The Supreme Court

2001 No.82 Denham, J. Hardiman, J. Geoghegan, J. Between

G.K., M.M., Z.M.

(an infant applying by her father and next friend G.K.)

and P.K. (an infant applying by her father and next friend GK.)

AND

The Minister for Justice, Equality and Law Reform,

the Appeals Authority, Ireland and the Attorney General

Judgment of Hardiman J. delivered the 17th day of December 2OO1, [Nem Diss]

1. This is the appeal of the respondents, whom I shall refer to as the authorities, against the order of the High Court (Finnegan J) whereby he extended the time (pursuant to s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000) for the applicants to apply for judicial review in relation to the refusal of their application for refugee status and of the making of deportation orders in respect of them.

2. The applicants who are a family consisting of father and mother and two children, applied for refugee status on 14 December 1999. Their application was determined to be manifestly unfounded and was refused by letter dated 15 February 2000. They appealed this refusal to the appeals authority and were informed by letter of 12 July 2000 that the authority had recommended that their appeal be refused and this recommendation was accepted by the officer authorised by the minister. They were informed by letter of 12 July 2000 that the minister proposed to make a deportation order pursuant to the power given to him by s. 3 of the Immigration Act 1999 and they were informed of their entitlement to make representations as to why they should be allowed to remain in the State, within 15 working days of the date of the letter.

3. After that time had elapsed, on 2 August 2000 the Refugee Legal Service which was acting for the respondents stated they had been instructed to make representations, and this was done. By letter dated 18 January 2001 they were informed that the minister had decided to make deportation orders in respect of them and the actual deportation orders were enclosed.

4. On 20 February 2001, being the date on which they were required to present themselves for deportation. they obtained an injunction restraining the authorities from deporting them and on 6 March 2001 they obtained the order extending time to apply for judicial review in respect of the two decisions mentioned above. By order of 26 March 2001 the authorities obtained an order granting them leave to appeal the order of 6 March on the ground that the decision to grant this order involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court, pursuant to s. 5(3)(a) of the Act of 2000.

Background to the applications

5. From the information given by the applicants in support of their application for refugee status it appears that the applicants are Polish nationals. The first and second named applicants are 29 and 30 years of age respectively and are a married couple. They are of gypsy origin. The third and fourth named applicants are their children aged eight and three respectively. They arrived in Ireland on 13 December 1999 having travelled by plane from Warsaw to Frankfurt, Germany, and then changed to a direct flight from Frankfurt to Dublin. They do not appear to have sought refugee status in Germany.

6. They had previously travelled to the United Kingdom from Poland in December 1997. They applied for refugee status in England but were refused and were unsuccessful on appeal. They were deported from the United Kingdom to Poland in January 1999. They said they came to Ireland to seek refugee status 'because we did not have a good life in Poland'. They claimed that people had broken into their flat, assaulted the first named applicant and damaged his car: G.K. said this happened 'because I had just come back from England (January 1999) and they thought I had money'.

The statutory framework

7. The applicants seek to challenge two decisions made respectively in February 2000 and in January 2001. These were the decisions to refuse refugee status, and the order to deport, respectively. According to the applicants' statement grounding their application for judicial review they wish to challenge the earlier of these decisions on the grounds that they 'had no legal advice and/or legal representation and/or legal assistance for the purpose of gaining asylum in the State'. They wish to challenge the second

decision on the grounds that their 'representations for leave to remain in the State, made further to the provisions of s. 3 of the Immigration Act 1999, were not considered'.

8. Each of these decisions are decisions of a type mentioned in s. 5(1) of the Illegal Immigrants (Trafficking) Act 2000. They are described at s. 5(l)(f) and 5(l)(b), respectively. Accordingly, they may not be challenged otherwise than by way of an application for judicial review and, by virtue of s. 5(2)(a) this application must be made within the period of fourteen days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made'.

9. Moreover, leave to apply for judicial review shall not be granted 'unless the High Court is satisfied that there are substantial grounds for contending that the decision; determination, recommendation, refusal or order is invalid or ought to be quashed'.

Criteria for extending the time

10. The time for applying for judicial review in respect of either of these decisions can be extended only if the High Court, or this court on appeal, 'considers that there is good and sufficient reason for extending the period'. This is a special statutory jurisdiction and it is in my view sui generis. Elucidation of the principles governing its exercise may be drawn from the jurisprudence which has developed in relation to other powers of a cognate nature, but none are directly analogous. Examples include the jurisdiction to extend time for appealing, or for the taking of a particular step in litigation and the Jurisdiction to strike out a claim in the exercise of the court's inherent jurisdiction. These various powers are not directly analogous to each other.

11. On the hearing of this appeal, a very clear point of divergence between the applicants and the authorities arose in relation to the interpretation of s. 5(2)(a). The applicants contended that the phrase 'good and sufficient reason for extending the period' excluded any consideration of the merits of the substantive application for judicial review. The phrase, they contended, related only to the merits of the application to extend time: if there were 'good and sufficient reason' for the failure to apply within time, and if the delay between the expiry of the statutory time and the making

of the application to extend was not excessive, the applicants were entitled to their order.

12. The authorities, on the other hand, contended that the phrase 'good and sufficient reason for extending the period within which the application shall be made' included a consideration of the merits of the case for judicial review. No very elaborate consideration of these merits was required on the application to extend time, they conceded, but it should at least appear that there were arguable grounds for seeking judicial review.

13. In other circumstances where the court is called upon to extend a period of time limited for the taking of any step, or considers an application to strike out proceedings in the exercise of its inherent jurisdiction, the merits of the substantive case are considered relevant. In relation to extensions of time to appeal to this court from the High Court, the well known case of Eire Continental Trading Co. Lid v Clonmel Foods Ltd [1955] IR 170 lays down three preconditions for the exercise of the discretion of the court to extend time, the third of which relates to the existence of an arguable case on appeal. This requirement was discussed and reaffirmed in this Court in Dalton v. Minister for Finance [1989] IR 269. The case related to the extension of time for appeal to this court, pursuant to an unqualified power contained in Order 58, rule 3(4) of the Rules of the Superior Courts. Specifically, the rule contains no requirement for 'good and sufficient reason'.

14. The merits of the underlying case also appear relevant in considering an application to stay proceedings, usually on grounds of delay, in the exercise of the inherent jurisdiction of the court. An example of this is Guerin v. Guerin [I992] 2 IR 287; [1993] ILRM 243 where such an application was refused inter alia on the basis that even if the delay were inexcusable, the plaintiff had a very strong, indeed almost unanswerable, case on the merits of the substantive action so that 'an obvious and substantial injustice' would be done to him if deprived of the opportunity to litigate his claim. By parity of reasoning, the fact that a case was apparently unarguable must also be relevant.

15. I believe that the use of the phrase 'good and sufficient reason for extending the period' still more clearly permits the court to consider whether the substantive claim is arguable. If a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however

understandable it may be in particular circumstances. The statute does not say that the time may be extended if there were 'good and sufficient reason for the failure to make the application within the period of 14 days'. A provision in that form would indeed have focussed exclusively on the reason for the delay, and not on the underlying merits. The phrase actually used, 'good and sufficient reason for extending the period', does not appear to me to limit the factors to be considered in any way and thus, in principle, to include the merits of the case.

16. On the hearing of an application such as this it is of course impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed.

The first decision

17. The applicants seek to challenge the first decision, to refuse their application for refugee status, on the sole ground that they had no legal advice, representation or assistance 'for the purpose of gaining asylum in this State'.

18. The applicants' application was found rnanifestly unfounded, and refused, by letter dated 15 February 2000. Shortly after that date they retained the services of Mr Conor Griffin, solicitor, of the Refugee Legal Service, who lodged an appeal on their behalf. The decision to accept the recommendation to reject the appeal was communicated to the applicants on 12 July 2000.

19. The complaint that the applicants had no legal advice can only relate to the first decision to refuse refugee status. This decision may well have merged in the decision on appeal to the same effect. The applicants were legally represented from a date shortly after 15 February 2000: the first item of correspondence from the Refugee Legal Service in the papers before the court is dated 23 March 2000 but it refers to previous correspondence.

20. Accordingly, the application to extend time to seek judicial review in relation to the first decision seeks to extend the time for a period of about 11½ months during the great bulk of which the applicants were legally represented. The application is grounded on two affidavits of Mr Pendred, solicitor. Neither of these affidavits addresses in any way the question of the delay in applying to quash the decision of 15 February 2000.

21. In those circumstances, no basis whatever for extending the time for proceedings in relation to the first decision has been put before the court, quite apart from any question of underlying merits.

The second decision

22. When the applicants' application for refugee status was refused on appeal on 12 July 2000 they were informed of the minister's proposal to make a deportation order in relation to them. The minister was plainly entitled to make this proposal under s. 3(2)(f) of the Immigration Act 1999: they were persons whose application for asylum had been refused by the minister. However, they were entitled, pursuant to s. 3(3')(b) of the same Act to make within fifteen working days representations, which the minister would be obliged to consider, as to why a deportation order should not be made. In fact, the applicants in the present case were late in making their representations but no point was taken on this by the authorities in the present appeal.

23. For the purpose of this application I am prepared to assume, without so deciding, that the applicants have some excuse for not making the application for judicial review in relation to the second decision within 14 days. Substantially, their explanation in this regard turns on the allegation that when they sought to consult the Refugee Legal Service after the decision had been communicated to them, they found that that body no longer occupied the offices where they had previously been based. They understood that someone in reception in the relevant building told them that the Refugee Legal Service could not assist them in relation to the deportation orders. Thereafter, they consulted their present solicitor who was unable to take the necessary instructions and draft the necessary documents until 20 February. I would remark in passing, that it is preferable that explanations of this kind should be put before the court on an affidavit of the applicants or one of them rather than by their solicitor on a hearsay basis.

24. It appears to me, however, that the applicants can show no arguable case in relation to the sole ground on which they seek to quash the second decision. This is that 'the applicants' representations for leave to remain in the State, made further to the provisions of s. 3 of the Immigration Act 1999, were not considered'.

25. There is simply no evidence whatever for this proposition. In P v. Minister for Justice, Equality and Law Reform [2002] 1

ILRM 16 this court considered in some detail the obligations of the minister in dealing with representations made pursuant to s. 3 (3)(b) of the 1999 Act. He must have regard to the matters set out in s. 3(6), take the representations into account, and notify the person in writing of his decision. This was done, in relation to each of the applicants, by letter dated 18 January 2001. This letter was in terms identical to the terms of the letter considered in the case of P. In particular it stated:

The reasons for the minister's decision are that you are persons whose refugee status has been refused and, having had regard to the factors set out in s. 3(6) of the Immigration Act 1999 including the representations received on your behalf, the minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might to tend to support your being granted leave to remain in the State.

26. It is unnecessary to repeat here the reasons, set out in detail in the decision just referred to, for the finding that this form of notification was entirely adequate in the circumstances. The challenge to the decision to make a deportation order in P was of a much more elaborate nature than that question here. However the following statement from the judgment in that case is equally applicable:

Where an administrative decision must address only a single issue, its formulation will often he succinct. Where a large number of persons apply, on individual facts, for the same relief, the nature of the authorities' consideration and the form of grant or refusal may be similar or identical. An adequate statement of reasons in one case may thus he equally adequate in others. This does not diminish the statement's essential validity or convert it into a mere administrative formula.

The letter may well be a common form letter and accordingly there may well be substance to this ground While it is not possible to say that the applicant's case on the first ground is a strong one it is a case that can readily be clarified by a short affidavit from the respondent on the application for leave as to whether or not the representations were taken into account.

27. The learned trial judge's decision of 6 March 2001 of course preceded the judgment of this court in P and he did not consider the letter of January 2001 in light of this court's upholding of the adequacy of a letter in that form. In light of that decision, it seems

indisputable that the letter was adequate in its form and, in the absence of evidence contradicting what was said in it, must be taken accurately to represent the minister's proceedings. On the hearing of this appeal, indeed, counsel for the applicants did not contest this but submitted, on the grounds summarised above, that this factor related to the merits of the application for judicial review, rather than the application to extend time.

28. If this submission were correct, the time would have to be extended, an the application for leave proceed on the basis only of the pure hypothesis that was what said in the authorities' letter might not be correct, and was therefore inadequate unless confirmed by an affidavit by or on behalf of the minister. I do not believe that this is the position in law. A person claiming that a decision making authority has, contrary to its express statement, ignored representation which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.

Conclusion

29. I would decline to extend the period for making the application for leave to seek judicial review in this case.