (as amended), the applicant is therefore presumed not to be a refugee unless they (sic) show reasonable grounds for the contention that they are".

8. It is accepted by counsel for all parties that neither Nigeria nor Benin has been designated by the Minister to be a safe country of origin. Counsel for the applicant argues that because of that error s. 11A of the 1996 Act comes into play and raises a presumption that the applicant is not a refugee.

9. There are a number of difficulties for the applicant in making this argument. In the first place the applicant never appealed the decision of the Commissioner. Secondly neither the Grounds nor amended Grounds on which the applicant seeks leave make reference to this point nor is it referred to in the grounding affidavit sworn by Mr. Sean Mulvihill on behalf of the applicant. It seems the first time that this argument was made was in the applicant's legal submissions which were served on the Chief State Solicitors office on 20th April, 2007.

10. It is undesirable that parties should challenge decisions by way of application for judicial review when an adequate remedy is available elsewhere. This is a matter the court can weigh in the balance in exercising its discretion whether to grant leave to apply for judicial review. In *Stefan v. The Minister for Justice Equality and Law Reform* The Supreme Court held that whereas judicial review was discretionary and could be refused where there was an adequate alternative remedy, the court nevertheless retained jurisdiction to exercise its discretion to achieve a just result. Denham J. giving the judgment of the court reviewed other decisions of the superior courts on this issue. In the *Stefan* case part of the applicant's completed questionnaire had been omitted from the translation before the officer to whom the application was made and the High Court ruled that the subsequent decision notified to the applicant refusing refugee status was defective being a decision both *ultra vires* the Minister and one made in breach of fair procedures. Denham J. pointed out that certain evidence of the applicant was not before the decision maker and it could not be said that the omitted information was immaterial. An order for *certiorari* would not be worthless but would enable the primary decision to be made in the light of all the evidence. In the *State (Abenglen) Properties v. Corporation of Dublin* [1984] I.R. 381 O'Higgins C.J. stated at p. 393:

> "The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the courts discretion. It is well established that the existence of such a right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which *certiorari* has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate".

11. In *McGoldrick v. An Bord Pleanála* [1997] 1 IR. 497 at 509 Barron J. stated

> "The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and the principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to shows that this is in effect the real consideration".

12. I am satisfied on the authorities that the court can, in a case such as this, grant leave to apply or, indeed, *certiorari* itself even if no appeal has been taken against the decision of the Commissioner. It is a matter for the discretion of the court.

13. I am not impressed by the fact that the point relating to the designation of Nigeria as a safe country of origin was only taken when the legal submissions were delivered and was never referred to either in the Statement of Grounds or Amended Grounds or the affidavits sworn in support of the application for leave.

14. An affidavit was sworn by Mr. Martin Mahony on 2nd May, 2007 referring to the applicant's written submissions and the reference to the declaration by the Commissioner that the country of which the applicant states to be a national has been designated by the Minister to be a "safe country of origin". Mr. O'Mahony deposes to the fact that he has spoken to the authorised officer who investigated the third named applicant's claim and he seeks to inform the court that this was " … due to an administrative slip on her part". His affidavit also states that "she did not have the provisions of s. 11A of the Act of 1996 in mind at arriving at her conclusion and in making the recommendation". In my view this information should have come from the authorised officer herself by way of an affidavit sworn in the matter.

15. While the procedure for challenging a decision under the immigration legislation is by way of judicial review pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 it seems to me that Part V of Order 84 of the Rules of the Superior Courts, which deals with judicial review generally, applies and that the court has power to grant relief mentioned in Order 18(1) or (2) which it considers it appropriate notwithstanding that it has not been specifically claimed. In any event the court would, in my view, have the power to do this if the justice of the case requires it.

16. If the point had not been realised until the day of the hearing it would seem to me to be unfair on the respondents to permit the matter to be raised when it had not been set out in the grounds on which leave was sought. But in this particular case the matter was raised in the legal submissions and to that extent the respondent was on notice of this argument and dealt with it in both the submissions and the affidavit of Mr. O'Mahony sworn on 2nd May, 2007.

17. Since the issue of the applicants national state being designated a safe country of origin is stated to be a legal basis for the assessment it seems to me to be a substantial ground for contending that the decision of the Commissioner ought to be quashed. At the very least it seems to be a matter which deserves to be fully argued in an application for judicial review. In deciding whether or not to admit this as a ground for granting leave I have regard to the fact that the third named applicant is a young child, and that the Courts should do all that it can to protect his interests.

18. In the particular circumstances of this case I am prepared to grant leave to apply for judicial review by way of *certiorari* on the sole ground that the Refugee Applications Commissioner considered the application on the basis of a fundamental error of fact which gave rise to a presumption under s. 11A of the Refugee Act, 1996. I direct that an affidavit dealing with this issue be furnished to the Court from the Refugee Applications Commissioner who determined the application.

19. As to the form of the order:

20. I grant leave on the basis of the reliefs sought at paragraph 20 of the Statement of Grounds on the following ground, namely, that the respondents their servants or agents have erred in law and in fact and acted *ultra vires* in deciding the third named applicant's application on the basis that his country of nationality has been designated a safe country of origin by the first named respondent.