Neutral Citation Number: [2012] IEHC 7

THE HIGH COURT

2011 875 JR

BETWEEN/

PI AND EI (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND

PI AND JNI (AN INFANT SUING BY HIS MOTHER AND NEXT

FRIEND PI)

APPLICANTS

AND

MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND THE

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 11th January, 2012

1. In these proceedings the applicants seek leave to apply for judicial review pursuant to the provisions of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") to challenge a deportation decision made by the Minister on 5th August, 2011. This decision was received by the applicants on 16th August, 2011, so that time expired on 30th August, 2011. The applicants further challenge the validity of a subsidiary protection decision taken on 19th October, 2010. The present proceedings were commenced on 21st September, 2011.

2. The applicants now seek an interlocutory injunction pursuant to the terms of a notice of motion issued on 21st November 2011 restraining the implementation of this deportation order pending the determination of the leave application. Before discussing the principles governing the granting of such relief, it is important in the context of the facts of this case to draw attention to the chronology of events leading up to this litigation.

3. While it is clear that the applicants can probably establish grounds by reference to which the time limit contained in s. 5(2) of the 2000 Act can be extended so far as the challenge to the validity of the deportation decision is concerned, the same cannot be said of the subsidiary protection decision. Almost a year has elapsed since that decision was taken and yet no explanation has been offered as to why it was not challenged in a timely fashion.

4. The effect of this is that the subsidiary protection must now be regarded as unimpeachable in law. In consequence, arguments advanced by the applicants in relation to the validity of that decision cannot be regarded as sustainable, since the Court cannot now look behind that decision. The only exception here might be if the applicants were

successfully to contend that the subsidiary protection decision was based on provisions of Directive 2004/83/EC ("the Qualification Directive"), which provisions were not themselves properly transposed into domestic law by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). I have already held that the provisions of s. 5 of the 2000 Act do not meet the test of equivalence and effectiveness, so that this particular national time limit cannot properly be relied on by the respondents in the context of a claim that the provisions of a Union Directive were not properly transposed into domestic law: see *D. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 37.

5. The present pre-leave application for an interlocutory injunction is governed by the provisions of the now former O. 84, r. 20(7)(a), as this application was commenced prior to 1st January, 2012, the date on which the new version of the relevant provisions of O. 84 came into force: see Rules of the Superior Courts (Judicial Review) 2011 (S.I. 691 of 2011).

Contrasting the new O. 84. r. 20(7) with the new O. 84, r. 20(8)

6. It may be convenient to set out the terms of the former O. 84, r. 20(7) in its entirety:-

> "(7) Where leave to apply for judicial review is granted then-
>
> (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
>
> (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by plenary summons."

7. Perhaps the most singular feature of the former r. 20(7) was the extent to which it differentiated so far as the grant of a stay and other forms of interim relief between those cases where certiorari and prohibition was sought on the one hand and those cases where other forms of relief was sought on the other. Without rehearsing again the debate which was generated by an analysis of these provisions by the Supreme Court in *Adebayo v. Garda Commissioner* [2006] 2 I.R. 298 and in subsequent case-law and which has, indeed, given rise to some differences of judicial opinion in this Court (see*, e.g.,* most recently the judgment of Cooke J. in *O. v. Minister for Justice and Equality* [2011] IEHC 441), it is sufficient to say that r. 20(7)(a) assumed - or, perhaps, it might be more correct to say, *appeared* to assume - that a stay would normally accompany the grant of leave in cases where *certiorari* or prohibition was sought, absent special circumstances, whereas r. 20(7)(b) clearly implied that applications for interlocutory relief in cases where all other forms of relief (such as a declaration or injunction) was sought would be governed by the standard *Campus Oil* principles (*Campus Oil Ltd. v. Minister for Industry and Commerce (No.2)* [1983] I.R. 88).

8. The new O. 84, r. 20(8) is now cast in very different terms from its predecessor:-

> "Where leave to apply for judicial review is granted then the Court, should it consider it just and convenient to do so, may, on such terms as it thinks fit—
>
> (a) grant such interim relief as could be granted in an action begun by plenary summons,

(b) where the relief sought is an order of prohibition or *certiorari*, make an order staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders."

9. It will be seen that the new r. 20(8) introduces at least three important new changes. First, the primary basis for the granting of interim and interlocutory relief is now contained in r. 20(8)(a) which clearly assimilates the *Campus Oil* test to all applications for interlocutory relief in judicial review proceedings, irrespective of whether the ultimate relief claimed is certiorari or prohibition on the one hand or a declaration or an injunction on the other. Second, the new r. 20(8) makes no implicit assumptions regarding the granting of interlocutory relief, such might be thought to have been contained in the old wording of r. 20(7)(a) ("and the Court so directs, the grant shall operate as a stay of the proceedings…"). Rather, the language of the new r. 20(8) makes it absolutely clear that the grant of relief is entirely permissive (…"should it consider it just and convenient to do so, may, on such terms as it thinks fit…"). The reference to "just and convenient" - words, which since the days of the Supreme Court of Judicature (Ireland) Act 1877 have been hallowed by usage in the context of injunction practice - is the clearest possible signal from the Rules Committee that the granting of interlocutory relief in judicial review proceedings has been generally assimilated to the principles which would apply in other plenary actions. Third, whereas the power to stay in the old r. 20(7) was the primary relief which might have been granted in those cases where certiorari or prohibition was sought, it is now clear from the terms of the new r. 20(8)(b) that this power is now considered to be supplementary and complementary to what is henceforth to be the primary form of relief, namely, what I might describe as the unified power contained in the new r. 20(8)(a) to grant interim or interlocutory relief in judicial review proceedings, irrespective of the nature of the specific type of relief claimed.

10. The changes effected by the new r. 20(8) apply only to motions for interlocutory relief commenced after 1st January, 2012. As we have already noted, the present application was commenced prior to that date and accordingly continues to be governed by the old rules. In this regard, I propose to adhere to the views which I expressed in *PJ v. Minister for Justice and Equality*, High Court, 18th October, 2011 so far as the construction of the (old) r. 20(7)(a) is concerned, namely that an applicant for leave should not be placed in a more disadvantageous position by reason of the fact that an application for leave has yet to be heard. Since such an applicant who obtained leave could normally expect to obtain a stay absent special circumstances by virtue of the (old) r. 20(7)(a), it follows that a pre-leave applicant was equally entitled to an interlocutory protection restraining deportation pending the determination of the leave application absent special circumstances, one of which was that the claim was manifestly unstateable.

11. We may now proceed to examine whether that is the situation which obtains here and whether there are any stateable grounds by reference to which the deportation order itself can be challenged.

Effective remedy

12. The applicant claims that she has been denied an effective remedy in respect of a challenge to either the deportation order or the subsidiary protection decision itself. No argument has been proffered as to how the remedy of judicial review is inadequate or even the manner in which it is said to be inadequate.

13. In my view, the entire argument regarding the inadequacy of a remedy is manifestly unstateable. In this regard, I would venture to repeat the views I expressed in *SZ v. Minister for Justice and Equality*, High Court, 14th November, 2011:-

> "Passing over for the moment the fact that the applicant has not specified how any such remedy is alleged to be deficient, it is clear from a series of decisions of this court culminating in the decision of Cooke J. in *ISOF v. Minister for Justice, Equality and Law Reform (No.2)* [2010] IEHC 457 and my own judgment in *Efe v. Minister for Justice, Equality and Law Reform (No.2)* [2011] IEHC 214 that the remedy of judicial review is sufficiently flexible to vindicate the applicant's rights, whether such rights derive from the Constitution, the ECHR or from European Union law. Moreover, quite independently from any obligations cast upon the State by Article 13 ECHR (and which litigants can in suitable cases invoke by reference to s. 3 of the European Convention of Human Rights Act 2003), Article 40.3.2 of the Constitution guarantees all litigants an effective remedy: see, *e.g., Albion Properties Ltd. v. Moonblast Ltd*. [2011] IEHC 107. In my view, therefore, this aspect of the claim is unsustainable in law."

The principle of equivalence

14. Ms. I. further claims that the absence of a right of an appeal in respect of a subsidiary protection decision violates the principle of equivalence in EU law. This is a matter which has been recently examined by Cooke J. in his judgments in *SL (Nigeria) v. Minister for Justice,* High Court, 6th October, 2011 and *A v. Minister for Justice and Equality* [2011] IEHC 381.

15. In both *SL.* and *A.* Cooke J. stressed the exceptional and country specific nature of the Irish arrangements for complementary protection. While it appears that all other 26 Member States have a unified procedure for the analysis of asylum and subsidiary protection claims, these arrangements are optional under the Procedures Directive and a Member State is free to adopt (as Ireland) a bi-furcated arrangement, so that the assessment of subsidiary protection comes after any negative decision on the asylum application. This follows from Article 3(3) of the Procedures Directive which provides that:-

> "Where member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances as defined by Article 15 [of the Qualifications Directive], they shall apply this Directive throughout their procedure."

16. As Cooke J. put it in *A*:-

> "Accordingly, except where a Member State employs a single or unifies procedure covering both forms of protection, the Procedures Directive imposes no minimum procedural standards in respect of the processing of applications for subsidiary protection….It is only where a single procedure for both forms of international protection is employed that Article 39 has the effect of extending the right of appeal to the subsidiary protection procedure by virtue of Article 3(3)."

17. In essence, therefore, as I pointed out in *SZ,* the argument based on equivalence is constructed on a false premise. As Cooke J. so painstakingly pointed out in *A*, the different treatment of asylum and subsidiary protection applications is one which is expressly contemplated and, indeed, sanctioned by the Procedures Directive. This was further underscored by the terms of Annex 1 of the Procedures Directive which stipulated that Ireland might elect (as it did) to deem the decision of the Refugee Applications Commissioner to be that of the determining authority, with the right of appeal to the Tribunal. But all of this is against a background where the Directive *required* this form of appellate procedure in the case of asylum applications, but did *not* do so in the case of

subsidiary protection applications, save in the case of those States (admittedly, 26 out of the 27) who had adopted a single procedure for the treatment of both types of applications.

18. The argument as to equivalence, therefore, amounts to a form of indirect collateral attack on the Procedures Directive itself. It is on that basis and for the reasons so elegantly and comprehensively advanced by Cooke J. in *A* (which reasons I gratefully adopt) that I must accordingly conclude that this aspect of the applicant's case is doomed to fail.

The alleged failure to transpose the Subsidiary Protection Directive

19. The applicants maintain that the State has failed properly to transpose Article 4(1) of Directive 2004/83/EC ("the Qualification Directive") which requires a Member State to assess all aspects of the claim for subsidiary protection "in co-operation with the applicant." It is said that by virtue of the fact that the European Communities (Application for Protection) Regulations 2006 (S.I. No. 518 of 2006) contains no such express obligation the State has failed properly to transpose Article 4(1).

20. It is, of course, an elementary proposition that a Member State is not obliged to replicate a Directive verbatim when transposing it into domestic law. It is true that I have already referred the question of the *interpretation* of Article 4(1) to the Court of Justice pursuant to Article 267 *TFEU in MM v. Minister for Justice, Equality and Law Reform*, High Court, 18th May 2011. That reference specifically asks whether Member States are obliged, by virtue of the duty of co-operation in Article 4(1), to provide applicants with a copy of provisional negative findings so as to enable them to comment thereon prior to a final decision. Even if (contrary to my view) that question were to be resolved in favour of the applicant in that case, this would not mean that Ireland had thereby failed properly to transpose the Directive. It would rather mean simply that the decision taken by the Minister was liable to be quashed by certiorari on the ground that he had thereby failed to comply with an essential procedural step in view of the requirements of Article 4(1) as now interpreted by the Court of Justice.

21. As we have already noted, the applicants in this case, however, never challenged that subsidiary protection decision in a timely fashion and are otherwise time-barred from challenging that decision. As there is no question of the non-transposition of Article 4(1) of the Qualification Directive, the principle in *D.* accordingly has no application. The applicants' claim in relation to the subsidiary protection issue is, however, otherwise clearly barred, absent an ability to rely on the principles in *D.* Since they cannot do so, it follows that any challenge to the subsidiary protection is time-barred. In consequence, it equally follows that any reliance on arguments bearing on the subsidiary protection decision are unsustainable in law.

The constitutionality of s. 3(1) of the 1999 Act

22. As I noted in *U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 492, a deportation order made under s. 3(1) of the 1999 Act has, in principle, lifelong effects, subject only to the mitigating effects of the revocation power contained in s. 3(11). The applicant now seeks to challenge the constitutionality of this provision on proportionality grounds and, if necessary, also seeks a declaration of incompatibility pursuant to s. 5(2) of the European Convention of Human Rights Act 2003.

23. As I pointed out in *SZ,* it is true that it is clear from two relatively recent judgments of the European Court of Human Rights in *Emre v. Switzerland (No1)(*2008) and *Emre v. Switzerland (No.2)* (2011) that life long expulsion orders will be subjected to a particularly rigorous examination for compliance with the right to family life in Article 8: see, *e.g*., para. 85 of *Emre (No.1).* In that case a Turkish national who arrived in Switzerland when he was aged 6 in 1980 was subjected to an expulsion order following

conviction for a range of serious offences including theft, firearms offences and assault. In *Emre (No.1)* the Court held that a life long expulsion order was a breach of Article 8 in that it did not strike a fair balance between the interests of family life on the one hand and effective immigration control on the other.

24. Following that judgment, Mr Emre applied to the Swiss Federal Court in July 2009 seeking revision of its original judgment. On this occasion, the Federal Court limited his exclusion from Swiss territory to ten years. In September 2009 Mr Emre married a German national and obtained a German residence permit. He then applied unsuccessfully to have the deportation order lifted so that he could settle in Switzerland. Mr. Emre then made a further application to Strasbourg.

25. In its most recent judgment delivered on 11th October 2011, the European Court held that the Swiss courts had violated Article 8(2) ECHR by imposing a ten year ban. This was "a considerable period in an individual's life" which "could not be said to have been necessary in a democratic society." There are nevertheless some differences between this case and the present one.

26. In *Emre* the applicant in that case had lived virtually all his life in Switzerland, so that his ties with that country were particularly strong. By contrast, while the applicant has resided here since March 2006, she arrived here as an adult. Moreover, her residency entitlement (such as it has been) is particularly tenuous, given that her asylum application was rejected. At the same time, another child, Mary I., was born here in 2006 and has spent her entire life here. The other two children (who are co-applicants with Ms. I. in these proceedings) are now aged 10 and 7 respectively and have spent most of their young lives there.

27. Against that background it nevertheless cannot be said that the challenge to either the constitutionality of s. 3(1) or its ECHR compatibility is tenuous or otherwise doomed to fail. Indeed, if anything, it is clear that the *Emre* judgments raise important questions in this respect concerning the proportionality in particular of a life long exclusion ban, even if this is potentially mitigated by the effects of s. 3(11).

Conclusions

28. It is clear that at least one aspect of the applicants' case cannot be said to be unsustainable in law. It follows that it is unnecessary to consider further any other arguments advanced in relation to the validity of the deportation decision, but not, of course, the subsidiary protection decision.

29. It follows that by analogy with the reasoning in *PJ* that the applicants are entitled to a stay pending the outcome of the leave application. As I have already explained above, this conclusion turns on the construction of (the old) O. 84, r. 20(7)(a) and, so far as the present case is concerned, this conclusion follows from the premise that as an applicant who obtained leave under that (old) sub-rule would normally have obtained a stay, a litigant awaiting the hearing of his or her leave application should not generally be placed in a worse position pending the outcome of that application.

30. This analysis and reasoning is, however, likely to be largely of historical interest only, since as we have seen, the special language of the old O. 84, r. 20(7) has been replaced by the new O. 84, r. 20(8). This provision has in turn assimilated the law and practice in relation to the grant of stays in judicial review proceedings to that applicable in the case of application for interlocutory injunctions, so that henceforth such applications will be governed by *Campus Oil* criteria, subject only to such modifications (if any) to those principles that may be required in exclusively public law proceedings.

31. Since, nevertheless, the present application is governed by the old r. 20(7)(a), it follows that the applicants are entitled to a stay pending the determination of the application for leave to apply for judicial review.