Neutral Citation: [2014] IEHC 409

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 654 J.R.]

BETWEEN

I.E.

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND E.E.)

APPLICANT

-AND-

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

RESPONDENTS

AND

[2011 No. 356 J.R.]

G.E.

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND E.E.) .

APPLICANT

-AND-

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

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 31st day of July 2014

1. This is an application for costs arising from two sets of judicial review proceedings which have been withdrawn by the applicants prior to a full hearing. This application is made on the basis that the respective judicial review proceedings have effectively become moot. The proceedings are said to have become moot owing to a grant of temporary permission to remain in the State for a period of three years being offered to the applicant's mother by the Minister, which was extended to include both the minor applicants.

Background:
2. The applicants in these proceedings are both nationals of Nigeria. I.E. was born in Dublin on 23rd May 2009, while his brother G.E. was born in Kerry on 29th October 2010. The applicants, suing through their mother and next friend, had sought to challenge negative decisions of the Refugee Appeals Tribunal dated 28th April 2010 and 13th April 2011 respectively. Given the minority of both applicants, their claims for asylum were substantially based on the fears expressed on their behalf by their mother. In particular, it was claimed that the minor applicants would face human sacrifice by members of a cult if returned to Nigeria. The applicants' mother had previously had her own application for asylum refused by the Tribunal on the 11th March 2008 and her application for subsidiary protection was also subsequently rejected by the Minister. A deportation order had been issued against her on 4th December 2008.

Correspondence:
3. It is useful at this juncture to set out excerpts from the relevant correspondence exchanged between the parties by way of background prior to these costs proceedings. Following an initial telephone call from the Minister's office and the submission of a copy of the applicants' mother's passport, she received a letter from the Irish Naturalisation and Immigration Service dated 18th June 2014 in the following terms:

> "Dear Ms. E,
>
> I am directed by the Minister for Justice and Equality to refer to your representations made in response to the Minister's proposal to deport you under Section 3 of the Immigration Act 1999, as amended. As an exceptional measure, I am to inform you that the Minister has decided to revoke the 'Deportation Order' made in relation to you in 4th December 2008, and instead, grant you 'Temporary Permission to Remain in the State' on a Stamp 4 basis, for 3 years from 18/06/2014 until 18/06/2017. This 'Temporary Permission to Remain in the State' extends to your two children who are at this time residing in the State, Namely; I.M.E. (69/1182/09 - d.o.b. 23/05/2009) and G.E. (69/1431/10- d.o.b. 29/10/2010).
>
> **Please note that this permission is extended to I.M.E. and G.E. without prejudice to their current legal proceedings against the Refugee Appeals Tribunal.**
> Your permission is subject to your compliance with certain conditions which are set out below." [Emphasis in original]

The letter also enclosed the formal revocation of the applicants' mother's deportation order.

4. On 19th June 2014, the Office of the Chief State Solicitor (the 'CSSO') wrote to the applicants' solicitors and with reference to the pending judicial review proceedings stated:

> "Dear Sirs,
>
> We refer to the above matters which are listed for hearing on 1st July 2014 and for mention on Monday 23rd June 2014.

We would be obliged if you would please confirm in advance of Monday that you are in receipt of up to date instructions from your clients and that they intend on prosecuting their cases to hearing."

5. On 20th June 2014, the applicants' solicitors wrote as follows:

"We note that the second named respondent recently granted the mother and next friend permission to reside in Ireland and that this permission is stated to include the minor child applicant.

In that the minor child has been permitted to reside in the State by the second named respondent, who would have been aware of the minor child's application for surrogate protection and the attendant proceedings as against the first named respondent, the proceedings are now effectively moot.

In the circumstances, we would respectfully suggest that the only issue to be determined is the cost of the proceedings to date. Accordingly, we would suggest that the hearing date be vacated and that if a contribution to the applicant's costs is not forthcoming that this matter be listed with cases in like circumstances for a costs hearing."

6. The CSSO replied on 26th June 2014 noting their position as follows:

"These judicial proceedings seek to challenge the decision of the Tribunal to refuse a recommendation of refugee status. Please indicate whether your clients wish to withdraw these proceedings by close of business on Friday 2ih June 2014 and if they intend to prosecute them we would be obliged if you would include your legal submissions with your reply. As you know the *Dokie & Ajibola* ('*HID*') judgment has determined the vast majority of the reliefs and issues in these proceedings.

Please note that if your clients indicate that they wish to withdraw the proceedings by Friday the 27th June 2014 then we are instructed that we will not seek the costs of these proceedings. However, in the event that no response is received the Tribunal intends to contest the cases and, if successful, to seek the full costs of both sets of proceedings. Furthermore if the Applicants seek to withdraw the cases after the 27th June 2014, the Respondent will seek costs in both cases.

You will note this is an open letter and we will be relying upon it in order to affix you with our costs should we be forced to apply for same."

Submissions:

7. Counsel for the applicants claims that as a result of the decision to grant them permission to remain, they are no longer exposed to a return to their country of nationality and the persecution they fear. As a result it is submitted that the case has become moot and the only issue remaining for determination by the court is that of costs. It is submitted that where a case is rendered moot, the general rule is that the court should lean in favour of awarding costs against the party through whose unilateral action the proceedings have become moot in line with the approach taken in *Cunningham v. The President of the Circuit Court* [2012] IESC 39 and *Mansouri v. Minister for Justice* [2013] IEHC 527.

8. Counsel submits that a 'unilateral action' might be so characterised if there was no change in the underlying circumstances outside the control of either party which caused the respondents to take the action. In this case, it is contended the proceedings were rendered moot when then the applicants were granted permission to remain and that this was a unilateral action by the respondent Minister. The applicants submit that the application of this principle is not dependent on the applicant succeeding on the merits of the case at a substantive hearing and further that the decision to initiate proceedings by the applicants was proportionate in the circumstances. In short form, the applicants submit that the question to be asked is: whether it was reasonable to commence the application for leave to seek judicial review? In circumstances where it was reasonable to commence the application and the unilateral action which caused the mootness was taken by the Minister, the applicants submit that they are entitled to their costs or a contribution towards same.

9. Counsel for the respondent submits that the case is not moot and notes the significant rights afforded to a person who is a declared refugee in the State, including, *inter alia*, the right to enter employment, the right to a travel document, the right to social protection on the same terms as those afforded to Irish citizens and the right to family reunification. As such, it is submitted that the applicants are entitled to continue their challenge to the decisions of the Tribunal on the basis that if they are ultimately successful, their entitlements would be far superior to that of a temporary permission to remain.

10. Counsel relies on the decision in *Adewoyin v. Minister for Justice* (Unreported, High Court, Cooke J., 18th July 2012) wherein the court held that the applicant was not precluded from prosecuting judicial review proceedings commenced in respect of a Tribunal decision and noted that "The fact that such an applicant for asylum has an existing permission cannot alter the effect of those circumstances on his or her status in international law under the Refugee Convention of 1951." It is noted that the permission granted to the applicants' mother and which is extended to the applicants themselves, is limited in duration (although it may be extended at the Minister's discretion upon future application by the mother) and is also subject to compliance with certain conditions. The permission obliges the mother to make every effort to gain employment and not be a burden on the State; it does not confer any entitlement or legitimate expectation on any other person related or otherwise to remain in the state; and it may be revoked on the basis of information relating the applicants' mother's character or conduct.

11. It is submitted by the respondent that the 'unilateral action' sought to be relied upon by the applicants in claiming that the proceedings are moot was an act of the Minister, unrelated to these proceedings and indeed stated to be "without prejudice to [the applicants'] current legal proceedings against the Refugee Appeals Tribunal". Counsel contends that it is within the power of the Minister to exercise her discretion from time to time and on a case by case basis and that the alleged unilateral action was not taken by the Refugee Appeals Tribunal, which is in reality the only party against which there is any live claim in the proceedings. It is noted that the Tribunal is an independent body and is not privy to the Minister's decision to exercise her discretion in this case. In any event, it is contended that the Minister expressly stated in her letter that the permission granted was without prejudice to the within proceedings.

Findings:

12. In the courts view the proceedings are not moot. It is evident that the temporary leave to remain for a period of three years which has been granted to the applicants and their mother is not commensurate with the rights which inhere in declared refugees in the State. The pursuit of judicial review proceedings in respect of decisions of the Refugee Appeals Tribunal which are perceived to

be unlawful or irrational is not rendered moot by the grant of a temporary permission to remain. I take account of the basis of the claim advanced in support of asylum status: the mother said that the children would be murdered if returned. If the proceedings were successful and the matter remitted, the applicants would be entitled to present this claim again and seek asylum. In withdrawing the judicial review proceedings the possibility of pursuing these matters has been abandoned. Assuming the Mother was telling the truth, she has swapped the possibility of seeking permanent protection for her children from the threat of violence for a permission to remain for three years only. In accepting the offer of leave to remain and then withdrawing the proceedings, the applicants did not achieve a result similar to what success in these proceedings might have brought. In accepting the offer of leave to remain the applicants have not resuscitated their claim for asylum- which is what would have happened had these proceedings been successful. If the applicants feel they no longer need protection from the harm which might be caused to them on repatriation, this is not because of any act by the State. That is why I find that the proceedings are not moot.