

THE HIGH COURT

[2010 No. 776 J.R.]

BETWEEN

B.K. (A MINOR SUITING BY HER MOTHER AND NEXT FRIEND D.M.)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Feeney delivered on 21st day of December, 2011.

1. The applicant in this case is a four year old girl, who seeks an order of *certiorari* quashing the decision of the respondent dated the 26th May, 2010. That decision was a refusal by the Minister to recognise the applicant as an Irish citizen. The applicant also seeks a declaration that she is an Irish citizen pursuant to the Irish Nationality and Citizenship Acts 1956 - 2004 and for an order of *mandamus* requiring the respondent to recognise the applicant as an Irish citizen and to authorise the Passport Office to issue a passport to the applicant.

2. The applicant's mother, who is her next friend, is a national of Cameroon who arrived in Ireland on the 15th July, 2005 and applied for refugee status. That application was successful following a recommendation of the Refugee Appeals Tribunal that the applicant's mother should be declared a refugee. A declaration pursuant to s. 17(1)(a) of the Refugee Act 1996, as amended, was signed on behalf of the respondent on the 12th February, 2009 declaring the applicant's mother, D.M., to be a refugee. She was notified of that declaration by a letter of the same date. Between the mother's arrival in Ireland and the declaration that she was a refugee, the applicant's mother gave birth to the applicant on the 30th August, 2006 in Cork. The applicant's birth was registered on the 28th April, 2008 and her mother and next friend was identified as the mother of the applicant. No details were provided in relation to the father of the applicant. The applicant's mother is the only identified parent of the applicant. As of the date of the birth of the applicant, the applicant's mother was residing in Ireland pursuant to s. 9 of the Refugee Act 1996 which provides for leave to enter or remain in the State pending final determination of an applicant's application for refugee status.

3. The applicant's mother has made two applications to the Department of Foreign Affairs for a passport for her daughter. The first by letter dated 31st July, 2009 and the second by letter dated the 17th February, 2010. Both applications were unsuccessful and the applicant's mother was informed that the Department were not satisfied that the applicant was an Irish citizen or entitled to Irish citizenship and that the applicant's mother could if she desired raise the issue of the applicant's entitlement to citizenship with the Citizenship Division of the Department of Foreign Affairs. The applicant's mother, through her solicitors, applied to the respondent on the 30th April, 2010 seeking an authorisation for the issue of a passport to the applicant and that application was refused by a decision dated 26th May, 2010. It is that decision which is impugned in these proceedings.

4. The applicant seeks to impugn the respondent's decision of the 26th May, 2010 refusing to recognise her as an Irish citizen on the basis that the applicant is in fact an Irish citizen pursuant to s. 6 of the Irish Nationality and Citizenship Act, 1956 (as amended). That claim is grounded upon the contention that under s. 9(2) of the Refugee Act 1966 (as amended), there is no restriction on the right of residence of the Refugee Act 1966 (as amended), there is no restriction on the right of residence of the applicant's mother in Ireland from the date of her application for refugee status on the 15th July, 2005 and that therefore it is claimed that the mother was as of the date of birth of the applicant a person entitled to reside in Ireland without any restriction on her period of residence.

5. Part II of the Irish Nationality and Citizenship Act, 1956 (as amended) deals with citizenship and s. 6A of that Act, as inserted by the Irish Nationality and Citizenship Act 2004 deals with the entitlement to Irish citizenship of persons born to non-nationals. Section 6 (1) of the Irish Nationality and Citizenship Act, 1956 (as amended) provided that, subject to s. 6A, every person born in the island of Ireland is entitled to be an Irish citizen. Section 6A(2) provides that the entitlement to Irish citizenship does not apply to certain categories of persons even though such persons were born in the island of Ireland. Section 6A(1) provides:

"A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years."

Sub-section (2) of that section provides that subs. (1) does not apply to certain categories of persons and the relevant subsection for consideration in this case is s. 6A(2)(d). That sub-section states:

"A person born in the island of Ireland-

(i) to parents at least one of whom was at the time of the person's birth a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004)."

The respondent claims that the applicant's mother did not have the appropriate years "reckonable residence in the State prior to the birth of the applicant such as would entitle the applicant to citizenship". On the facts of this case there is no dispute but that the applicant's mother did not have the appropriate years reckonable residence in the State prior to the birth of the applicant on the 30th August, 2006. The applicant's mother had only been in Ireland for a period slightly greater than one year. The applicant contends that the provisions of s. 6A(1) do not apply to the applicant as the applicant's mother comes within the provisions of s. 6A(2)(d)(i) in that

the applicant's mother as of the date of birth of the applicant was a person entitled to reside in the State without any restriction on her period of residence. The central issue for determination in this case is whether or not the applicant's mother was a person entitled to reside within Ireland without any restriction as of the date of the birth of the applicant.

6. The respondent submits that the applicant's mother not only did not have the appropriate years reckonable residence in Ireland prior to the birth of the applicant such as would entitle the applicant to citizenship, but also that the applicant's mother's residence in the State was restricted as of the date of the birth of the applicant and remained so restricted until the applicant's mother obtained a declaration of refugee status and that, since such declaration post-dated the applicant's birth, the exception provided for in s. 6A(2)(d) did not apply and the applicant is not entitled to Irish citizenship.

7. The applicant claims that there was no restriction on her mother's period of residence within the State as of the date of birth of the applicant. This is claimed to arise from the terms of s. 9 of the Refugee Act 1996. The applicant's mother had leave to remain in the State under the provisions of s. 9(2) as of the date of the birth of her daughter. The applicant claims that a correct and proper reading of s. 9(2) is that such leave to remain in the State is without any restriction as to period unless one of the three events identified ins. 9(2)(a), (b) and (c) occur and none of those events occurred. Section 9(1), (2), (3) and (4) provides:

"(1) Subject to the subsequent provisions of this section, an applicant, being a person referred to in section 8 (1)(a), shall be given leave to enter the State by the immigration officer concerned.

(2) Subject to the subsequent provisions of this section, a person to whom leave to enter the State is given under subsection (1) or an applicant, being a person referred to in section 8 (1) (c), shall be entitled to remain in the State until-

(a) the date on which his or her application is transferred to a convention country pursuant to section 22, or

(b) the date on which his or her application is withdrawn or deemed to be withdrawn under this section or section 11, or

(c) the date on which notice is sent that the Minister has refused to give him or her a declaration.

(3)(a) The Commissioner shall give or cause to be given to a person referred to in subsection (2) a temporary residence certificate (in this section referred to as "a certificate") stating the name and containing a photograph of the person and such other information relating to the person as may be prescribed and specifying the date on which the person's application for a declaration was received by the Commissioner and stating that, subject to the provisions of this Act, and, without prejudice to any other permission or leave granted to the person concerned to remain in the State, the person referred to in the certificate shall not be removed from the State before the final determination of his or her application.

(b) A certificate shall remain the property of the Minister.

(c) A certificate shall be deemed to be a registration certificate for the purposes of section 12 of the Immigration Act 2004 and a person who is issued with a certificate shall be deemed to have complied with section 9 of that Act.

(d) If a person forges, or fraudulently alters, or assists in forging or fraudulently altering, or procures the forging or fraudulent alteration of a certificate, that person shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both.

(4) An applicant shall not-

(a) leave or attempt to leave the State without the consent of the Minister, or

(b) seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration.

(4A) (a) An applicant shall inform the Commissioner of his or her address and of any change of address as soon as possible.

(b) Where 5 working days have elapsed since the making of an application for a declaration and the applicant has not informed the Commissioner of his or her address, the application shall be deemed to be withdrawn."

8. The applicant claims that her mother had permission to reside in the State pursuant to s. 9 of the Refugee Act 1996 at the time of the applicant's birth and whilst s. 9 imposes certain conditions, such as a prohibition on work and a prohibition on leaving the State without permission, that the only restriction on the period of residence is that imposed by subs. (2). The applicant claims that since her mother was granted a declaration of refugee status that therefore none of the provisions set out at s. 9(2)(a), (b) or (c) arose and that therefore no restriction applied to the applicant's mother's period of residence and she remained entitled to remain in the State pursuant to s. 9 of the Refugee Act 1996. The applicant therefore contends that her mother did not have any restriction on her residence in the State as and from the date of her arrival, given the provisions of s. 9 of the Act and that a restriction would only arise in respect of her mother's residence if one of three events occurred, namely, the transfer of the mother's application to a Convention country, the withdrawal of her mother's application, or that application being deemed to have been withdrawn, or the date upon which the Minister sent a notice indicating his refusal to give the mother a declaration of refugee status. Since none of those events occurred, the applicant's mother was resident within the State without any restriction as to period. It is the applicant's case that her mother was so resident as and from the date of her mother's arrival in the State.

9. The Court is satisfied that the meaning and interpretation sought to be placed upon the legislation by the applicant is not correct. Section 9 of the 1996 Act deals with the entitlement of a person seeking refugee status to obtain leave to enter and remain in the State until that status is finally determined. That determination is by a decision of the Minister to transfer the application for refugee status to another Convention country, or by the withdrawal of the application, or by the refusal by the Minister to give a declaration as to refugee status. Section 9 of the 1996 Act allows an applicant for asylum, that is a person to whom s. 8 of that Act applies,

permission to enter and remain in the State pending the finalisation of an application for declaration of refugee status. The provisions set out in s. 8 and s. 9 of the Refugee Act 1996 gives effect to the State's responsibilities under the Geneva Convention. It provides a statutory scheme by which an asylum seeker can apply for refugee status and to ensure that such person is treated on the assumption that they may be a refugee until their status has been determined. That statutory scheme ensures that the principle of non-refoulement is applied. A person is a refugee within the meaning of the 1951 Convention as soon as that person fulfils the criteria contained in the definition and that occurs prior to the time at which that person's refugee status is formally determined. It follows that in logic the recognition of a person's refugee status does not make that person a refugee but declares him to be one, the person having been a refugee from the time that such person departed from the country from which he or she is seeking refuge. A person does not become a refugee because of the recognition of that person as a refugee but a declaration of refugee status does recognise that such person is a refugee. That position has resulted in the provisions of ss. 8 and 9 of the Refugee Act 1996 being enacted to provide asylum seekers, whether they are ultimately identified as refugees or not, with an entitlement to remain in the jurisdiction pending the determination of an asylum application. As of the date of birth of the applicant, the applicant's mother was a person, who was a refugee, and was entitled to remain in the State for the period up to and including the final determination of the mother's application for refugee status. That status is apparent from the provisions of s. 9(3)(a) of the Act which obliges the Commissioner to give a person applying for refugee status a temporary residence certificate and provides that the person shall not be removed from Ireland before the final determination of that person's application for refugee status.

10. The interpretation sought by the applicant would mean that any parent seeking refugee status who had a child born in the State during the process leading to the final determination of such an application would be entitled to have that child declared an Irish citizen as none of the events specified ins. 9(2)(a), (b) or (c) had yet occurred even though one of those events might occur at a later date. Section 9(2) of the Refugee Act 1996 must be read in the context of the other sections of the Act and in particular in the context of ss. 3, 4, 5 and 18. The provisions of the Act are such that a person who is found to be a refugee does not have the benefits of refugee status backdated under the Act and it follows that if this Court were to accept the interpretation of s. 9(2) of the Act contended for by the applicant, such interpretation would be inconsistent with the other provisions of the Act. The statutory provisions provided that the applicant's mother, who at the time of the applicant's birth was an asylum seeker within the State, was entitled under s. 9 to remain in the State until the final determination of her application for refugee status. The Act is framed to provide that if such an application resulted in a declaration, then the applicant's mother could remain without restriction within the State. This Court is satisfied that a correct reading of the statutory provisions results in the situation being that as of the date of the applicant's birth, the applicant's mother was a person entitled to remain in Ireland on the basis that her entitlement to remain was for the purpose of ensuring a final determination of her application for refugee status. It was therefore the case that as of the date of birth of the applicant that the applicant's mother was a person within the State with a restriction on her period of residence. The date of the restriction was unknown but the entitlement was limited for a particular purpose. The Court is satisfied that there therefore were restrictions on the applicant's mother's residence in the State prior to the date of the declaration of refugee status. Since that declaration post-dated the date of birth it cannot be said that the applicant's mother was a person without any restriction on her period of residence as of the date of birth. The restriction on the applicant's mother's residence remained in force until the date upon which she was declared a refugee and it was therefore in force as of the date of the birth of the applicant.

11. This Court is satisfied that a correct reading of s. 9 of the Refugee Act 1996 results in a situation where the applicant's mother's residence in the State was restricted as of the date of birth of the applicant and that such restriction on the mother's period of residence continued up to the date that the mother obtained a declaration of refugee status. Since the restriction continued until after the date of the birth of the child, and since the mother did not have three years reckonable residence in the State prior to the date of the birth, it follows that the applicant does not have an entitlement to Irish citizenship under s. 6A of the Irish Nationality and Citizenship Act 1956, as amended. The applicant is therefore not an Irish citizen and is not entitled to an Irish passport. It should be pointed out that the applicant is lawfully within the jurisdiction and will be entitled to apply for a certificate of naturalisation in her own right as and from her fifth birthday which occurs on the 30th August, 2011.

12. In the light of the above findings the Court is satisfied that the correct construction of the legislation results in a situation where the applicant's mother was a person whose right of residence within the State was restricted as of the date of birth of the applicant and that therefore the applicant does not have an entitlement to Irish citizenship. The applicant is not entitled to the relief sought in the notice of motion dated 12th July, 2010 and the Court declines to make an order of certiorari quashing the decision of the respondent dated the 26th May, 2010. It also follows that the applicant is not entitled to the declaration sought that she is an Irish citizen pursuant to the Irish Nationality and Citizenship Act 1956 (as amended) nor is she entitled to an order of mandamus requiring the respondent to recognise the applicant as an Irish citizen.