[2018] IEHC 501

THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 678 J.R.]

BETWEEN

F.M.O. (NIGERIA), S.G.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND E.O.) AND E.O.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2018

1. The first-named applicant was born in 1964. The third-named applicant is her sister and the second-named applicant is her nephew and an Irish citizen. The citizen child has five other siblings. I am told that one is in the UK and has mental health issues. Two are in Ireland but do not live in the family home, and of the two that do reside with the other applicants, one is eighteen and single, and the other one is the parent of her own child.

2. The first-named applicant arrived in the State on 22nd May, 2006 and claims she flew from Nigeria to Belfast and then went to Dublin, where she sought asylum. That was refused on 16th June, 2006. The refusal was upheld by the Refugee Appeals Tribunal on 30th August, 2006. An incomplete application for subsidiary protection was sought to be made but was not pursued. A deportation order was made on 20th September, 2007. That was notified on 5th October, 2007 to the first-named applicant and her solicitors at the time, Terence Lyons & Co.

3. She evaded until 2018, for over a decade. The applicants say that the first named applicant presented in February, 2018. The respondents say it was June, 2018, although they are not in a position to provide evidence of that as of the current hearing. In April, 2018, the applicants changed solicitors from KOD Lyons to Mulhall & Co. The new solicitors made what was effectively a s. 3(11) application pursuant to the Immigration Act 1999. The previous file from KOD Lyons has not as yet been made available to the court.

4. On 2nd May, 2018, a negative consideration of the s. 3(11) request was prepared. On 21st May, 2018, the Minister made an order under s. 3(11) amending the deportation order to encompass the fact that the first named applicant appears to have at least three alternative names or aliases. Why that is so does not seem to have been clearly explained by her in the papers. On 31st May, 2018, the Minister wrote to the applicants' solicitors informing them of the decision. On 26th July, 2018, the first-named applicant was arrested. On 30th July, 2018, the applicants sought to make the leave application in the present proceedings but only a limited amount of court time was available, so the matter was postponed until 31st July, 2018. On that date the application was renewed and leave was granted. The applicants also seek an injunction restraining the deportation of the first-named applicant. That deportation is due to take place within a matter of hours. At the time that this judgment is being given, it is 9.24 pm on the last day of the legal year, which illustrates the timescale involved.

5. I have received helpful submissions from Mr. Femi Daniyan B.L. for the applicants and Mr. John P. Gallagher B.L. for the respondents.

6. The test for an injunction is set out in *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152 [2013] 1 I.L.R.M. 1 . The first Okunade criterion is whether there is an arguable case, which I accept there is because I have granted leave. The second criterion is to give all appropriate weight to the orderly implementation of measures which are *prima facie* valid and that obviously favours the refusal of an injunction. The next criterion is to give such weight as appropriate (if any) to any public interest in the orderly operation of the particular scheme involved. That does not add much to the deportation order as such here. The next criterion is to give such weight (if any) as appropriate to such factors as would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings. In that regard, the first-named applicant's evasion for over a decade, the entire period since the deportation order was made apart from very recent months, must be a factor because to reward that conduct with an eleventh-hour injunction would damage the public interest. More generally, the last-minute nature of the application being made heightens the risk to the public interest involved. The decision impugned in the proceedings was made on 21st May, 2018 and notified on 31st May, 2018, so exactly two months ago. The applicants' explanation for the failure to apply for leave prior to 30th July, 2018 is, on any view, unsatisfactory. There is merit in Mr. Gallagher's submission that when we are at the "*deportation end-game*", an application for an injunction has to be looked at with a more jaundiced eye.

7. The next *Okunade* criterion is to give all due weight to the consequences for the applicant of being required to comply with the decision under challenge in circumstances where that measure may be found to be unlawful. In this context it is important to note that the first-named applicant is being removed pursuant to the deportation order, which is not a measure under challenge. What is being challenged is the s. 3(11) application, which gives rise to a right to remain only in exceptional circumstances: see *L.C. v. Minister for Justice, Equality and Law Reform* [2006] IESC 44 [2007] 2 I.R. 133.

8. It would appear from the papers that the deportation of the first-named applicant certainly has the potential to interfere with her family relationships with the second and third-named applicants, in particular, the relationship with the child who, it is alleged, has special needs. It is also asserted that the first-named applicant is his primary carer. It is alleged that the third- named applicant has mental health issues and so is unable to look after the child. However, these are in the first instance matters for the Minister to consider in the exercise of the executive power of the State, rather than the court, on the basis of full information being put before the Minister in that regard. If that is done and the Minister takes a favourable view in a s. 3(11) context, presumably the first-named applicant can be brought back. I also note that there is a fair support network available to the second and third-named applicants in terms of extended family members even if the first-named applicant is deported.

9. The next *Okunade* criterion is whether damages could be an adequate remedy, which does not arise here.

10. The final *Okunade* criterion is the strength or weakness of the applicant's case. All that can be said at this juncture is that, without prejudging the proceedings in any way, the challenge does not appear to be overwhelmingly strong in the context where the medical information now exhibited was not submitted to the Minister in the first place. Overall the balance of justice and the factors against an injunction come out somewhat ahead of those in favour, so I would decline to enjoin the first-named applicant's deportation.