Neutral Citation Number: [2011] IEHC 104

THE HIGH COURT

JUDICIAL REVIEW

2009 675 JR

BETWEEN

O.O., S.O., O.O.

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND

O.O.) AND O.P.O (A MINOR SUING

BY HIS FATHER AND NEXT FRIEND O.O.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 9th day of February, 2011

1. This application to amend the applicants' statement of grounds raises issues which are similar to - but not quite identical to - the issues which also arose for decision in the other judgment which I am also delivering today, *MAU v. Minister for Justice, Equality and Law Reform (No.2*). Both applications take as their starting point the earlier judgment delivered by me in *MAU v. Minister for Justice, Equality and Law Reform (No.1)* [2010] IEHC 492.

2. The net question which arose for consideration in *MAU (No.1)* concerned the interpretation of s. 3(1) of the Immigration Act 1999 ("the 1999 Act") and the effect of a deportation order made under that sub-section. I held that it was clear beyond argument that the consequence of s. 3(1) was that once the deportation order takes effect, the subject of that order must endure a life long exclusion from the State, subject only to the mitigating power of the Minister for Justice, Equality and Law Reform to revoke a deportation order already made by virtue of s. 3(11).

3. Subsequent to the delivery of this judgment - albeit before the perfection of the order and the disposal of issues such as costs and whether a certificate dealing with leave to appeal should be granted - the applicants in that case then applied to amend their pleadings to enable them now for the first time to challenge the constitutionality of s. 3(1) of the 1999 Act on the ground that it effects a disproportionate interference with their constitutional rights by virtue of this life long ban. In the alternative, they also sought leave to enable them to seek a declaration of incompatibility under s. 5(1) of the European Convention of Human Rights Act 2003. In the judgment which I have just delivered today, I held that this Court had no jurisdiction to permit an amendment of the pleadings post-judgment and in respect of which proceedings the Court was now *functus officio*, at least so far as the question of the validity of the deportation order was concerned.

4. As I have already indicated, the present application to amend raises a similar issue, albeit that there is one important difference between the two cases, namely, that unlike *MAU (No.2)*, the present case has not proceeded to judgment. The jurisdictional bar to any amendment which was therefore present in that case is accordingly not present here.

5. It is clear, accordingly, that this Court has a jurisdiction to permit the amendment under Ord. 28, r. 1. The issue is rather whether this jurisdiction to amend should be exercised in the present case.

6. In the substantive proceedings the applicants seek to challenge the validity of a deportation order made in respect of the first applicant on 23rd April, 2009. The making of that order was communicated to the applicants by letter dated 8th May, 2009, and these proceedings were commenced on the 25th June, 2009.

7. It is true that both the statement of grounds and the grounding affidavit of Mr. Orola contain (admittedly fairly general) pleas to the effect that the deportation order would have a disproportionate impact on their constitutional rights and rights protected by the ECHR. But there is nothing here to suggest that they ever sought to challenge the constitutionality of s. 3(1) of the 1999 Act or, indeed, that any question of this nature was even in contemplation when they commenced their proceedings.

8. When the case was first opened before me, the applicants sought to contend that the decision to deport in the present case was disproportionate by reason, *inter alia*, of the fact that, subject to the critical provisions of s. 3(11), it operated in principle as a life time ban. I drew counsels' attention to the judgment which I had recently delivered in *MAU (No.1)* regarding the construction of s. 3(1) and queried whether it was open to the applicants to contend that the deportation order actually made in this case was disproportionate in this respect without challenging the constitutionality of s. 3(1) itself. It was agreed that the applicants would then bring the present motion in order to seek leave to effect an amendment of pleadings in this regard.

9. I have already alluded to the fact that there is nothing in the applicants' pleadings which suggested that this point, or anything really like it, was within their scope. In this regard, the present case is totally different from *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31. In that case the applicants were permitted a late amendment to their pleadings in order to challenge the constitutionality of the common law rules of judicial review on the ground that they did not adequately protect the applicants' constitutional rights. Critically, however, the applicants had always maintained that these rules infringed Article 13 ECHR on the ground that these rules did not secure them an effective remedy. I took the view that there were two very special reasons – "practically unique" to the case - why such an amendment should be allowed:-

> "First, the applicants have always maintained that the existing common law rules were basically inadequate to secure an effective remedy: the proposed amendments would - more or less - simply allow them to make the same case by reference to the Constitution. Viewed from that perspective, the amendment merely amplifies the case which the applicants have always been making and in that sense it cannot be regarded as an entirely new ground of challenge.
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> Second, the amendment is necessary by virtue of the view which I have taken of the jurisdictional limits of the power to grant a declaration of incompatibility contained in s. 5(1) [of the European Convention of Human Rights Act 2003] and, specifically, the fact that the court can only grant the applicants such a declaration in circumstances where their constitutional remedies have been exhausted."

10. None of these very special considerations apply here. The proposed new ground of challenge is entirely new and cannot even remotely be said to be simply an amplification of arguments already advanced. Nor can it be said that the proposed amendment is one which has been imposed by the Court in view of the jurisdictional bar contained in s. 5(1) of the European Convention of Human Rights Act 2003, although different considerations would have applied had the applicant sought a declaration of incompatibility in the first instance pursuant to s. 5(1) of the 2003 Act in respect of s. 3(1) of the 1999 Act.

11. At the hearing Ms. McDonagh SC (who appeared for the applicants) urged that my judgment in *MAU (No.1)* had clarified the law in this area. I cannot, with respect, accept that this is so, as that judgment merely re-stated that which was quite obvious from the express language of the sub-section. But even if (contrary to my view) it were to be accepted that *MAU (No.1)* had brought about a significant change in the law or the accepted understanding regard the construction of s. 3(1) of the 1999 Act, it is clear from the authorities that this *in itself* will be insufficient to justify an amendment, having regard to the clear legislative policy prescribed by the Oireachtas in s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. By prescribing a requirement that applications for judicial review of deportation orders must be commenced within 14 days, subject to the power to extend time for good and sufficient reason, the Oireachtas clearly intended that all such applicants must advance the entirety of their grounds of challenge within that period.

12. The situation with regard to amendments of this kind in the context of statutory schemes prescribing short limitation periods for applications to apply for judicial review of administrative decisions governed by such schemes was enunciated by Kelly J. in *Ni Eili v. Environmental Protection Agency* [1997] 2 I.L.R.M. 458 at 464 in the following terms:-

> "It cannot be denied but that the amendment sought by the applicant amounts to an additional and entirely new case. The new grounds are very different to those already advanced. They raise in effect a new cause of action. Can the applicant be permitted to do this by way of an amendment to her existing proceedings?
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> In my view she cannot. To allow such a course would, in my opinion, run counter to the will of Parliament as expressed in section 85(8) of the Act. All statutory construction has as its object the discernment of the intention of the legislature. What is the object of section 85(8)? It seems to me that it is (a) to require that proceedings which question the validity of a decision of the respondent be instituted at an early date to ensure that uncertainty about the decision be disposed of one way or the other in a timeous fashion; and (b) to make the beneficiary of such a decision and the respondent aware that the validity of such a decision is being questioned and aware of the basis for such questioning so that they may prepare their response to such proceedings expeditiously. To permit of the amendment sought here would run counter to the legislature's intent in this regard."

13. This passage was subsequently approved by the Supreme Court in *SM v. Minister for Justice, Equality and Law Reform* [2005] IESC 27. In *SM* the applicants argued that they should be permitted to amend the grounding statement so as to add entirely new grounds by reason of change of counsel. McCracken J. held that in those circumstances it was incumbent on the applicants to show that they had "good and sufficient reason" within the meaning of s. 5(2) of the 2000 Act before the Court could accede to this request.

14. So far as the change of counsel is concerned, McCracken J. noted that:-

> "The fact that there had been a change of counsel was put forward by the appellant as a reason for the delay. It was argued that the effect of a change of counsel depends on the circumstances, and if a new counsel spots a points which had not previously been put forward, the litigant ought to be entitled to rely on it. There may indeed be circumstances in which this is so. However, such occasions will only arise when it can be shown that there was a serious error made by the original counsel in the case which would of itself lead to a serious miscarriage of justice. No such serious error has been shown in the present case. In any event, in exercising the discretion under s.5(2), a change of counsel under almost any circumstances would simply be one factor to be taken into account in the exercise of that discretion. In the present circumstances the learned High Court judge was quite correct in finding that the change of counsel was not of itself a good a sufficient reason to extend the time."

15. I take the view that these principles apply, at least by analogy to the present case. While there has been no change of counsel, the existing legal team has been prompted to think of a new line of argument by reason of a recent decision of this Court. The failure to advert to this point cannot in any way be described as a serious error, not least once regard is had to the fact the 1999 Act has been in operation for over a decade and no counsel has heretofore come forward to advance this particular argument. While I accept that the point is one which is certainly open to argument, the fact that it is now canvassed is in its own way a tribute to the ingenuity and inventiveness of counsel. It certainly cannot be said that this argument was one which was manifestly obvious.

16. In these circumstances, I cannot overlook the fact that the legislative policy requiring applicants to advance the entirety of their challenge to the validity of a deportation order at the earliest opportunity and which is reflected in s. 5(2) of the 2000 Act is likely seriously to be compromised were a late amendment of this kind to be permitted at this juncture, some twenty months after the proceedings were commenced. An amendment of this kind at such a late stage could only be countenanced in quite exceptional circumstances, such as I found to be present in S. The dicta of Kelly J. in *Ni Eili* and those of McCracken J. in *SM* are very clear authorities for this proposition.

Conclusions

17. Since the exceptional circumstances identified in cases such as S. are not present here, I fear that, for the reasons just stated, I cannot accede to the applicants' request to be given leave to amend their statement of grounds.