Neutral Citation Number: [2007] IEHC 275

THE HIGH COURT

Record Number: 2007 794 JR

BETWEEN

O.O., F.O., E.O.O (A MINOR SUING BY HER FATHER AND NEXT FRIEND O.P.), M.I.O. (A MINOR SUING BY HER FATHER AND NEXT FRIEND O.O.), S.O. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND O.O.), MW.O. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND O.O.), AND MA.O. (A MINOR SUING BY HER FATHER AND NEXT FRIEND O.O.)

PLAINTIFFS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE GOVERNOR OF CLOVERHILL PRISON

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 3rd day of July 2007

Introduction

1. The First named applicant (hereinafter referred to as "father") is the husband of the second named applicant, and the father of the remaining minor applicants. The third and fourth named applicants are Irish born children, and the remaining minor children were born in Nigeria. The second named applicant (hereinafter referred to as "mother") is the mother of all five children. She has been granted residency here on the basis of being mother to Irish born children. The father's application in that regard has been refused on the 16th August 2005 on the basis that he did not meet the criteria for granting such residency under the IBC 05 scheme since he has not been in continuous residence in this State since the birth of his Irish born children. In that regard he had been deported from the State on the 12th October 2004, but returned in January 2005 without seeking permission.

2. Before setting out some of the unfortunate history of the father's interaction with this State since the month of June 2000 when he first arrived using a false name, I need to state that the present situation is that there is a valid and unchallenged Deportation Order dated 6th March 2001 in existence in respect of father on foot of which he was arrested at 7.30am on the 23rd June 2007 by members of the Garda National Immigration Bureau for the purpose of effecting his deportation from the State.

3. Following that arrest, he obtained an interim injunction, in advance of any hearing of his application for leave to seek judicial review herein on Thursday the 28th June 2007, returnable for the following day Friday the 29th June 2007. I heard the application for leave on that date, as well as an application for an interlocutory injunction restraining the deportation of the father until the hearing of any substantive determination of the application for judicial review.

4. Clearly if leave is not granted, then no interlocutory injunction can be granted. In the event that leave is granted, then the question of whether it is appropriate that an interlocutory injunction be granted must be determined by reference to the so-called Campus Oil principles.

5. On the 25th June 2007, being two days after his said arrest, solicitors acting on father's behalf wrote to the Minister seeking a revocation of the Deportation Order dated 6th March 2001, and residency based on his family and domestic circumstances in the State and his role as the parent of Irish citizen children. Needless to say those applications are not yet determined. The Deportation Order dated 6th March 2001 predated the birth of his Irish born children.

6. The letter of application for revocation of the deportation order states that at no stage of the process leading to the deportation order being made was consideration given to the present family circumstances since those circumstances did not exist, and that therefore there has been no consideration of what effect father's deportation will have on his own family rights under the Constitution and the European Convention on Human Rights, as well as those of his wife and children. He maintains that effect should not be given again to the Deportation Order until such time as this application for revocation and residency has been determined.

7. With regard to the application for residency, the letter of application submits that even where father did not meet the criteria for residency under the IBC 05 scheme, the Minister has an inherent power in relation to aliens "to receive, consider and determine an application for residency or leave to remain…… independently of any statutory scheme" as stated by Finlay Geoghegan J. in *Bode and others v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 14th November 2006, and that this discretion has been exercised by the Minister regularly. It was submitted that in the case of all the applicants herein it was incumbent upon the Minister to consider their interests under the Constitution and the Convention when considering the father's application for residency, and that it was insufficient to reject his application simply on the basis of his absence from the State for a period after the birth of the Irish born children. It was submitted that given the numbers of families to whom residency has been granted under the scheme, it would be disproportionate and against the best interests of the children and mother to refuse the application of the father.

General Factual Background:

8. Father arrived in this State *without* his wife and three Nigerian children on the 22nd June 2000, and made an application for a declaration of refugee status on political grounds. The name under which he applied is now said to have been a false name. His application was processed in the normal way by the completion of the usual questionnaire, followed by interview, and was assessed in August 2000. His application was found to be manifestly unfounded. By reason of some of his answers to questions it is clear that he was found not be credible in his account of relevant facts. He lodged an appeal against this decision, but the appeal was unsuccessful. By letter dated 9th November 2000 the Minister wrote to father informing him of his intention to make a deportation order. On the 6th March 2001 the deportation order was made, and father was informed of this fact by letter dated 9th March 2001. This letter dated 9th March 2001 notifying father of the making of the deportation order went on to require that he present himself to the Garda Station at Henry Street, Limerick on the 21st March 2001 in order to make arrangements for his deportation. His grounding affidavit herein fails to state whether or not he complied with this requirement.

9. Instead, his grounding affidavit skips forward to December 2001 when he states that in that month his wife and his three Nigerian-born children (the fifth, sixth and seventh named applicants herein) arrived in the State. He says that at that moment his wife made an application for refugee status for herself and her children and that he also made another application, this time under his correct name. In that application he did so on the basis that he had arrived in the State on the 7th December 2001 with his family.

10. However, given the fact that the third named applicant was born in April 2002, it is a cause for great concern to me that mother arrived here on the 7th December 2001, and *father has now sworn that he had remained here in the State* in the period following the letter dated 9th March 2001. How mother became pregnant in such circumstances is not explained, and the Court is concerned in that context with an averment in father's grounding affidavit that when his then solicitor stated in a letter dated 6th July 2004 to the

Minister that father had returned to the State on the 7th December 2001 in the company of his wife, this was based on an incorrect instruction by him to his solicitor. He says that this false instruction to his then solicitor was given "as I had received ill-informed advice from a friend that it would help my case to base to claim that I had left the State and re-entered with my wife". In retracting this statement he appears to have overlooked the impact of that retraction on the fact that his wife arrived here on the 7th December 2001 already pregnant, and gave birth to a daughter in April 2002.

11. Unsurprisingly, following the birth of their daughter here on the 8th April 2002 father and mother each withdrew their applications for refugee status and relied on their parenthood of an Irish born child for the right to remain. That withdrawal was acknowledged by the Minister in a letter dated 21st May 2002. The remainder of 2002 appears to have passed uneventfully, as did the first six months of 2003. However, on the 20th July 2003 father was arrested on foot of the Deportation Order dated 6th March 2001. According to the same letter dated 6th July 2004 from his then solicitor, Kevin Tunney, it appears that father was released at that time on condition that he sign on at GNIB, Burgh Quay, Dublin until his deportation from the State was put in place. This would have been around the time of the birth of his second Irish born child, M.I. who was born here in July 2003.

12. According to Mr Tunney's said letter, father continued to sign on at GNIB from August 2003 until April 2004, when he appears to have stopped signing on. The reason given in that letter is that he was ill and suffering from depression. In support of that assertion letter from the family's General Practitioner is attached dated 4th June 2004. While there is exhibited a letter from that GP which states that he and his family have attended that GP's practice as patients since 2nd May 2002, it goes on to say that father "last attended surgery here on 6th April 2004". There is no information as to the nature of the illness, but more striking is the fact that this letter is attached in order to give a reason why he stopped signing on at GNIB *after* April 2004 - *not before* April 2004.

13. Mr Tunney's said letter then requests that father's case be considered compassionately, and notes that in cases such as these the then-recent government policy was that parents of Irish born children will not be deported without being afforded an opportunity to make representations and that the issue of the Irish born child will "be factored in" before a decision on deportation is made. The letter requested that the deportation order stated therein to be dated 20th July 2003 (but this must be that dated 6th March 2001 since that is the only deportation order made) be "rescinded" and that he be allowed to make representations under s.3 of the Refugee Act, 1996 as amended in order to take account of the fact that he was by then the father of two Irish born children. That letter was acknowledged by a letter from the IBC unit dated 9th July 2004.

14. Nothing further happened apparently until father was again arrested by members of GNIB on the 10th September 2004 for allegedly having taken steps to avoid deportation. I presume that this resulted from his failure to sign on at GNIB as required after April 2004. The letter from the GP to which I have referred and which was sent in with Mr Tunney's letter dated 6th July 2004 is for some reason referred to as a justification for this failure to sign on in April 2004. A further letter dated 13th September 2004 from Mr Tunney states that since the IBC unit had acknowledged this letter dated 6th July 2004 the reason for failure to attend at GNIB in April 2004 was also acknowledged, and submits for some reason which certainly escapes me at the moment that his client was "justified in believing that he would not be made the subject of arrest for failure to report t the GNIB in April 2004". The letter ended by threatening Habeas Corpus proceedings if father was not released.

15. I am unaware if any steps to obtain the applicant's release were taken at that time, but it is clear that he was deported on the 12th October 2004 on foot of the original Deportation Order dated 6th March 2001 obtained in the false name used by father on that original application, and after representations were made by letter dated 6th July 2004 to the Minister based on the subsequent birth of the two Irish born children, including a request for the deportation order to be "rescinded".

16. It was not long following his deportation that he returned illegally to this State in January 2005. He acknowledges in his affidavit that it was wrong to do so but states that he was "desperate being separated from his wife and family and could not bear to be away from [his] family".

17. By this time the new regulations known as the IBC 05 Scheme was in place, and both mother and father applied for leave to remain thereunder. Mother's application was successful, and this operates as a *de facto* permission for all her children to remain with her. However, father's application was refused, as I have already referred to, on the basis that he does not fulfill the criteria under that scheme, one of which is that he have remained in the State for all the time since the birth of the Irish born children. This would mean that the applicant would have to have been present in the State continuously from April 2002. His absence through deportation between 12th October 2004 and some unstated date in January 2005 has acted to exclude father from the scheme, according to the decision which was conveyed to him in a letter dated 16th August 2005.

18. That letter concluded by stating that the Deportation Order dated 6th March 2001 was still in force and that the papers in the case had been passed to "the relevant unit in this Department for their attention in this regard".

19. In August 2005 the applicant instructed new solicitors to act on his behalf, namely his solicitors on this application, Cathal O'Neill & Co. They firstly sought information as to how the decision could be appealed. That was by letter dated 22nd August 2005. In a letter dated 30th August 2005 they submitted representations pursuant to s. 3 of the Immigration Act 1999. This was in spite of the fact that the Deportation Order was dated over four years previously. These representations contain inaccurate information, presumably on the basis of father's instructions. Firstly it states that he first came to this State in 2001 instead of 2000. Secondly, under the heading "Nature of Connection with the State", it states:

> "Details of the applicant's connection with the State are as follows: Applicant first arrived in the State in 2001 and sought asylum. Applicant has resided here since that date and no longer has any ties with applicant's country of origin."

20. Other matters are referred to including the birth of the two Irish born children.

21. Further submissions were made in a lengthy letter dated 27th September 2005 from these solicitors, highlighting the presence of the two Irish born children and submitting that there would have to be "compelling and overwhelming reasons" to deport the parent of such children, and that to do so would be disproportionate to the end sought to be achieved, and that any such decision would have to have regard to the personal and family rights of father and his children under Article 8 of the European Convention on Human Rights. It was submitted that due regard would have to be had also to the fact that his wife and children had been allowed to remain under the scheme, and that to deport him in such circumstances would be in breach of her legal and constitutional rights and those of his children. Extensive reference was also made to case-law said to support the submissions made.

22. Those submissions were acknowledged by the Repatriation Unit of the Minister's office by letter dated 3rd October 2005. By the 17th January 2006 no substantive response had been received and these solicitors wrote a reminder letter in which complaint was made that their client was having to wait for so long for the Minister's response to the submissions. That reminder letter received a

formal acknowledgement only by letter dated 24th January 2006. By May 2006 mother's application to remain on the basis of her Irish born children had been granted and she wrote a letter dated 24th May 2006 expressing her gratitude for this outcome and pleading for a similar permission for her husband, even though his application had been refused by letter dated 16th August 2005 as already set forth.

23. Nothing further appears to have happened until the father was arrested on the 23rd June 2007 and detained under s.5 of the Immigration Act, 1999 as amended, and Regulations made thereunder 9S.I. 55 of 2005) pending his removal from the State. That detention order was made on the basis that he "intends to avoid removal from the State". That detention order was made in the false name under which the first application for refugee status was made as well as the Deportation Order dated 6th March 2001.

24. As I have already stated, this arrest led to a letter being written by father's solicitors in which they seek residency "based on family and domestic circumstances in this state and parentage of Irish citizen children", as well as a revocation of the Deportation Order dated 6th March 2001 "having regard to the change in his family and domestic circumstances … and his marriage to a woman who has been granted residence in the State, his parentage of Irish citizen children and his overall family and domestic circumstances."

25. For the sake of completeness I should add that mother has sworn a grounding affidavit also in which she has stated they wish to raise their family in this State where they will enjoy a better quality of life than in Nigeria, and that it is in the best interests of their five children that they grow up in this State, and further that if her husband is deported she will remain here with their children so that they can avail of the opportunities here which would not be available in Nigeria. She states that she is currently working here as a kitchen porter. She concludes by saying that if her husband is deported the family unit will be broken and that her children will suffer the loss of their father, and that she will be left to care for them on her own. She says that the children depend on their father for emotional support.

26. The above is a chronology and factual background to what has occurred to date in relation to this family, and against which the present application must be considered. It is firstly an application for leave to seek reliefs by way of judicial review, and secondly an application for an interlocutory injunction to restrain deportation of father pending the hearing of that judicial review application should leave be granted.

The application for leave:
27. The Statement of Grounds sets out the principal reliefs being sought as follows:

> 1. A declaration that any removal or deportation of the first named applicant from the State is unlawful and/or that the execution of the deportation order in respect of the first named applicant is unlawful;
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> 2. Without prejudice to the foregoing, a declaration that the first named applicant has an entitlement to remain in the State pending consideration and processing of outstanding applications made in respect of him for revocation of the deportation order pursuant to section 3(11) of the Immigration Act, 1999 and for residency based on his family and domestic circumstances as now pertaining in the State including his role as the parent of Irish born children;
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> 3. A declaration that the removal/deportation of the first named applicant from the State and/or without prejudice his deportation without consideration in accordance with law of the outstanding applications made to the first named respondent for residency of him, and the revocation of the deportation order made in respect of him is in breach of the rights of the applicants under Articles 40 and 41 of the Constitution of Ireland, in breach of the rights of the applicants under Articles 8 and 14 of the European Convention on Human Rights and in breach of the rights of the third to seventh named applicants pursuant to the United Nations Convention on the Rights of the Child (1989);
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> 4. An injunction, including an interim injunction restraining the first named respondent, his servants or agents and all persons having notice of the making of the injunction from deporting the first named applicant and/or from detaining him or continuing his detention for that purpose pending the outcome of these proceedings and/or without prejudice pending the consideration in accordance with law of the outstanding applications for residency and revocation of the deportation order by the first named respondent in respect of the first named applicant;
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> 5. If necessary, an order requiring the first named respondent to consider properly and adequately the outstanding applications of the first named applicant for residency (based on his role as the parent of Irish born children and his family and domestic circumstances in the State) and for revocation of the deportation order in respect of him pursuant to section 3(11) of the Immigration Act 1999 in accordance with law;
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> 6. If necessary, an order pursuant to the inherent jurisdiction of this Honourable Court directing the release from detention of the first named applicant or without prejudice directing his release from detention on such conditions as this Honourable Court deems meet.

28. It will be noticed immediately that there is no challenge being mounted against the Deportation Order dated 6th March 2001. That is not surprising given the length of time which has passed since it was made and the fact that father has already been deported once on foot of same and returned to the State shortly thereafter without permission. Rather the execution of the deportation order is sought to be restrained pending the determination of the most recent applications for residency and revocation of the Deportation Order made by letter dated 25th June 2007 following the arrest of the first named applicant on the 23rd June 2007.

The leave application:
29. David Leonard BL on the applicants' behalf relies very much on the fact that following the withdrawal of the applications for refugee status lodged by mother and father following mother's arrival here in December 2001, the application by father to remain in the State on the basis of parenthood of Irish born child was refused in respect of father without any consideration of the merits of that application, and only because he was found not to meet the criteria specified in the IBC05 scheme because he was not continuously in the State following the birth of his children.

30. It will be recalled that this absence was caused solely by his deportation from the State on the 12th October 2004 on foot of a valid deportation order. Mr Leonard submits that in circumstances where there has been no consideration of the merits of that application by father, the Minister has failed to consider the family-based Constitutional and Convention rights of mother and of the children, namely to be entitled to the emotional and other support and the company of their father in this State. In such circumstances it is submitted that there should be no execution of the deportation order until these rights have been considered. In that regard, reference has been made to the fact that at the time of the making of the deportation order these two Irish born

children had not been born and accordingly their rights were never under consideration at that time.

31. Mr Leonard has in this regard referred to the judgment of Finlay Geoghegan J. in *Oguekwe v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 14th November 2006, in which, *inter alia*, it was held that a decision to refuse permission to remain to the applicant was unlawful and invalid since the respondent failed to consider the personal rights of his Irish born child who was also an applicant in those proceedings. In that case the application had been refused under the scheme on the basis that the father had not been continuously resident in the State since the birth of that child here.

32. It is submitted therefore that in circumstances where there are now fresh applications before the Minister, both for revocation and residence, albeit lodged after arrest, which are based on matters not already considered, the first named applicant should be entitled to remain here pending that consideration taking place. Mr Leonard emphasises that the rights at issue are not simply the rights of the first named applicant as father of the Irish born children, and which have not been ever considered by the Minister, but also the rights of the other applicants, namely mother and all the children, especially the Irish born children.

33. It is further submitted that the Minister has failed to consider properly whether there are any grave or substantial reasons to remove father from the State given his current family and domestic circumstances, and that to deport him in such circumstances would be a disproportionate having regard to all the circumstances of the case.

34. It is submitted that to deport the father now would be discriminatory to the two Irish born children in circumstances where under the IBC05 scheme (as well as its predecessor) very large numbers of parents of such children have been allowed to remain with their children, and that such discrimination is a breach of these childrens' rights under Articles 8 and 14 of the Convention, and that no justification for that discrimination has been put forward.

35. It is further submitted that any execution of the deportation order by reason of a refusal of the application for residency would fail to recognise the obligation on all agencies of the State to act in the best interests of the child. In that regard mother has sworn an affidavit, as already adverted to, in which she has stated that those best interests of herself and the children are best served where they should be able to remain here with their father, rather than that she should be forced to remain here with her children but without the emotional and other support and company of the childrens' father.

36. It has been submitted also that to deport the father now, while his applications are pending, would be irrational and in defiance of common-sense.

37. Daniel Donnelly BL on behalf of the respondents has, as I have already stated, highlighted that there is no challenge to the deportation order itself, and that the applicants are seeking simply to restrain the execution of that order until such time as the Minister has completed his consideration of the most recent applications made by letter dated 25th June 2007. He submits that no substantive relief is being sought besides the injunctive relief. In the context of the application for an interlocutory relief he makes this submission in relation to the question as to whether there exists at all a fair issue to be tried at full hearing – that being something which is required to exist before any interlocutory injunction can be granted by this Court. He emphasises that in the presence of an unchallenged and lawful Deportation Order no further executive or other decision is needed to be made before giving effect to the deportation. He submits that the circumstances of this case are on all fours with the case of *Lelimo v. Minister for Justice, Equality and Law Reform* [2004] 2 IR. 178, in which Laffoy J. held that the enforcement of a deportation order made prior to the coming into operation of the European Convention on Human Rights Act, 2003, after that Act came into force could not constitute a breach of s. 3(1) thereof, since the authority to act on foot of the order derives solely from the order itself, and that the enforcement thereof has no separate basis in law.

38. Mr Donnelly submits that there is no reason why the applications lodged by letter dated 25th June 2007 cannot be fully and properly considered while the first named applicant is outside the State. He has referred in this regard to the judgment of McCracken J. in the Supreme Court in *Cosma v. Minister for Justice, Equality and Law Reform*, unreported, Supreme Court, 10th July 2006 in which there was a valid deportation order in existence, but where the applicant had lodged an appeal against the refusal by the Minister to accede to an application for revocation of the deportation. That applicant sought an injunction to restrain her deportation pending the outcome of her appeal against that decision not to revoke the order. Towards the conclusion of that judgment, the learned judge stated:

> "It has been held by the High Court that the deportation order is valid, and that finding cannot be challenged before this Court. If the Court were to grant an injunction such as is being sought by the appellant, the effect would be to thwart the operation of the perfectly valid deportation order, and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order."

39. I should at this point, for the sake of completeness, refer to the fact that Mr Leonard in his replying submissions, drew the Court's attention to the paragraph in this judgment which immediately follows the above paragraph and which goes on to state as follows:

> "There might indeed be circumstances, although it is hard to envisage them, where the Supreme Court might exercise its inherent jurisdiction to grant an injunction which could have this effect, for example it might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order, and which is one of such gravity as might stay implementation of the deportation order. No such case has been made out before us."

40. Mr Leonard submitted that in the present case the fact that of necessity the deportation order was made before the birth of the two Irish born children, and that accordingly this fact was not known at that time and that this should constitute a sufficiently grave circumstance as to warrant the restraining of the execution of the deportation order. However, I am of the view, as was McCracken J. in that case, that nothing has been shown in the grounding affidavits by way of gravity, such as would bring this case within the sort of exceptional circumstances envisaged as a possibility by him. Neither father's nor mother's affidavit has demonstrated such a set of circumstances.

41. Mr Donnelly referred also top the judgment of Feeney J. in *Omatseye v. Minister for Justice, Equality and Law Reform*, High Court, unreported, 1st March 2007 in which in an ex tempore decision he identified a number of factors to be taken account of in deciding the issue of an injunction to restrain deportation. He referred to the Court's undoubted discretion in this regard, but that this discretion must be exercised having regard to a number of factors including the existence of a valid deportation order, the need for consistency, and the question of how necessary it is for the applicant to be present while a judicial review application is being pursued here on his behalf. In that case the learned judge was of the view that the case in question involved largely a purely technical question of law to be determined. He referred also to the judgment of Geoghegan J. in the Supreme Court in *Adedayo v.*

Minister for Justice, Equality and Law Reform.

42. Mr Donnelly, in the context of the application for an interlocutory injunction submitted that even if the Court found that there was a fair issue to be tried, this was clearly a case where damages were an adequate remedy in the event that the applicants' judicial review application was successful. He referred to the fact that there was no evidence of any particular irreparable damage which could not be compensated for by way of an award in damages in such an event. In that regard he refers to the judgment of Finlay Geoghegan J. in *Awonuga v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 4th April 2006 where the learned judge referred to the requirement that the onus is on an applicant for injunctive relief to establish by evidence that he/she will suffer irreparable loss and damage, and that she was satisfied in that case that no such evidence had been adduced as to what damage would be suffered by the minor in that case should he have to accompany his deported mother to Nigeria. She stated that there was "no evidence or no information as to his present circumstances in Ireland save that the solicitor has stated that his mother has a concern for his welfare and safety while she is in custody here and has stated that he suffers from a medical condition, otitis, which can lead to deafness and that he should be taking medication".

43. Finally, in relation to this application generally, Mr Donnelly has made submissions in relation to the lack of candour exhibited by the first named applicant throughout his dealings with the State since his first arrival here in June 2000. I have already dealt with much of his dealings with the State in this regard, and there is no need to highlight again these incidents where that applicant has been less than open and honest with all concerned. But Mr Donnelly submits that such an applicant ought not to be in a position to obtain discretionary equitable relief from this Court in such circumstances. He points also to the undoubted fact that the applicants have waited until the very last hour, namely after he has been arrested for the purpose of effecting his deportation, before bringing yet another application before the Minister, and now seek that the first named applicant be allowed to remain here while these applications are proceeded with. This delay is also something which, it is submitted, should disentitle the applicants to the injunctive relief, and should militate also against any submission that sufficient grounds have been made out for the Court to grant them leave.

Applicants' submissions in response:
44. Mr Leonard has put up a stout defence of his clients' entitlement to challenge the enforcement or execution of the deportation order. He accepts that the Deportation Order itself is valid and that he cannot challenge it per se. But he refers the Court to the judgment of Finlay Geoghegan J. in *Malsheva v. Minister for Justice, Equality and Law Reform*, unreported, High Court (ex tempore), 25th July 2003. That was a case where a deportation order was made in respect of Ms. Malsheva, but three days before she was arrested to enable her to be deported she married an Irish citizen. It was contended firstly that once she became married to an Irish citizen he had an absolute right to reside here with his spouse, being a right under Article 41 of the Constitution, and that the deportation order was accordingly invalid. Leave was refused on the basis that 'substantial grounds' had not been made out on the leave application. But leave was granted on other reliefs which did not attract the higher 'substantial grounds' threshold, but fell to be considered by reference to whether there were 'arguable grounds' – a lower threshold. In the face of fact that while the deportation order was validly made before the marriage of the applicants, it was sought to enforce same after the Minister became aware of the marriage, the Court concluded that it was at least arguable that at the time Ms. Malsheva was arrested, three days after her marriage, she and her spouse enjoyed family rights recognised under Article 41 of the Constitution, and that before enforcing the deportation order there was an obligation on the authorities to have considered the marital status of the applicants. The learned judge was satisfied for the purpose of leave that it was arguable therefore that the deportation of Ms. Malsheva was illegal by reason of the failure to consider these rights.

45. Mr Leonard submits that there are similarities to the present case, since it is the enforcement of the deportation which he is seeking to have restrained on the grounds that the Minister has not yet considered the family rights of all the applicants which have arisen by virtue of the birth of the two Irish born children, and that accordingly it is 'arguable' that in such circumstances the deportation of the father would be illegal, even though the Deportation Order itself is a valid deportation order. That is 'fair issue' which he says exists to be tried.

46. Mr Leonard also referred the Court to the judgment of O'Neill J. in *Yau v. Minister for Justice, Equality and Law Reform,* (ex tempore) High Court, 14th October 2005 in support of his submission that simply because the deportation order may have been validly made, its enforcement can yet be challenged. In that regard, O'Neill J. stated:

> "In my view, Ms. Farrell's submission to the effect that the enforcement of the order is inseparable from the original order is incorrect. There are many instances where an order which was made validly can cease to have force and effect, for example a deportation order which is excessively delayed or which is used for an ulterior purpose. In my view the passage in the judgment of the Supreme court in the case of the Illegal Immigrants Trafficking Bill Article 26 [2000] 2 IR. 360 at page 411 is ample authority for the proposition that an order though validly made may for one reason ore another cease thereafter to have force and effect."

47. In relation to the issue of whether or not there would be irreparable damage for which damages would not be an adequate remedy, Mr Leonard relies on the averments by mother in her affidavit, and refers again to the judgment of Finlay Geoghegan J. in *Malsheva* at page 13 thereof. The learned dealt with that case by deciding whether the balance of convenience favoured the granting of interlocutory relief, since it was accepted by the parties to those proceedings that damages would not be an adequate remedy. That of course is a distinguishing feature to the present case since that concession is not made by the respondent. It also appears to have been the case that Counsel for the respondents in that case did not seriously contest that the balance of convenience favoured the applicants. However, having taken account of a lack of candour and also inconsistencies in the manner in which the applicant in *Malsheva* made her initial application for asylum, the learned judge concluded the matter by exercising her discretion by granting an interlocutory injunction, on the basis that there would be prejudice against the applicants if the first named applicant was deported while her application for a revocation of the deportation order was considered and decided in her absence, and that this was not outweighed by the lack of candour and inconsistencies adverted to by the respondent.

48. Mr Leonard submits that in just the same way in the present case there will be prejudice to the applicant's if father is not present when his applications are being processed, and that any lack of candour shown to exist in the manner in which father has interacted with the State since 2000 should not outweigh that consideration. I should just refer to the fact that the prejudice submitted in the present case is not based on any perceived difficulty in instructing lawyers or dealing with the applications which are lodged, but rather on the lack of support by father for the family during his absence from the State.

Arguable grounds
49. At the heart of the reliefs now sought is the contention by the applicants that, having decided father's application for residency on the basis only that his absence from the country resulting from his deportation on the 12th October 2004 until some date in January 2005 excluded him from inclusion in the IBC 05 scheme, the Minister has never given consideration to the constitutional and Convention rights of the two Irish born children, and that to remove him from the State in such circumstances may be in breach of

the requirements under s. 3(1) of the European Convention on Human Rights Act, 2003, given the State's obligations under Article 8 of the Convention.

50. Although these proceedings do not seek an order quashing the decision to refuse permission under the IBC05 scheme as such, as was sought in *Oguekwe*, and indeed no effort was made at the time to do so and much time has passed in the meantime, nevertheless I am of the view that it is at least arguable that substantive consideration has never been given to those rights even though representations have at various times been made in that regard by solicitors acting for the applicants, and that such a consideration may be necessary to be undertaken in order that the family rights and best interests of the children and the family rights of mother and father also be taken into account. Even though the recent application has been lodged at the very latest hour, that delay should be a matter to be considered and taken into account at the substantive hearing, rather than on this leave application.

51. It seems to me also that in the event that a consideration of these rights by the Minister was to result in a decision to grant residency to father, as has been given already to mother, then the Minister might proceed to either revoke the deportation order, or at least suspend any enforcement of it, depending on the length of the residency granted to father.

52. These two conclusions mean therefore that these applicants ought in my view to be granted leave to seek the relief at paragraph 3 in the Statement of Grounds set forth above, namely:

> "A declaration that the removal/deportation of the first named applicant from the State and/or without prejudice his deportation without consideration in accordance with law of the outstanding applications made to the first named respondent for residency of him, and the revocation of the deportation order made in respect of him is in breach of the rights of the applicants under Articles 40 and 41 of the Constitution of Ireland, in breach of the rights of the applicants under Articles 8 and 14 of the European Convention on Human Rights and in breach of the rights of the third to seventh named applicants pursuant to the United Nations Convention on the Rights of the Child (1989)."

53. In addition, leave should be granted to seek the relief at paragraph 5 thereof (as amended by me), namely:

> " …… an order requiring the first named respondent to consider the applications of the first named applicant for residency (based on his role as the parent of Irish born children and his family and domestic circumstances in the State) and for revocation of the deportation order in respect of him pursuant to section 3(11) of the Immigration Act 1999 in accordance with law, and as contained in letter dated 25th June 2007 from Messrs. Cathal O'Neill & Co. solicitors."

54. It seems to me that leave ought not to be granted in respect of the relief at paragraph 1 since there can be no doubt that the deportation order dated 6th March 2001 is a valid deportation order. There is no challenge to that fact, and it cannot in my view be unlawful that the father would be deported on foot of same. That is different to saying that its revocation might have to be considered, if residency was granted having regard to the family rights identified already.

55. The reliefs sought at paragraphs 3, 4 an d 6 are not ones where leave should be sought as such, since they will be determined on this application for an interlocutory injunction to restrain the deportation pending the determination of the issues in respect of which leave is being granted.

56. I emphasise that the threshold by which these reliefs have been considered by me is the low one of arguability and not that of substantial grounds, which might well have given rise to more difficulty, but I reach no conclusion in that regard since it would not be appropriate to do so. The substantive consideration of these reliefs must await a full hearing in due course.

57. I should add at this point that I am not prepared to exercise the Court's residual discretion to refuse leave in respect of reliefs by way of judicial review for which arguable grounds have been established, simply on the basis of the conduct on the part of the father since his interaction with this State commenced in June 2000. Such conduct is but one consideration to have regard to. To do so in this case might be an injustice to the remaining applicants who are innocent of any wrongdoing, and their rights should not be diluted by the conduct of father which, in some respects, he himself accepts was wrong. I have already set out aspects of that conduct and there is no need to repeat it here.

Interlocutory Injunction application

58. This application must be determined in accordance with the principles in *Campus Oil v. Ireland*. In addition the issue of candour will become relevant again for consideration given the fact that the relief being sought in this regard is equitable relief. It is trite law to state, but one must do so nonetheless, that the conduct of an applicant for equitable relief can affect the entitlement to such relief, and that it is a relevant consideration in the exercise of the Court's undoubted discretion in this area.

Fair issue to be tried

59. It suffices in my view that I have already concluded that leave should be granted to seek certain of the reliefs. I cannot apply any higher standard of arguability for the different purpose of deciding whether a fair issue exists to be tried in the context of the Campus Oil principles. There would be no useful purpose to be served in so doing. I will therefore proceed to the next stage on an assumption that the first requirement necessary to be established, namely a fair issue to be tried, has been satisfied.

Damages as an adequate remedy

60. As I have already stated, there is no evidence given as to what if any irreparable loss will be suffered by any of the applicants, should father be required to leave the State while his most recent applications for revocation of the deportation order and residency are being considered and determined. The establishment of such irreparable loss is necessary, and the onus in this regard is on the applicants. In *Awonuga* already referred to the question was whether there would be irreparable loss suffered in circumstances where an Irish born child would be required inevitably to follow his mother to Nigeria while her proceedings here were being determined. The learned judge decided that there was no evidence that irreparable loss would be suffered if returned to Nigeria. The present case is different in as much as mother and all the children will be able to remain here while the present proceedings are determined, since residency for them has been granted, so loss and damage to them by removal does not arise in the same way. What is contended for is simply that by the removal of father to Nigeria while these proceedings are determined, mother and children will suffer irreparable loss and damage. The irreparable loss and damage is described in terms of the family unit being broken up if he is sent back, and that it would make very difficult for her the running of the household in a situation where she must do that alone. It is also stated that the children depend on their father for emotional support.

61. In my view these matters fall short of demonstrating an irreparable loss and damage. It must be borne in mind that family rights are not absolute rights. There may in certain circumstances be a curtailment of those rights. The most obvious instance is where a

family member is imprisoned by law. In every case it could be said that where one family member is separated from the others by deportation or otherwise, there will be difficulties and loss of emotional and other support. In my view that is not something which in all cases is irreparable and not capable of being compensated for in damages. No sufficient case in that regard has been established by evidence in this case. Indeed father himself has not sought to make out any case for himself of irreparable loss and damage.

Balance of Convenience:
62. Even though I have reached the conclusion that damages are an adequate remedy in this case, I propose in any event to consider the question of the balance of convenience in case I should be in error in so deciding. The arguments in favour of the balance being in the applicants' favour have been stated by mother as already outlined. She has stated that she needs to have the company and support of her husband here, and that the children depend on him for emotional support. They do not depend on father for economic support since he is not permitted to work. Mother has some employment but it can be presumed in the absence of evidence that she has other supports provided by this State. In the applicants' favour also is the possibility that father's presence here while these proceedings are being determined may assist a favourable outcome of these proceedings. However, these proceedings are virtually ready to be heard in full at a substantive hearing. Purely legal and technical issues arise for determination, and the presence of father cannot in my view be required or necessary.

63. On the other side of the equation is the fact that there is a valid deportation order in existence and which is itself not under challenge and was never challenged. In addition is the fact that the father has already been deported to Nigeria on foot of this order and has illegally returned to this State in defiance of that order. In addition it is also the case that he could just as easily have made the applications which are presently before the Minister from Nigeria, and he could have remained there until decisions were made.

64. Another very important matter to be weighed in the balance is the whole question of how the father has interacted with this State since June 2000. I appreciate that in *Malsheva*, it was decided that the actions of one of the applicants should not militate against the entitlement of the other applicant to interlocutory relief, and that in *Arsenio v. Minister for Justice, Equality and Law Reform*, unreported, High Court, 22nd March 2007, Charleton J. was prepared to grant relief even in the face of lies which he spoke of as being "understandable and sometimes a human activity". But the behaviour of the father in this case is in my view of a much greater order such that a benign view cannot and should not be taken of it. In my view an important factor in the weighing of the balance of convenience in this case is the need to uphold and vindicate the integrity of the immigration and asylum system, and respect for this State. Firstly, he entered this State and made a false application for refugee status by using a false name. No attempt to explain this has been made except by reference to advice which he received from an unnamed "travel facilitator". On the 7th December 2001, after the deportation order in this case had been made, he again made application for refugee status in his real name. This was made on the basis that he and his wife and three Nigerian children arrived in this State on the 7th December 2001. He has later stated that this was incorrect since he had at all times remained here following his arrival in June 2000, and states that when he falsely instructed his solicitor in July 2004 that he had arrived in the State in December 2001 he did so on the advice of a friend. I have already made some comments about this aspect which is tied into the fact that his first Irish born child was born here in April 2002. He has on other occasions failed to attend at GNIB when he was required to, and I have found that the attempt to explain that away on the basis of medical illness has not been established by the note from the doctor already referred to.

65. In my view father has in these ways failed to accord any respect to the laws of this State and his obligations. He has demonstrated a willingness to deceive the authorities in a way which surpasses the mere telling of lies, which in other cases has been overlooked for the purpose of the reliefs sought. This in my view disentitles him to any sympathy from the Court, and is such as to far outweigh, in the context of the weighing of the balancing of convenience, the other features of the case which relate to his wife and children and their interest in having him remain in this State while these proceedings are determined. In my view the behaviour of father in aspects of his interaction with the State has been egregious, and such that it cannot be overlooked as being simply a symptom of the human condition and understandable. To fail to recognise the egregious nature of father's actions would be to bring the immigration and asylum system into disrepute, and would fail to do justice, as is my duty. It would be contrary to justice in my view to permit the father applicant to reap a benefit in such circumstances. It would require very very compelling circumstances, which are absent in this case, for this Court to allow equity to intervene in favour of granting the interlocutory relief sought .

66. I will therefore grant leave in respect of the reliefs which I have indicated, but will refuse the application of an interlocutory injunction to restrain the deportation of the first named applicant pending the determination of these proceedings.