Neutral Citation Number: [2009] IEHC 235

THE HIGH COURT

JUDICIAL REVIEW

2009 193 JR

BETWEEN

G.A.

(A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, K.A.)

AND K.A.

APPLICANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

AND

THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice McMahon delivered on the 22nd day of May, 2009

Background
The first named applicant is an Irish citizen born in this State on the 24th September, 2004. He is the son of the second named applicant who is a citizen of Nigeria born on the 4th October, 1969. The first named applicant has a twin brother who is also an Irish citizen by virtue of his birth in the State.

The second named applicant was married to M.A., the mother of the first named applicant, in Ivory Coast in 2003. M.A. is a citizen of Ivory Coast where the second named applicant lived at that time. They both left Ivory Coast in 2004. Mrs. A. travelled to Ireland and was granted permission to remain in this State under the "IBC 05" residency scheme. The second named applicant had gone back to Nigeria and was not living in the State at the time the "IBC 05" scheme was in operation. The second named applicant came to Ireland in November 2007, to reunite with his family and he has resided with his wife, children and two stepchildren as a family unit since then. Mrs. A. has established herself in a business and is able to earn an income from this activity. It is alleged that the second named applicant assists in the home and in the education and the social activities of the children. A deportation order was made against the second named applicant by the respondent on the 27th January, 2009.

This is an application for leave for judicial review of the decision to make a deportation and is made pursuant to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended by ss. 10 and 13 of the Immigration Act 2003).

The standard
The appropriate standard to be applied by this Court in a leave application is that which is set down in s. 5 (2) (b) of the Illegal Immigrants (Trafficking) Act 2000, namely, that the applicant is required to establish substantial grounds. In *McNamara v. An Bord Pleanála* (Unreported, High Court, Barr, J., 10th May, 1996), Carroll, J., who was the learned trial judge, expanded on the standard to be applied by the court:-

> "….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...."

Arguments advanced on behalf of the applicants
Counsel for the applicants advances arguments in favour of this application under the following headings:-

(a) The personal rights of the first named applicant as an Irish citizen child.

(b) The family rights of both applicants under Article 41 of the Constitution.

(c) The rights of the applicants under Article 8 of the European Convention on Human Rights.

(d) The rights of the applicants to have the deportation order assessed on the basis of its proportionality.

(e) The arguments in favour of an injunction.

What is the proper criterion to be applied by the State when deciding whether to issue a deportation order or not?
In the executive officer's report dated the 13th January, 2009, which forms the basis on which the Minister made the deportation order in respect of Mr. A., the executive officer, having noted the factual situation at some length and having examined the country of origin information, made the following statement in connection with the concept of proportionality:-

> "In *R. (Mahmood) v. Home Secretary for the Home Department* [2001] 1 W.L.R. 840 [at p. 861, Lord Phillips (M.R.) of] the United Kingdom Court of Appeal found, *inter alia*, that the removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 [of the Convention on Human Rights] provided that there are no insurmountable obstacles to the family living together in the country of origin of the

family member excluded, even where this involves a degree of hardship for some or all members of the family."

Later, under the heading of 'Conclusion', the officer stated:-

> "Having considered all of the above factors relating to the position of the family and, in particular, Master G.A.A.A. and Ms. G.A.A.A., Irish citizen children, there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish [a] life in Nigeria."

The test which the executive officer applies in arriving at her decision is the test that if there are no insurmountable obstacles to the family being able to establish a life in their country of origin, then the deportation order should stand. In other words, it is only in exceptional cases that an adjudicator can allow Article 8 considerations under the Convention to prevail over the public interest in maintaining efficient and orderly immigration control.

In the English House of Lords case of *Huang v. Secretary of State for the Home Department (Kashmiri v. Same)* [2007] 2 W.L.R. 581, the *Mahmood* approach was greatly modified. Part of the head note in that decision sets out the more nuanced approach favoured in recent decisions. It was held in that case, *inter alia*:-

> "That, on a proper approach, the authority would investigate the facts, on an up-to-date basis, test the evidence and evaluate the nature and strength of the family bond, weighing the competing considerations on each side, taking account of matters of general administrative concern and giving appropriate weight to the judgment of the decision-maker with access to special knowledge and advice; that it would consider the factors in favour of the refusal with particular reference to justification in article 8(2) and, in assessing the proportionality of that decision, it would give effect to the overriding need to strike a fair balance between the individual's rights and the interests of the community; that the ultimate question, where family life could not reasonably be expected to be enjoyed elsewhere, was whether the refusal, taking account of all the factors in its favour, prejudiced the claimant's family life sufficiently seriously to breach his rights under article 8; and that where it did so the refusal was unlawful and the authority was required so to hold; but that there was no additional requirement that a case should meet a test of exceptionality; and that, accordingly, since the appeal tribunal had misdirected itself as to the applicable standard of review, both cases would be remitted to the appropriate appellate tribunal (post, paras. 13, 15-16, 18-22)." (At p. 582)

On the issue that the person who is deported can appeal his deportation from abroad, the judicial attitude can also be seen from the following excerpt from the House of Lords judgment of Lord Browne of Eaton-Under-Heywood (with whom Lord Bingham of Cornhill agreed) where he said:-

> "Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad…." (*Chikwamba v. Secretary of State for the Home Department* [2008] 1 W.L.R. 1420, at 1432).

The Supreme Court's decision in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] I.E.S.C. 25. is more relevant for this jurisdiction.

In this case, the Supreme Court had to consider the matter of reviewing the Minister's deportation order in respect of the father of an Irish born citizen child. In the High Court, Finlay Geoghegan J. granted *certiorari* on that issue and the Supreme Court affirmed this decision [see para. 28]. The issue, according to Denham J. in the Supreme Court, related to "…the nature of the consideration required to be made by the Minister of the facts relevant to the rights of the citizen child…" when such a deportation order was being considered [see para. 19].

In the High Court, Finlay Geoghegan J. noted that Irish citizen children had personal rights under Article 40.3 of the Constitution including:-

> "1. The right to live in the State.
>
> 2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her." [See para. 22].

She then stated that when the Minister is considering the deportation of the parent of an Irish citizen child, he/she must comply with the following principles:-

> "(i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by an appropriate enquiry in a fair and proper manner; and
>
> (ii) It must identify the grave and substantial reason at the relevant time, which requires the deportation of the non-national parent of the Irish citizen; and
>
> (iii) It must demonstrate that the [Minister] considers deportation, having regard to each of the above, to be a reasonable and proportionate decision." [See para. 22].

Denham J. affirmed these principles in the Supreme Court, in the following language:-

> "I would agree and affirm paragraph (i) above, though perhaps state it now in slightly different words:
>
> > '(i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by due enquiry in a fair and proper manner.'"
>
> As to paragraph (ii), I am satisfied that the decision making process should identify a substantial reason which requires the deportation of a foreign national parent of an Irish born citizen. The test is whether a substantial reason has been identified requiring a deportation order. The term 'grave' is tautologous, and while it reflects the serious nature of a 'substantial' reason, it is not an additional factor to 'substantial', and there is the danger that it could be so construed. As to (iii), the Minister is required to make a reasonable and proportionate decision." [See para. 22].

In relation to the level of consideration which the Minister should engage in, Denham J. said:

> "…[T]he consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development and opportunities. This consideration relates not only to educational issues but also involves the consideration of the attachment of the child to the community, and other matters referred to in s. 3 of the Act of 1999. The extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the part, if any, he or she has taken in the community. Thus, his or her education, and development within the State, within the context of his or her family circumstances, may be relevant. If the child has been in the State for many years, and in the school system for several years, and taken part in the community, then these unrelated facts may be very pertinent. However, if the child is an infant, then such consideration will not arise." [See para. 26].

In so far as an enquiry is required of the educational standard prevailing in the country of origin, Denham J was not so demanding: a general investigation would suffice.

In my view, the report of the executive officer did not reflect the principles laid down by Denham J. in *Ogueekwe*. It did not consider sufficiently the facts relevant to the personal rights of the citizen child and did not identify a "substantial reason" which required the deportation of Mr. A. with sufficient clarity. Neither, in my view, were the facts relating to the family unit sufficiently assessed and weighed. This, perhaps, was due to an over reliance on the *Mahmood* approach which, as I have said, has clearly fallen out of favour, not only in England, but in this jurisdiction as well.

In taking this approach, I also note a similar approach taken recently by Charleton J. in *H.L.Y., N.J. and P.Y. v. Minister for Justice, Equality and Law Reform and The Attorney General and The Human Rights Commission* [2009] I.E.H.C. 96.

For the above reasons, I will grant leave on grounds 5.1 to 5.9 inclusive set out in the statement required to ground the application for judicial review.

At the hearing, it was noted that the respondent did not make any strenuous objection to the applicant's requests for an extension of time. In any event, the delay was a minor one and to avoid doubt I would grant the required extension of time in the circumstances.