Neutral Citation: [2014] IEHC 223

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 717 J.R.]

BETWEEN

K.A. (A MINOR SUING BY HER FATHER AND NEXT FRIEND M.I.)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 11th day of April, 2014

1. This is an application by notice of motion dated 28th February, 2014, whereby the respondents seek an order pursuant to O.19, r.28 of the Rules of the Superior Courts dismissing or striking out the proceedings as frivolous and/or vexatious and/or having no reasonable prospect of succeeding or alternatively, on the exercise by the court of its inherent jurisdiction to dismiss the proceedings as an abuse of process.

2. By notice of motion dated 7th October, 2013, the applicant initiated an application for leave to apply by way of judicial review for an order of *certiorari* "quashing the decision to refuse her recognition of refugee status". The application was grounded on the affidavit of M. I. on the grounds set out at para. 5(I-IV) of the statement of grounds as follows:-

> "I. The refusal to recognise the infant applicant as a refugee is irrational and/or unreasonable with reference to her statelessness. The first named respondent unlawfully omitted to consider her well-founded fear of persecution in this respect by placing wrongful reliance on a right only to acquire citizenship. Further, such right is not established and further it purports to apply alternatively to the differing countries of origin of her parents, without establishing that the applicant could reside in either country with both her parents;
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> II. The first named respondent fails to make the best interest of the infant applicant a primary consideration of his decision. He further fails to undertake a determination of such best interest; which considers the applicant's history, her current circumstances, health and wellbeing and her future health, safety and wellbeing, such as to identify a durable solution. The first named respondent further affirms a recommendation of the Refugee Application Commissioner that the infant applicant should not be declared to be a refugee which recommendation failed and omitted to make her best interest a primary consideration. Such failures breach the provisions of Article 24.2 of the Charter for Fundamental Rights of the European Union, Article 8 of the European Convention of Human Rights and para. 12 of the preamble to Council Directive 2004/83/EC (The Qualification Directive);
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> III. The first named respondent fails to vindicate the infant applicants inherent right to life and to ensure to the maximum extent possible her survival and development; including failing to consider particularly her infancy, her ill health, and her vulnerability to harm; breaching the provisions of Article 6 of the United (Nations) Convention on the Rights of the Child,
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> IV. Such further and other grounds as may be advanced at the hearing."

3. An application for leave to challenge a decision of the Refugee Appeals Tribunal must be made pursuant to the provisions of s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, by motion on notice and leave 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". The determination of this court on such an application shall be final and no appeal lies from the decision of to the Supreme Court except with the leave of the court which shall only be granted "where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal shall be taken to the Supreme Court". As stated in *McNamara v. An Bord Pléanala* [1995] 2 ILRM 125:-

> "a ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial".

In the same case Carroll J. noted that:-

> "In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

This test was approved by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. As noted by this court in *Doo (An Infant) v. MJELR & Ors.* [2013] IEHC 616, s. 5 is a statutory filtering process which is designed to ensure that frivolous, vexatious, trivial or other tenuous grounds may be identified at the leave stage thereby ensuring that leave will not be granted on such grounds.

4. The respondent's reliance upon O. 19, r. 28 on the basis that the grounds advanced are frivolous and/or vexatious or certain to fail overlaps to a significant degree with the statutory jurisdiction vested in the court to determine whether leave should be granted to the applicant to seek judicial review on the basis of the relatively low threshold set out in section 5. The effect of making an order under O. 19, r. 28 will deprive the applicant of the opportunity to seek leave to apply for judicial review under the section which, as recognised in the Supreme Court judgment in the referral case, is the sole statutory mechanism whereby the decision may be

challenged. I am satisfied that, absent exceptional circumstances, it would not be appropriate to dismiss an application for leave to apply for judicial review under the rule at the pre-leave stage. The case advanced for the earlier disposal of an issue which is effectively the same as that to be determined at the pre-leave stage is that the case will be concluded at an earlier stage and at somewhat less expense for the parties than may be incurred at a pre-leave hearing. I am not satisfied that is a sufficient basis upon which to grant the application. The court is satisfied that the case should proceed in the normal way unless for some reason the respondent at this stage can establish, on the basis of the facts of the case, that the initiation and maintenance of these proceedings is an abuse of process and should be dismissed on the exercise of the inherent jurisdiction of the court.

5. The minor applicant's family has a considerable history in the asylum/immigration process. The applicant was born in Ireland on the 4th September, 2012, to a Cameroonian mother, P.A. and a Ghanaian father, M.I., the minor's next friend in these proceedings. The claim made on her behalf by her father is said to be based on a fear of persecution in Cameroon because her mother had to flee that country owing to pressure exerted on her to marry someone not of her choice. Her mother feared that the man she refused to marry might target the child. Her father also fears that there may be no shelter for the applicant and that she may be a diabetic who would not obtain adequate medical treatment (though there is no medical report to that effect). Other fears that the child might be at risk of child labour or not receive an adequate education in the Cameroon were advanced. The child's father is a native of Ghana and fears that if the child were returned to Ghana with him she would become a target because of his previous political activities and because he converted from Islam to Christianity. He also feared that she may lack food, shelter and education and might face child molestation, prostitution or other forms of exploitation.

6. The applications of the child's father and mother have already been considered separately by the Refugee Applications Commissioner and on appeal, by the Refugee Appeals Tribunal and, in both cases, it was recommended that they not be granted refugee status.

7. The applicant's father arrived in Ireland on 22nd January, 2006 and claimed asylum on the basis of fear of political persecution in Ghana. Following an extensive review of the evidence the tribunal member determined that M.I. had contrived a story for the tribunal which was rejected: he had failed to tell the truth.

8. P.A. was a national of Cameroon and had two daughters born in 1995 and 1998 who live with her parents there. She had also resided there with her parents, her sister and two cousins. She claimed that her father asked her to take part in a forced marriage as a result of which she ran away. She was attacked and allegedly raped by two boys and stabbed with a knife shortly thereafter. She feared that her father would track her down in Cameroon. She did not seek the assistance of police in respect of the forced marriage as she believed that they would not interfere in a family matter. She fled Cameroon because she was in fear of her father. The tribunal determined that her story was contrived and implausible and "firmly rejected" her story on 25th September, 2006.

9. On 19th May, 2010 deportation orders were made in respect of M.I. and P.A. Decisions were also made refusing them subsidiary protection on 18th May.

10. In the meantime the couple had two children, twins, K.E. and K.I. born in Ireland on 22nd January, 2008. The twins were the subject of the deportation orders made in the case but subsequently applications for refugee status were made on their behalf on 8th June, 2010. Their application for refugee status was based on the claims made by their parents. These were unsuccessful and separate decisions in respect of each child issued on 18th November, 2011 from the Refugee Appeals Tribunal. Following receipt of notification from the second named respondent that he proposed to consider deportation, applications for subsidiary protection were made in respect of each child on 9th February, 2011. On 28th June, the deportation orders in respect of K.E. and K.I. were revoked. Their applications for subsidiary protection were refused on or about 4th July. Deportation orders were made again in respect of the twins on 8th August.

11. On 18th May, 2011, M.I. sought revocation of the deportation order made against him under s. 3(11) of the Immigration Act 1999, based on his medical conditions and family rights. This application was refused on or about 6th July, 2011. An interim injunction was obtained preventing M.I.'s deportation on 5th August, 2011, (record no. 2011 No. 711). It was alleged that his deportation would be in violation of his, P.A.'s and the twins' right to respect for family life under Article 8. An interlocutory injunction was refused as was leave to apply for judicial review on 10th August, 2011. In an extempore judgment, O'Neill J. stated that he was not satisfied on a review of the evidence and medical reports submitted that a substantial case had been made out that M.I.'s right to bodily integrity would be interfered with in Ghana. It was claimed that M.I.'s state of health only arose for consideration within the recent past but the learned judge considered the condition not to be of the most serious kind and noted that he was expected to recover within six to nine months. Treatment was available to him free of charge in Ghana. He could also secure medication for some time to come when leaving the jurisdiction.

12. It was claimed that the children were stateless and that it was unclear whether either parent could go to the country of origin of the other. The court was satisfied that P.A. had a clear entitlement to return to Cameroon and M.I. had a right to return to Ghana. O'Neill J. stated that there was no doubt that the parents must have been aware in 2008 of the necessity to give attention to the future citizenship of their children. They could and should have made plans to obtain citizenship but did nothing. He found that the two children were still entitled under the constitutional and legal provisions of the two countries to assert their citizenship in either. It was the duty of their parents to do so on their behalf. He concluded that this was never a ground on which the execution of a deportation order could be resisted. He noted that the question arose as to whether the parents were entitled to reside in either state. It was clear that both parents were entitled to go to their native countries but it was not clear that they were entitled to go to the country of the other parent. However, he noted that there was an onus on the applicants to decide where to go together. They took no such steps to regularise matters and could not use their inaction as a ground to resist deportation. Therefore the application was refused.

13. Judicial review proceedings were also commenced in respect of the twins (record no. 2011/760JR) and these proceedings are still pending before the High Court.

14. The twins are not Irish citizens. Though born in 2008, they were not registered with the Office of the Refugee Applications Commissioner until June, 2010. The tribunal determined that it had not been established that there was any basis for a fear of persecution on the part of the twins in either Ghana or Cameroon. Insofar as their fears were based on their father's or mother's asylum application, they were deemed not to be well founded nor were other fears based on a supposed threat to life because they were born outside wedlock, ritual sacrifice for religious reasons in Ghana or religious discrimination based on their father's religion , or discrimination on the grounds of nationality based on the fact that their father was Ghanaian in Cameroon.

15. An application on behalf of the twins seeking their readmission to the asylum process under s. 17(7) of the Refugee Act 1996 (as amended) was refused on 17th April, 2013, on the grounds that there was no new convincing evidence supplied to indicate that a

favourable view might be taken if readmitted to the process.

16. The decisions of the Refugee Appeals Tribunal in respect of the parents and the twins were never challenged by way of judicial review. The subsidiary protection decisions in respect of all four remained unchallenged as did the deportation orders in respect of the parents. A s. 3(11) application to revoke the deportation orders made against the twins has been submitted but not yet determined.

17. The child applicant in this case was born on 4th September, 2012 and is not an Irish citizen. It is asserted that she is stateless. From the papers submitted on her behalf, it is clear that the child applicant has never been to Cameroon or Ghana. The basis of the claim as set out at question 21 of the questionnaire largely mirrors the father's claim in his own application for asylum. It was also claimed that the child would not receive an education in Ghana because of her father's inability to work due to health difficulties. It is claimed that her mother would not travel to Ghana because of fears for her own safety and that of the other children. Primarily, the child would be targeted because of her father's political opinions and activities. She was also in danger because her father had converted from Islam to Christianity and would be at risk from "the Muslim brotherhood". This was not a basis upon which the applicant's father claimed to fear persecution on his own behalf.

18. A claim was also made that the child would be persecuted in Cameroon because of her mother's relationship to M.I. because she feared the man to whom she was to be forcibly married prior to her leaving the country. It was also claimed that a diabetic condition which the child might have would not receive adequate medical treatment. A general suggestion was made that the child applicant would be at risk of servitude, exploitation and sexual molestation.

19. The tribunal determined that the child applicant may be entitled to citizenship of Cameroon and was also entitled to citizenship of Ghana. The tribunal was satisfied that while living with her parents in Cameroon or Ghana she would not suffer persecution. It noted that the parents' claims for refugee status had been rejected by the Refugee Appeals Tribunal on credibility grounds. The Tribunal stated:-

> "The father of the infant confirmed the applicant's fears were connected to that of her mother's and maintained the nexus between the applicant's claim and that of her mothers. As the mother's claim on this issue was not well founded it follows that the applicant's fear is similarly without merit and the tribunal is satisfied she could live in Cameroon given its size, and avoid the man whom her mother allegedly fled from. There is no evidence to suggest the applicant would be denied medical treatment for her alleged medical complaint in Cameroon for a Convention reason.
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> The witness alleges the applicant would be targeted in Ghana. His country of origin, as a result of his political involvement and his religious conversion from Islam to Christianity. It is noteworthy this religious element did not form part of her father's own claim. However, as pointed out in COI in the s.13 report the laws in Ghana allow freedom of movement, religion, peaceful assembly and political expression. Regarding the contention she would not obtain an education in Ghana this is not supported by COI which clearly points out the state provide free compulsory education for all children from kindergarten through junior high school. The tribunal is therefore satisfied the applicant will not suffer persecution for a convention reason if she lives in Ghana with her father."

20. The tribunal decision is dated 9th September, 2013, following which proceedings issued challenging the decision on 7th October, 2013.

21. Ground I relied upon by the applicant is based on the proposition that the tribunal wrongfully relied upon her right to acquire citizenship in Ghana and Cameroon which was not established as a matter of fact and purported to apply alternate countries of origin to her without establishing that the applicant could reside in either country with both parents. The court is satisfied that this ground is misconceived. It is clear from the papers, the s. 13(1) report prepared for ORAC and the determination of the tribunal that the applicant is not stateless and is a national of Ghana entitled to citizenship in Ghana as a matter of Ghanaian constitutional law. The tribunal determined that she may be entitled to citizenship of Cameroon though there was a degree of uncertainty about this because a child born outside wedlock to a Cameroonian mother and a Ghanaian father may not automatically be entitled to Cameroonian citizenship. It is clear from the papers that no effort was made at all by the parents to assert the citizenship of this child applicant or obtain the necessary documents from their appropriate national authorities. There is no suggestion in this case that either parent is the subject of government or government inspired persecution. The claim for asylum is based on a fear of persecution in Cameroon and Ghana of which the parents are respectfully nationals. There is no suggestion that the parents are stateless or have been deprived of their nationality. The tribunal has determined that there is no Convention related reason as to why the child applicant requires international protection in either Ghana or Cameroon. Ground I does not appear to offer a substantial basis on which to grant leave to apply for judicial review.

22. Grounds II and III complain that the best interests of the child applicant were not considered in reaching a determination or taken into account as a primary consideration in the matter. It is clear from the United Nations Handbook and Guidelines on Procedures and Criteria for determining refugee status (Geneva 2011) that a child sensitive application of the refugee definition is consistent with the 1989 United Nations Convention on the Rights of the Child including Article 3(1) to the effect that the best interests of the child should be regarded as a primary consideration in all actions concerning children. However the guidelines are clear that:-

> "4. Adopting a child sensitive interpretation of the 1951 Convention does not mean of course, that child asylum seekers are automatically entitled to refugee status. The child applicant must establish that she/he has a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. As with gender, age is relevant to the entire refugee definition. As noted by the U.N. Committee on the Rights of the Child the refugee definition: 'must be interpreted in an age and gender sensitive manner, taking into account the particular motives for, and forms and manifestation of, persecution experienced by children. Persecution of kin, underage recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child specific forms and manifestations of persecution as well as gender based violence and national refugee status determination procedures.'
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> Alongside age, factors such as rights specific to children, child stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status."

23. The child applicant in this case is an infant. That was, of course, the reason that the application was made on her behalf by her father and why the substantive claims made on her behalf relate to the experiences of her parents. Once the parents' claims are

determined to be without substance, it necessarily follows that this was a matter to which the tribunal would have regard as a matter of logic and commonsense. Furthermore, the grounds do not identify with any degree of precision what aspects of the child's best interests were not considered by the tribunal and how such matters affected in any meaningful way the determination of whether the child was in need of international protection for a Convention reason.

24. I am satisfied that the grounds sought to be advanced in this case may be criticised in a number of significant respects. However, it is important to bear in mind there is a specific statutory jurisdiction under s. 5 to deal with the question of whether substantial grounds have been advanced. In that regard the existence of such a procedure must be considered when the court is asked to dismiss proceedings on the basis of its inherent jurisdiction as an abuse of process. That jurisdiction, it is well settled, should be sparingly used. Unless something in the nature of bad faith, or deliberate prolongation of proceedings to delay the implementation of patently valid orders is demonstrated or the invocation of judicial review jurisdiction is inappropriate, when, for example, a right of appeal is established on the authorities as the appropriate way to proceed (as in *Doo*), the court is most reluctant to exercise its inherent jurisdiction. In this case also, the court is mindful of the fact that the child is a minor applicant and great care should be taken to ensure that the fullest and earliest possible opportunity is given to present her case.

25. In the circumstances, I am not satisfied to dismiss this case on the basis of the inherent jurisdiction of the court notwithstanding the suggested infirmities of the grounds to be advanced by the applicant. In the circumstances, I refuse this application but will list this matter for early hearing in the new term.