THE SUPREME COURT
JUDICIAL REVIEW

[S.C. No: 459/2004]

Denham J.
Geoghegan J.
Fennelly J.
Kearns J.
Finnegan J.
BETWEEN/

A.N. AND
L.N., C.N., U.N.,
C.N. AND W.N.,
MINORS SUING BY THEIR MOTHER AND NEXT FRIEND A.N.

APPLICANTS/APPELLANTS

AND
THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM
AND
COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

Judgment delivered the 18th day of October by Fennelly J.

1. The first-named applicant is the mother of the second to sixth named applicants and appellants. She is not herself an appellant, because her application for leave to apply for judicial review was dismissed in the High Court and she did not obtain the certificate required to entitle her to appeal. Accordingly, I will refer to the second to sixth named applicants and appellants simply as the appellants.

2. The proceedings relate to Deportation Orders made in respect of the appellants by the First Named Respondent ("the Minister") on the 2nd August, 2002. The appellants obtained leave from the High Court (Finlay Geoghegan J) to seek judicial review of those decisions by way of certiorari. Peart J in a judgment dated 26th May 2004 dismissed the application of the appellants for judicial review. The learned High Court Judge certified pursuant to Section 5 (3)(a) of the Illegal Immigrants Trafficking Act, 2000 that his decision involved points of law of exceptional public importance and by order dated 28th July 2004 granted leave to appeal against his decision to the appellants. The terms of the certificate are set out in the judgment of Finnegan J.

3. There is a single legal point at the centre of the appeal. The deportation orders were explicitly made on the basis that each appellant was "a person in respect of whom a deportation order may be made" pursuant to the provisions of section 3(2) (f) of the Immigration Act, 1999. That provision relates to:

> "a person whose application for asylum has been refused by the Minister."

4. The High Court order of 5th November 2003 (Finlay Geoghegan J) granted leave to apply for judicial review on the following single ground:

> "The Deportation Orders of 2nd August 2002 relating to the second to sixth named Applicants are invalid in that the second to sixth named Applicants were not on that date persons whose applications for asylum had been refused by the first named Respondent within the meaning of Section 3(2)(f) of the Immigration Act 1999."

5. In her judgment on the leave application, Finlay Geoghegan J. noted that the sole basis justifying the making of the deportation orders was that the persons named were persons in respect of whom an asylum application had been refused.

6. The question is whether an application for asylum made by the appellants had been refused by the Minister. In simple terms, the first-named applicant applied for asylum; no separate applications were made for the children; the Minister had a policy of treating such an application as having been made by the family; none of the communications emanating from the Minister or the Refugee Appeals Tribunal, up to and including the refusal of the first-named applicant's application refer to any application by the appellants. They were, however, given notice of the Minister's intention to make deportation orders in respect of them.

7. A related issue, which was decisive in the view of the learned High Court judge, was the principle of family unification. This gives rise, in turn, to a question of whether that principle can be deployed against as distinct from in favour of family members.

The Facts
8. These issues can be considered only in the light of detailed consideration of the facts.

9. The appellants are Nigerian nationals. They arrived in Ireland on the 10th May, 1998, accompanied by their mother. They were then respectively aged 12, 8, 6 and four-year old twins.

10. On 11th May 1998, the day after her arrival in Ireland, the first named applicant applied for asylum. She completed the official form provided by the Minister, "ASY-1." The file reference number, 69/1346/98B was written on this application. In the box for "Name" only that of the first named Applicant was given i.e. A.N. The names of the appellants were listed in the part of the form headed: "children." Their place of birth was stated to be Nigeria and "Ireland" was given in answer to the question: "where is the child now?" In answer to the question, "why are you seeking asylum?" an account is given of events in Nigeria concerning her brother in the army. This mentions "the children" in connection with her move from Nigeria.

11. Mr Charles O'Connell, Assistant Principal Officer in the Department of Justice Equality and Law Reform deposed on affidavit that file reference numbers were assigned to each of the children named in the ASY 1 form signed by the mother in accordance with the "policy of treating the application for asylum of accompanied minors as being an application on behalf of the First Named Applicant and each of the accompanied minors." Thus the appellants were assigned file reference numbers with the suffixes (c), (d), (e), (f) and (g) respectively, following the (b) assigned to their mother. He continued:

> "I say and believe that this was a proper course for the [the Minister] to take, taking into account the diminished capacity of the [appellants] herein. I further say and believe that no objection was taken by the First Named Applicant or by any of the Applicants herein to this course of action, and that none of the Applicants has suffered any prejudice or detriment as a result of this course being taken."

12. Mr O'Connell deposed further that the above course of action followed the guiding principle set out in Paragraph 213 of the UNHCR "Handbook on Procedures and Criteria for Determining Refugee Status," which reads as follows:

> "There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems arise due to the difficulty of applying the criteria of "well-founded fear" in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity". (emphasis added).

13. Mr O'Connell said that, on 11th May 1998, details of each of the appellants were taken "in order to record their applications for asylum." He exhibited these photographic records upon which was written the file reference number relating to each child. Mr O'Connell deposed that these steps showed that the Minister was treating the application of the mother as having been made on behalf of all the appellants. He does not, however, refer to any communication made by or on behalf of the Minister either to the first named applicant or to any of the appellants, indicating that the Minister was deeming applications to have been made by or on behalf of the appellants.

14. Mr O'Connell exhibited the questionnaire under the heading, "Application for Refugee Status", which was completed by the First Named Applicant on 13th May 1998. That document bore only the file reference number of first named applicant. She was described as the "Applicant." The Minister makes the point that there is no reference whatsoever to any specific fears that any of the appellants might have. No questionnaire was completed either by or on behalf of any of the children. The children were, of course, of tender years. But there is no evidence of any administrative act, other then the purely internal one of assigning separate file reference numbers, showing that the Minister was treating the appellants as having applied for asylum.

15. The next relevant step was the sending, on 11th March 1999, of a letter to the first named applicant, calling her for interview. The letter refers throughout to a single application. The file reference, both on the letter and on a detachable slip designed to confirm attendance, was that of the first named applicant alone. The letter includes the following: "Unfortunately there are no facilities for children in the Department so arrangements should be made to have them looked after while you attend for interview."

16. Similarly, the report on the interview of the first named applicant, held on 30th March 1999, refers throughout to her alone as the applicant for asylum and uses only her file reference number. The first named applicant was required, as part of that report, to sign an acknowledgement of a number of matters, running to some eighteen lines of text, concerning her application. No part of this text contained any reference to the application being made on behalf of her children or to the principle of family unity. It is true that, in answer to a question concerning her grounds for claiming asylum, she answered: "Political grounds because they would kill me and the five children." This, of course, referred to her claimed fear of persecution in Nigeria. She has deposed that she was not asked any questions concerning her children or their welfare, or whether they had any grounds of persecution peculiar to themselves. There is an addendum, upon which the Minister relies: when asked if she wished to add anything, she said: "It's up to you to keep us as we can't go home".

17. On 22nd September 1999, Pacelli Clancy of the Asylum Division made a written assessment of the application of the first named applicant for asylum. That document also refers only to her and uses only her file reference number. It states as a fact that she has five children and refers to the alleged threat to "kill her and her children." It contains no mention of any application, deemed or otherwise, on behalf of the children.

18. The first named applicant appealed against the recommendation that she not be accorded refugees status. All documents connected with the processing or conduct of the appeal were in her name alone and under her file reference number. The recommendation of the Refugee Appeals Authority was dated 25th July 2000. That detailed assessment of the merits of the asylum claim contains no inkling that appeals on behalf of the appellants were under consideration. The children are twice mentioned in passing: that an agent had arranged a passport for the first named applicant and her five children; that she had presented three birth certificates. Under "Decision," the substantive merits of the asylum application are assessed. There is no mention of the children.

19. By letter dated 23rd August 2000, the Minister gave notice to the first named applicant of the adverse recommendation of the Refugee Appeals Authority and of the fact that the writer, on behalf of the Minister, had decided to uphold the original decision and to refuse her appeal. The Minister, it was stated, proposed to make a deportation in respect of her. The letter did not mention the appellants.

20. Following this, the first named applicant made submissions requesting leave to remain. Nothing further happened and nothing was heard from the Minister until the letter of 1st July 2002, when the Minister, for the first time, mentioned the appellants. On that date, a letter from the Immigration Division and addressed to all six applicants (the mother and five children) gave notice that the Minister proposed to make deportation orders in respect of all six members of the family. It claimed that the reason was that: "you, all six named persons, failed in your asylum application." By a letter of 9th August, similarly addressed, the Minister gave further notice of deportation proposals and procedures.

21. On 8th August 2002, the Minister made the separate Deportation Orders in respect of the appellants which are the subject of these proceedings.

22. The Minister points to the fact that no complaint was made by or on behalf of the appellants that they were not persons in respect of whom refusal orders had been made.

23. On the basis of all that evidence, the appellants submit that there was no investigation into the capacity of the children to apply separately or to be heard and that no efforts were made to interview the children. On the contrary, the invitation to A.N. to attend at interview was accompanied by a statement that the children were not to accompany her.

Issues in the Case

24. The single ground upon which Finlay Geoghegan J granted leave sets the boundaries to the issues on the appeal. We are concerned only to discern whether the appellants were persons whose applications for asylum had been refused by the Minister ("a refusal order") on the date when he made the deportation orders.

25. The order granting leave limits the scope of this appeal. It does not extend to any question whether, assuming a refusal order to have been made, it was invalid by reason of failure to respect the rules of natural justice (*audi alteram partem* in particular). The question whether the Minister afforded to the appellants any opportunity for a hearing arises only as evidence of whether there was,

in reality, in the view of the Minister, any application for asylum on behalf of the appellants. It is common case that the Minister took no steps to permit a hearing to any of the appellants. They were children of tender years, of "diminished capacity," in the view of Mr O'Connell. Nonetheless, it is clear that the Minister gave no consideration at all to their status as applicants for asylum. He considered only the application of the first named applicant.

26. The appellants have made submissions on a wide range of issues which it is not necessary to determine. In particular, they submit that, by virtue of the language of the relevant sections of the Refugee Act, 1996, only a single individual may make an asylum application. I am unconvinced. For reasons mentioned later, I believe a single application could, in principle, be made on behalf of a number of persons, particularly where they are members of one family. It is not necessary to decide that issue finally, in view of the conclusion I have reached on the main issue in the case.

27. Nor do I believe that the extensive submissions made in respect of the constitutional rights of the family have any real bearing on the issue to be decided. It is not in question that, as individuals, they have rights to be heard with regard to any steps the State proposes to take in respect of them. The Minister simply claims that they were applicants for asylum.

28. Peart J accepted the case made on behalf of the Minister essentially on the basis that the first named applicant represented the appellants throughout the asylum process. The Minister relies particularly on the findings of Peart J that the First Named Applicant was lacking in credibility, but goes on to introduce the notion of family unity, as being, as indeed the Minister has at all times claimed , his guiding principle.

29. The decisive issue on this appeal remains, in my view, that which was defined by Finlay Geoghegan J in her order granting leave. It is whether the appellants were, in law, persons "whose application for asylum has been refused by the Minister," for the purposes of section 3(2)(f) of the Immigration Act, 1999.

Conclusion

30. The statutory question relates to the refusal of an asylum application. It does not ask whether an asylum application has been made by or on behalf of the appellants. Obviously, a refusal of an application for asylum implies that an application has been made. To that extent, the questions are related. Nonetheless, the existence of a refusal of an asylum application was a fundamental prerequisite to the exercise by the Minister of his power. I do not understand this proposition to have been contested by the Minister.

31. There is no record of any decision refusing an asylum application on behalf of any of the appellants. The decision to refuse is made by the Minister. The only conceivably relevant decision made by the Minister is that dated 23rd August 2000. It is addressed only to the First Named Applicant. It is not addressed to the appellants. That decision could not be treated as being a decision to refuse an application by the appellants without doing violence to its clear terms. In my view, it is incapable of being read as a decision relating to the appellants.

32. On that basis alone, the claim of the appellants is unanswerable. To the extent that it may be thought necessary to consider whether there was ever an application for asylum, and I consider that it is not, by or on behalf of the appellants, I think it is clear that there was no such application. The Minister could have implemented the policy described by Mr O'Connell. He could, for example, have written to the first named applicant and/or to her children stating that several applications were deemed to exist. Whatever might have been done in this respect, nothing at all was in fact done.

33. The essence of the Minister's defence is that he applied a policy of family unity in accordance with paragraph 213 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. The key sentence states:

> "If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity".

34. Mr O'Connell's affidavit cited this sentence to justify treating the application of the first named applicant as being an asylum application on behalf of the family.

35. There is no question but that asylum seekers arrive in the State as family groups. There is equally no question but that the principle of family unity is central to asylum and immigration practices and policies. The most obvious consequence is that, where an asylum seeker is accompanied by his or her children of tender years and such a person is accorded refugee status, it quite obviously enures to the benefit of the children. Paragraph 184 of the same Handbook states: "If the head of the family meets the criteria his dependants are normally granted refugee status according to the principle of family unity." It would be simply inhuman to permit a person to remain in the State and to expel or deport his children. Clearly, that is the principle underlying the Minister's policy. As described, it is a proper and reasonable policy.

36. The Minister's difficulty is that he has assumed that the converse is true. He extrapolates from the principle that a favourable asylum decision benefits other family members the further untenable proposition that a decision which is unfavourable to one is unfavourable to all.

37. Paragraph 185 of the Handbook states that

> "the principle of family unity operates in favour of dependents and not against them."

38. The Minister's policy, as explained by Mr O'Connell, was to treat the application of the First Named Applicant as having been made also on behalf of the appellants. That would be to treat them all as a family unit. I have already stated that such a policy would be reasonable. The Minister did not, in fact, act in accordance with that policy. At no stage in the asylum process did any document emanating from or required by the Minister advert to the existence of applications on behalf of the appellants. Since preparing this judgment, I have had an opportunity of reading the judgment which is about to be delivered by Finnegan J, who has dealt more completely with the position of minor children and the context of the UNHCR Handbook. I agree with that judgment in respect of these matters. It provides helpful guidance as to the procedures which should be followed in respecting the principle of family unity as well as the individual rights of children.

39. The ultimate question is whether the decision refusing asylum, which confers jurisdiction, which was exercised by the Minister, was made in the case of any of the appellants. Clearly it was not.

40. It follows that the claimed basis for the exercise of the power to make the deportations orders did not exist and that those orders are invalid.

41. I would emphasise that this decision involves no other or wider proposition regarding the immigration status of the appellants.

42. I would allow the appeals in these cases, set aside the judgment of the High Court and make an order of *certiorari* quashing each of the deportation orders.