THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 771 J.R.]

BETWEEN

G.E.O (NIGERIA) (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND R.O.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE GARDA NATIONAL IMMIGRATION BUREAU, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of March, 2018

1. The applicant's mother arrived from Nigeria in 2006. Her asylum and subsidiary protection applications were refused and a deportation order was made against her on 8th November, 2007. The mother says she formed a relationship with a Mr. G.N., as a result of which the applicant was born. The relationship broke up; seemingly as a result.

2. The applicant was born on 18th June, 2012 and now claims to be an Irish citizen by virtue of s.6A of the Irish Nationality and Citizenship Act 1956 as inserted by the Irish Nationality and Citizenship (Amendment) Act 2004, section 4. The general rule is set out in s.6A(1) that "*A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years*." That rule is subject to a complex series of qualifications set out in the section.

3. The applicant contends that (a) Mr. G.N. is his father and (b) Mr. G.N. was lawfully resident in the State for three years prior to the birth. The next friend says she has attempted to obtain evidence of this and has written to the applicant's father (without reply), made representations to the Minister and made a number of applications to the District Court, which I will come to.

4. On 20th March, 2013 the Irish Naturalisation Immigration Service said in relation to the mother's application to remain on the basis of parentage of an Irish citizen child that it was a fundamental requirement to submit evidence of identity and nationality in the form of a current valid passport. On 26th July, 2013, the District Court made a maintenance order and a further order on 21st November, 2013 as against Mr. N. The court made an order dispensing with his consent to the issue of passport on the 30th February, 2014 and directed the issue of the passport by order of the 4th March, 2014. Subsequently, the Minister reiterated the need for the production of a passport; for example by letter dated the 13th January, 2015.

5. A separate deportation order was made in respect of the applicant on 22nd January, 2016, which was not challenged in accordance with s.5 of the Illegal Immigrants (Trafficking) Act 2000, or indeed at all.

6. On 14th July, 2017 the Department of Foreign Affairs and Trade wrote in relation to a passport application for the applicant stating that they required the father's passport showing reckonable residency stamps from 18th June, 2008 to 18th June, 2012 or a letter from the GNIB giving information as to the reckonable residency stamps.

7. On 9th August, 2017 the Minister rejected an application to revoke the deportation orders under s. 3(11) of the Immigration Act 1999, and again that decision was not challenged.

8. On 5th October, 2017 the applicant's solicitors wrote to INIS requesting a letter in relation to the father's residency, and similar correspondence was also sent to the GNIB. On 9th October, 2017 the GNIB replied indicating that the Data Protection Act 1988 prohibited them from divulging information to third parties other than legal representatives of such parties. On the same date, the INIS wrote indicating that they were also precluded from divulging information under s.19 of the Refugee Act 1996 and the Data Protection Act.

9. On 11th October, 2017 the application for leave in the present proceedings was formally opened. On 23rd October, 2017, I granted leave. Following the formal issue of the proceedings, a statement of opposition was delivered dated 4th December, 2017. Paragraph 10 of that statement pleaded that no application had been made under s. 28 of the Irish Nationality and Citizenship Act 1956 for a certificate of nationality. On 7th January, 2018 the applicant wrote to apply for a certificate of nationality without prejudice to the proceedings. That was sent incorrectly to the Repatriation Unit, but ultimately made its way to the appropriate officials. On 19th January, 2018 the respondents wrote to the applicant's solicitors stating that "*the proceedings were clearly brought in ignorance of s. 28 of the Irish Nationality and Citizenship Act 1956*", which Mr. Paul O'Shea B.L. for the applicant essentially confirmed by accepting that he was not aware of the section when the proceedings were instituted. The respondents also offered an undertaking not to enforce the deportation orders until the expiry of fourteen days from the determination of any s. 28 application that might be brought promptly.

10. I have heard helpful submissions from Mr. O'Shea for the applicant and from Mr. Daniel Donnelly B.L. for the respondents.

Relief sought

11. The applicant seeks declarations regarding the implementation of the deportation order and the legal position in relation to the questions raised by the proceedings. It can be noted that no challenge is made, or indeed possible, to either of the deportation orders at this stage. There is at the least a significant question mark as to whether the court could make declarations or grant injunctions restraining an unchallenged deportation order in the manner sought outside of the scheme provided for by s. 5 of the 2000 Act. It can also be noted that no mandatory orders regarding the furnishing of information by the applicant are sought that might enable him to obtain a passport or demonstrate his citizenship. Mr. Donnelly submits that the "*quixotic nature*" of the proceedings is demonstrated by the fact that the relief sought in the amended statement of grounds delivered on the hearing date seeks a declaration that the failure by the respondents to have a regime whereby the asserted citizenship of the applicant can be properly examined is in breach of the applicant's rights, whereas it is simultaneously accepted that there is such a regime.

The availability of an alternative remedy
12. An applicant does not get to the merits of their case unless they can get over the problem of whether there is an alternative, more suitable remedy. That is an issue that applies even at the leave stage, as stated by Finlay C.J. in *G. v. DPP* [1994] 1 I.R. 374, at 377 to 378. One of the requirements of instituting judicial review proceedings is to demonstrate "*that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure*".

13. The latest comprehensive consideration of the issue of alternative remedies by the Supreme Court is in *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2012] IEHC 264 [2013] 2 I.R. 669 where the Supreme Court endorsed the principle that, while the general rule was that a party should pursue a statutory appeal rather than initiate judicial review proceedings, there were exceptions where the justice of the case would not be met by confining a person to the statutory appeal and excluding the judicial review option; citing *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497, *Stefan v. Minister for Justice* [2001] 4 I.R. 203, *O'Connor v. Private Residential Tenancies Board* [2008] IEHC 205 (Unreported, Hedigan J., 25th June, 2008) and *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 (Unreported, Hogan J., 1st November, 2010).

14. Mr. O'Shea submits that the alternative remedies issue arises primarily in the context of an appeal but it is clear from the formulation in *G. v. DPP*, which has been endorsed on many occasions in subsequent case law (see *e.g. Riordan v. Ireland* [2002] IEHC 42 (Unreported, McKechnie J., 14th February, 2002) paras. 9-12, *O.O. v. Minster for Justice and Equality* [2008] IEHC 325 (Unreported, Hedigan J., 22nd November, 2008) para. 14) that the question of the availability of an alternative remedy and the need to establish that judicial review is the most appropriate remedy is wider than the context of a formal appeal and could apply to any other procedure provided that it is genuinely a more suitable remedy.

15. Applying this to the facts of the present case, Mr. O'Shea accepts that the grant of a s. 28 declaration would resolve his problem. He is concerned about delay and cost but whatever the cost is it will be significantly less than court proceedings. He also complained about the uncertainty of the process, such as whether the Minister would seek a DNA test. He says it is obvious that the father will not cooperate and that will "*lead him down to another difficult situation*". It seems to me that that objection is speculative. The Minister will have to act lawfully and constitutionally, in accordance with the principles set out by the Supreme Court in *East Donegal Co-Operative Livestock Mart Ltd. v Attorney General* [1970] I.R. 317 104 I.L.T.R. 81. Mr. O'Shea submits that a DNA test is "*frightening for us*" and "*a road to nowhere*", but of course the onus of proof of the descent of the applicant from a lawful resident is on the applicant. Whether one goes down the passport route or the certificate of nationality route, the applicant cannot get either unless he proves his descent from Mr. N.

16. Mr. O'Shea suggested that there was some sort of difference between the issue of a passport and the issue of a certificate of nationality and that the proofs for the former were easier in the sense that the passport office would not necessarily investigate matters such as DNA. It seems to me there is no legal basis for such a submission as the applicant cannot get either a passport or a certificate of nationality unless he establishes that he is a citizen. If the s. 28 declaration is refused, the applicant is not worse off than he is now and can challenge the refusal if he has grounds to do so at that particular time. Mr. O'Shea's main complaint is that he was directed down the road of applying for a passport and that the Minister in correspondence did not make any reference to the s. 28 issue prior to the issue of the proceedings. That may well be a valid complaint up to the point in time at which the s. 28 issue was raised but given that we are where we are now it is clear to me that the s. 28 process is the more convenient remedy, or to put the same point differently, that the applicant has failed to demonstrate in accordance with *G. v D.P.P.* that the application by way of judicial review is on all the facts of the case a more appropriate method of procedure.

Order
17. Given that situation, I will dismiss the proceedings. The order will note that it is accepted by the respondent that the applicant will not be disadvantaged in the s. 28 application by having unsuccessfully prosecuted the present proceedings.