Neutral Citation Number: [2009] IEHC 297

THE HIGH COURT

2009 196 JR

BETWEEN/

M.O., K.O., V.O. (A MINOR SUING BY HER MOTHER AND

NEXT FRIEND, M.O.)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 17th day of June, 2009.

1. In this case, leave is sought to bring an application for an order of *certiorari* to quash orders for the deportation of the first and third named applicants made on the 4th February, 2009 by the Minister, consequent upon the rejection of their applications for asylum by the Refugee Applications Commissioner and confirmed on appeal by decision of the Refugee Appeals Tribunal of 15th (or perhaps 13th) July, 2008 and given to them under cover of a letter of the 28th July, 2008.

2. The first named applicant arrived in the State from Nigeria on the 23rd November, 2007 and gave birth to the third named applicant, her daughter, on the 5th December, 2007. The identity of the father of the third named applicant is not given in the exhibited birth certificate and while the Court is perhaps left to get the impression from the grounding affidavit and the filed papers in this case that it is the second named applicant, who is described as the husband of the first named applicant, it may be of some significance that nowhere is direct evidence given that he is, in fact, the father of the third named applicant.

3. The basis upon which the first and third named applicants' claim for asylum was made, - fear of persecution of the first named applicant in Nigeria as a former lesbian, - was rejected by the Refugee Appeals Tribunal as being incredible.

4. Following that rejection, the first and third named applicants made an application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 and lodged representations as to why they ought to be permitted to remain temporarily in the State. In the application, the first named applicant gave this description of her family and domestic circumstances, "The applicant is a married woman and resides with her Irish born child. Her husband resides in Nigeria."

5. This last statement was untrue because the second named applicant, whom she describes as her husband, had already entered the State illegally on the 25th

August, 2008. Although the second named applicant applied for asylum in his own right at some point before the 31st December, 2008, it was not until the applicant's solicitor wrote making short additional representations against deportation on the 2nd February, 2009 that the first named applicant disclosed his presence to the Minister with the view to relying on it as a factor in the representations.

6. The Minister had made the two deportation orders on 4th February, 2009 prior to the receipt of that letter, and the usual file examination on which his decisions were based and which constitute, in effect, his statement of reasons, had been concluded on the 22nd January, 2009. Nevertheless, the file note records that in advance of the letter of the 2nd February, a search had disclosed the presence of the second named applicant in the State but no specific claim had been made to the Minister on the basis of his presence or by reference to his having any relationship to the first named applicant's family circumstances other than that of his being described as her husband. According to her asylum application she had married her husband in a traditional ceremony in Nigeria in December 2006.

7. In the analysis on which the decision to make the deportation orders was made, it is clear that the Minister fully discharged his statutory obligations by considering separately and specifically the matters required to be examined under s. 3 (6) of the 1999 Act, namely the particular representations made by Messrs. Mulvihill; and the possible relevance of the prohibitions on refoulement in s. 5 of the 1996 Act and s. 4 of the Criminal Justice (UN Convention against Torture) Act 2000. In addition, the analysis addresses in detail the implications of deportation of the first and third applicants for respect for their private and family life under Article 8 of the European Convention on Human Rights. In the latter regard, the Minister notes that the third named applicant is not an Irish citizen but is entitled to Nigerian citizenship and that the first named applicant's parents, two sisters and one brother, still reside in Nigeria. It also notes the recent arrival of the second named applicant and the fact that he is in the asylum process but concludes that the deportation would not constitute an interference with their rights to the respect for their family lives.

8. Following receipt of the letter of the 2nd February, 2009 and the additional representations, the Minister reconsidered the case, and by a further decision given by letter of the 23rd February, 2009, he reaffirmed the original determination. Again, a file analysis was furnished giving the reasons for rejection of the new representations and for reaffirming the deportation orders. That new decision has not been challenged and is not the subject of the present application for leave.

9. The grant of an order of *certiorari* by way of judicial review is a discretionary remedy and even in a case where a substantial issue might be said to be raised for the purpose of granting leave pursuant to s. 5 (2) of the Act of 2000, the Court may still refuse leave if it is satisfied that the case is one in which on a full hearing the leave would be refused in the exercise of the Court's discretion.

10. One such circumstance is where the Court is satisfied that the proceeding is tainted by an element of bad faith. The Court would be strongly inclined to consider that this is such a case, having regard to the lack of candour on the part of the first named applicant as to the precise relationship between the second and third named applicants and the absence of any explicit evidence or statement that he is the latter's father. More importantly however, the Court could not disregard the false basis upon which the applications for subsidiary protection were

presented by failing to disclose the fact that the second named applicant had entered the country in August 2008 before those applications had been made.

11. Nevertheless, the Court will not base its rejection of this application on the exercise of its discretion as it is satisfied that in any event no ground of substance has been made out in either of the two points that are advanced as the basis for the application for leave.

12. First, it is claimed that the deportation orders were unlawful for failing to respect or adequately consider the applicants' rights to family life under Article 8 of the Convention. In particular, it is argued that the making of the orders had the necessary effect of breaking up the family and it is therefore disproportionate to any consideration which the State might invoke to justify interference.

13. The first answer to this ground is that the Minister's analysis did, in fact, address explicitly the Article 8 family rights but did so on the basis of the actual representations made as to the family and domestic circumstances put forward in the representations. In circumstances where the first named applicant and her daughter had been in this country for only a short period of time, where her own family were still in Nigeria, and where her husband had voluntarily joined her here since her asylum claim had been rejected, it cannot be said that a deportation order is in any sense disproportionate. Her family and domestic ties and connections are in Nigeria and not in Ireland.

14. The second answer to this ground is that the making of the deportation orders does not have the effect of breaking up a family. As mentioned, the second named applicant arrived in the State voluntarily and illegally when he must be taken to have known that the first and second named applicants had been refused asylum and were therefore at risk of imminent deportation. If they are deported, the second named applicant is perfectly free to preserve the family unit by leaving with them. The second applicant may have a right to respect for his family life but that does not encompass a right to insist upon its being pursued in a country in which neither he nor they have a current right to future permanent residence.

15. The second ground invoked is legitimate expectation, in the sense that the first and third named applicants claim to be entitled to remain in the State, at least until the second named applicant's asylum claim has been determined. Quite apart from the fact that such a ground has not been articulated in the statement of grounds for this application, the Court is satisfied that it raises no issue of substance. Legitimate expectation, as a principle of law, is based on the notion that some express or implied promise has been made, as a result of which the promise has undergone or undertaken some change of circumstance. The mere fact that the second named applicant voluntarily arrived illegally in the State and lodged an asylum application after the Tribunal had rejected the claims to refugee status of the first and second named applicants, gives rise to no such promise or expectation in favour of the first and second named applicants. The only conceivable legitimate expectation of the second named applicant is that his own application will be processed in accordance with law. It cannot give rise to any curtailment of the Minister's entitlement to pursue the further implementation of the asylum process, including deportation, in respect of the first and second named applicants.

16. In these circumstances, the Court must refuse leave and accordingly the issue as to a grant of a possible injunction does not arise.