Neutral Citation Number: [2009] IEHC 186

THE HIGH COURT

JUDICIAL REVIEW

2005 1122 JR

BETWEEN

O. A. B. AND A. B. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND O.A.B.)

APPLICANTS

AND

THE REFUGEE APPLICATIONS COMMISSIONER,

THE REFUGEE APPEALS TRIBUNAL,

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

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MS. JUSTICE CLARK, delivered on the 21st day of April, 2009.

1. This is an application for leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister") to make a deportation order in respect of the first named applicant, who is the mother of the second named applicant. Mr. Garry O'Halloran B.L. appeared for the applicants and Ms. Sinéad McGrath B.L. appeared for the respondents. The hearing took place at the King's Inns, Court No. 1, on the 19th March, 2009.

2. The applicants must show substantial grounds for the contention that the decision to make a deportation order ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

The Asylum Application

3. The first named applicant is a national of Nigeria and the second applicant is her infant daughter. The first applicant applied for asylum in the State on the 15th April, 2005 when she was approximately six months pregnant. She claims that in February, 2005, her village in Adamawa State was attacked by neighbouring villagers. Her parents and 26 other local residents were killed and the village was destroyed. The applicant fled to Lagos where she lived by begging

on the streets as she could not locate her husband or siblings. She was afraid of what might happen to her unborn baby and used the money she made from begging to pay for her travel to Ireland. She left Nigeria in April, 2005 with an agent and flew to Dublin via Amsterdam. She had no travel documents and, as is the now frequently recounted story, the agent held all travel documents and showed everything at the airport for her when required and then retained the documents. She had no documents to establish her identity or travel arrangements.

4. The first named applicant says although she could not locate her husband in Nigeria and did not see him after the attack on her village she met him in Ireland ten days after she arrived here. She has given no explanation for this happy coincidence. Her asylum application was dealt with on a priority basis and her interview with the Office of the Refugee Applications Commissioner (ORAC) took place within weeks after her arrival. In the s. 13(1) report prepared after a consideration of her questionnaire and interview, a finding was made under s. 13(6) (a) of the Refugee Act 1996, i.e. that she had showed either no basis or a minimal basis for the contention that she is a refugee. She was therefore not entitled to an oral hearing on appeal. Her document based appeal was not successful before the Refugee Appeals Tribunal (RAT) and in June, 2005, she was notified that the Minister had refused to grant her refugee status and was proposing to make a deportation order.

5. Representations were made on her behalf by the Refugee Legal Service (RLS) seeking leave to remain temporarily in the State. The Minister was informed that she had been joined in the State by her husband and that she was pregnant and due to give birth in July, 2005. No further submissions were made in relation to the expected child and when the second applicant was born on the 9th August, 2005 the Minister was not notified. Under the Irish Nationality and Citizenship Act 2005, the baby is not entitled to Irish citizenship.

The Examination of the File

6. In September, 2005, an examination of the first named applicant's file was conducted under s. 3 of the Immigration Act 1999. The applicant's family and domestic circumstances were noted including that her spouse was in the State and was in the asylum process; that her parents were deceased and the whereabouts of her eight siblings was unknown; and that she had entered the State six months pregnant and gave birth to a child on 9th August, 2005. (It appears that the Minister's officials were aware of the birth as a result of enquiries they conducted with the Department of Social and Family Affairs.)

7. The file was examined under s. 5 of the Refugee Act 1996 and each of the submissions relating to what are known as the humanitarian grounds for leave to remain was examined and commented upon. It was noted that the applicant had given birth to a child in the State in August, 2005 but was not eligible for inclusion under the IBC '05 scheme. Consideration was then given to the situation of the child born in Ireland who was not an Irish citizen and that it was observed that even if she had been an Irish citizen, the judgment of the Supreme Court in *Lobe and Osayande v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 32 makes it clear that there is no absolute right for a child to have the care and company of its parents in Ireland and that this can be provided abroad. It was also noted that it cannot be said as a matter of law that the parents of a minor can assert a choice to reside in the State on behalf of the minor, even if that could be said to be in the interests of the minor. It was noted that "*children can return to countries which would have inferior welfare and health services to those available in Ireland"* and that is not, in itself, a basis for allowing them to

remain here. It was concluded that "*the fact that, in this instance, the child is not an Irish citizen lends further weight to the conclusion that deporting the parent, along with the child, is not contrary to our national or international obligations*". It was noted that the child is not entitled to Irish citizenship but is entitled to Nigerian citizenship and "*does not have an automatic right to remain in the State"*. It was further noted that the child's father is in the State and that his application for asylum, made on the 25th April, 2005, had been rejected. It was pointed out that the Supreme Court *in P, B and L v. The Minister for Justice, Equality and Law Reform* [2001] I.E.S.C. 107 rejected the submission that the Minister is precluded from deporting one partner while the other's leave to remain application is pending.

8. The Executive Officer ultimately found that repatriating the first named applicant to Nigeria would not be contrary to s. 5 of the Refugee Act 1996 and no issues arose under s. 4 of the Criminal Justice (U.N. Convention against Torture) Act 2000. She recommended that the Minister sign a deportation order. An Assistant Principal endorsed that recommendation the following day but added no substantive analysis to the examination on file. A deportation order was then signed directed to the first applicant on the 29th September, 2005 and she was notified of that order by letter dated the 5th October, 2005. At the date of the deportation order, the first named applicant had been in the State for a period of less than six months.

9. The applicants' current solicitors came on record on the 12th October, 2005 and on the 17th October, 2005, an individual application for asylum was made on behalf of the child, who was then two months old. The child's asylum file was not before the Court and counsel for the applicants was unable to assist in providing any details on the progress of that asylum application. Counsel for the respondent informed the Court that the child's claim for asylum was unsuccessful before the ORAC and the RAT. Judicial review proceedings were instigated and although leave was granted, the applicant was unsuccessful at the substantive hearing and the second named minor applicant is now a failed asylum seeker. No deportation order has been made against the child and the only deportation order made and now challenged is the order relating to the first named applicant. The child's leave to remain application is awaiting consideration by the Minister. The father's application for leave to remain is also before the Minister. He is not party to these proceedings.

The Validity of the Deportation Order

10. Mr. O'Halloran B.L., counsel for the applicants, seeks to impugn the deportation order on the basis that in deciding to deport the first named applicant, who is the mother of the second applicant, the Minister failed to carry out any real assessment of the minor applicant's own circumstances but confined his examination to reviewing her citizenship rights. He argued that at the time when the deportation order was made, no determination had been made in respect of the child's asylum application and no consideration had been given to the child's best interests. He argued that as the Minister is obliged to consider what is in the best interests of the child and there was therefore no legal basis for the making of a deportation order and relied on *A.N. (Nwole) v. The Minister for Justice, Equality and Law Reform* [2007] I.E.S.C. 44. He further argued that as the determination to make a deportation order was confined to the first named applicant, this it was a breach of the concept of "family unity". The applicants did not identify what other consideration the Minister should have given to the existence of the then two month old baby when viewing her mother's file.

The Respondent's Submissions

11. Ms. McGrath B.L., counsel for the respondents, informed the Court that at the time the Minister was considering the first applicant's leave to remain and her deportation, no application for asylum had been made on behalf of the infant second named applicant. The Minister was therefore viewing the file on the basis of evidence before him and evidence which his own officers had obtained in relation to the birth of the second named applicant. She argued that the facts of this case mirror those of *Ebinum v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Peart J., 27th July, 2007), a case in which leave was refused and where Mr. O'Halloran had been the counsel and made similar arguments.

12. The respondent opened correspondence between the respondent and the applicants' solicitor arising from an application to adjourn this matter pending the determination of two cases, *Ebinum* (see above) and *Omukoro* in which the applicants' solicitor had an interest and where it was stated the same legal point arose. The respondent asked the applicants' solicitor, Mr. Mulvihill, to indicate the precise facts of both cases and the precise legal points which were said to exist in all three cases. The response was that "*the legal issue common to all three cases relates to the adequacy of a consideration relating to a child which is limited to a consideration of its citizenship rights when making a deportation order relating to the child's mother*."

13. On 14th February, 2007, the respondent wrote again to the applicants' solicitor, stating as follows:-

"By judgment dated the 27th July 2007 Judge Peart in ***Ebinum*** *refused leave and in so doing he relied on the two statutory pre requisites laid down by Clarke J. in* ***Kouaype v. Minister for Justice****, namely the Minister should be satisfied that none of the conditions set forth in s. 5 of the Refugee Act, as amended, are present, and that he considered the humanitarian and other matters set forth in s. 3 of the 1999 Act in so far as they are known to him and in this regard he is required to have regard to representations made to him on the applicant's behalf. See page 4 of the Ebinum judgment."*

14. The applicant was twice requested to withdraw this particular application and was warned that the respondent would be seeking his costs if he continued with this action in the light of the decision.

15. The facts in *Ebinum* were opened to the Court. In that case the mother entered the State in 2004 and made an unsuccessful application for asylum. She was notified that the Minister was proposing to deport her and she made representations seeking leave to remain in which she informed the Minister *inter alia* that she was pregnant and due to give birth in about three weeks time. A few weeks later she gave birth to a child in the State but did not update the Minister as to the birth. Some three months later in February, 2006, her file was examined under s. 3 and s. 5 and it was recommended that a deportation order be signed. It appears from the judgment of Peart J. that the consideration given to the Irish-born child in *Ebinum* was virtually identical to the consideration given to the Irish-born child in this case. The child in *Ebinum* was not entitled to Irish citizenship but was entitled to Nigerian citizenship and it was found that there was nothing in the State's national or international obligations preventing the deportation of the mother along with the child.

16. In his judgment Peart J. records the argument made by Mr. O'Halloran B.L., who acted for the applicants. It was argued that the s. 3 consideration given to

the mother's file was invalid because no consideration was given to her child other than the citizenship situation. He also argued that the Minister is obliged to consider what was in the best interests of the child but he did not do so. These are identical to the submissions made by Mr. O'Halloran in the present case. In *Ebinum*, Peart J. reviewed the principles outlined *in Kouaype v. The Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 345, where Clarke J. had outlined the matters which must be considered by the Minister before making a deportation order. The Minister must be satisfied that there is no risk to the person being deported which would offend the provisions of s. 5 of the Refugee Act 1996 and he must consider the matters set forth in s. 3 of the Immigration Act 1999 in so far as they are known to him and to have regard to the representations made to him on the applicant's behalf. Once the Minister has complied with those requirements, his decision to make a deportation order is not reviewable since it is entirely a matter for the Minister as to how various matters are to be weighed and determined. Peart J. was satisfied that in Ebinum that all of the representations made on behalf of the mother were considered. He concluded:-

"In my view the Minister's officials were perfectly entitled to consider matters arising from the birth of the second named applicant by reference predominantly to the issue of his citizenship since no representations were made in any other respect."

17. Ms. McGrath for the respondent distinguished the facts of *Nwole* where the Minister had made a deportation order directed to the mother who was a failed asylum seeker and also her five children on the basis that the children were automatically included on her application in line with the Minister's policy of family unity at the time. The children were treated as failed asylum seekers and the deportation orders were made on that basis. In fact, there had never been an application for asylum on their behalf and therefore the order was made on an incorrect premise and was quashed. It was in those circumstances that the Supreme Court held that the application for refugee status on behalf of the mother did not automatically include her children who were entitled to make applications in their own right based on their own circumstances and reasons. Ms. McGrath pointed that in *Nwole*, the Minister had made a deportation order in respect of both mother and children but that is not the case here. Ms. McGrath also argued that the facts in *Ojuade* were different as in that case Peart J. granted leave to apply for judicial review of an RAT decision but refused leave to challenge the deportation order.

Assessment

18. In this case, it is important to note that no deportation order was made in respect of the child and no application for asylum had been made on behalf of the child when her mother's application for leave to remain was submitted or when her file was being reviewed by the Minister. It is of concern that the facts and issues in this case bear a striking similarity to those in *Ebinum* to which the Court was referred by the respondent and which have already been determined. The arguments in *Ebinum* and the later case of *Ojuade* in which the same legal representatives were acting, mirror the submissions in this case. When the Court raised this issue with the applicant, Mr O'Halloran sought to argue that the ratio in *Ebinum* had been overtaken by the later decision of the Supreme Court in *Nwole* and *Oguekwe* and that *Ebinum* is no longer good law, a fact which he argues was recognised in a later decision delivered by Peart J. in *Ojuade v. The Refugee Applications Commissioner* (Unreported, High Court, 2nd May, 2008). Mr. O'Halloran submitted that in that later case, Peart J. granted leave to a minor applicant in identical circumstances as occurred in *Ebinum* and that the earlier

case was reversed due to the decision of the Supreme Court in *Oguekwe* and *Nwole*.

19. I have considered the judgments in all of those cases and fully accept the arguments made by the respondent relating to the principles clarified in those cases and reject the argument made by the applicant. In *Nwole*, the Minister made a deportation order in respect of a mother and her five children purportedly on the basis that s. 3(2)(f) of the Immigration Act 1999 applied to each of them, i.e. that their asylum applications had been refused by the Minister. The Supreme Court found that as there had been no application for asylum on behalf of the minors, s. 3(2)(f) did not apply and on that premise alone there was no basis upon which the Minister purported to make deportation orders in relation the minors. In this case, no deportation order was made in respect of the child and thus the issue for consideration is quite different.

20. *Nwole* was decided on very distinct facts where the order for deportation of the children's parent was not impugned. It was only the deportation orders relating to the children that were before the Court. The Supreme Court did not determine that the policy of the Minister to treat the application of the parent as a family unit was wrong. Such a policy was found by Fennelly J. to be reasonable provided that the asserted risk to each child was considered. The Supreme Court also examined the concept of family unity when a family seeks asylum and restated what is in the UNHCR Handbook on the concept. As Finnegan J. said:-

"The same definition of a refugee applies to all individuals regardless of their age: thus a minor will have to establish a well founded fear within the Convention and where the minor is of tender years this clearly creates a difficulty. Accordingly a minor accompanied by a parent and whose parent requests refugee status will have his refugee status determined according to the principle of family unity. Where the head of the family fulfils the necessary conditions for admission as a refugee the contracting state should ensure that the refugee's family unity is maintained. Paragraph 184 of the Handbook provides that if the head of a family meets the criteria of the definition of refugee his dependants are normally granted refugee status according to the principle of family unity. However under paragraph 185 if the head of the family is not a refugee there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition of their status as refugees: the principle of family unity operates for the benefit of the minor and not against him. Minors under 16 years of age may normally be assumed not to be sufficiently mature to have a well founded fear of persecution. The handbook envisages, it seems to me, an application by the parent of a minor child and if that is successful the minor will be granted status and if unsuccessful the minor can apply based on his own circumstances and reasons: see E.C.H.R. handbook paras. 184 and 185.

21. According to these principles, if a parent is granted refugee status then the children benefit from that status but if a parent does not succeed, it does not preclude the right of the child to put forward its own case as to risk to him/her. Family unity has not been breached in this case as the mother whose deportation was being considered was the mother of a two month old baby. It was expected that the child would return with her to Nigeria. At the time the Minister was considering whether to make a deportation relating to the first named applicant, no application had been made for asylum on behalf of the second applicant. The decision to sign a deportation order was therefore made on information made available to the Minister and it appears that the asylum application on behalf of the minor applicant was only commenced after the making of the deportation order was notified to her mother.

22. I am also satisfied that the decision of Peart J. in *Ojuade* does not indicate a change of position from *Ebinum*. In *Ojuade*, leave was granted to argue that the Tribunal Member had failed to consider the situation of the minor applicant separately from that of her mother. Peart J. held as follows with respect to the effect of the grant of leave on the deportation order made subsequently in respect of the child:-

"Insofar as a consequence of that appeal decision is that the Minister made a deportation order in respect of the second named [minor] applicant based on the fact that she was a person whose application for refugee status had been refused, the second named applicant should be granted leave to seek injunctive relief to restrain her deportation at least until such time as her fresh appeal has been finally determiner, and thereafter in the event that the appeal is determined in her favour."

23. In *Ojuade*, Peart J. considered the submissions concerning the validity of the deportation order relating to the minor made by Mr. O'Halloran, who represented the applicants. As in *Ebinum*, he found that in circumstances where the applicants' representations seeking leave to remain went no further than to assert that it would be disproportionate to deport the minor applicant, "*the Minister was entitled to be of the view that the making of that order was a proportionate one, having considered the submission made*." Peart J. found that none of the matters set out in *Kouaype* which might possibly form the basis for challenging a deportation order by a failed asylum seeker could avail the applicants in *Ojuade*. He refused to grant leave to challenge the validity of the deportation order.

24. It is clear that Peart J. did not reverse the position that he took in *Ebinum* in *Ojuade*. The legal principles which were very clearly outlined by Clarke J. in *Kouaype* were not altered by the Supreme Court decisions in *Nwole* and *Oguekwe*. In those circumstances, it seems to me that the applicants are attempting to argue an issue which has already been determined several times. The application is misconceived as the particular issue in the case is not affected by the decision of the Supreme Court in Oguekwe which involved the deportation of the father of an Irish citizen child whose mother had obtained leave to remain under the IBC 05 scheme and where the father and husband was outside of the scheme. That case involved the consideration which ought to be given to such an Irish citizen child before a deportation order is made in respect of its parent(s). The facts of this case are wholly different.

25. I refuse leave and direct an order of costs against the applicants.