

## THE HIGH COURT

2008 No. 1156 JR

BETWEEN

R. O'C. (A MINOR, SUING BY HER FATHER AND NEXT FRIEND, V. R.) AND V. R.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

**Judgment of Mr. Justice Hedigan, delivered on the 26th day of November, 2008.**

1. The applicants are seeking an order of *certiorari* quashing the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated 10th October, 2008, to affirm a deportation order that was made in respect of the second named applicant on 20th February, 2006. Leave was granted on 20th October, 2008, by Finlay Geoghegan J. on foot of an *ex parte* application made on behalf of the applicants.

**Factual Background**

2. The second named applicant is a national of Georgia. He lived in South Ossetia, a breakaway republic in Georgia, until 2003. Since arriving in Ireland, he has had successive relationships with two Irish citizens, L.K. and M. Each relationship gave rise to the birth of a daughter; L. was born to L.K. on 7th January, 2005 while R. was born to M. on 22nd November, 2006. Thus, L. is now nearly four, while R. has just turned two. The children and their mothers are Irish citizens. The second named applicant is no longer in a relationship with either of the mothers; he continues, however, to have a close relationship with his daughters. Both mothers have since married other men; the children reside with their mothers and step-fathers.

**Procedural Background**

3. The second named applicant applied for asylum upon arrival in the State in October, 2003. He received a negative recommendation from the Office of the Refugee Applications Commissioner (ORAC) in September, 2004. His appeal to the Refugee Appeals Tribunal was rejected as it was submitted out of time, and he was notified on 28th October, 2004, that the Minister was proposing to deport him. He made no representations seeking leave to remain and, although the Refugee Legal Service (RLS) contacted the Minister on his behalf on 30th December, 2004, to indicate that his first Irish citizen partner, L.K., was about to give birth, the second named applicant did not contact the Minister after the birth of his daughter, L.

4. In July, 2005, the second named applicant's file was analysed under s. 3 of the Immigration Act 1999 and s. 5 of the Refugee Act 1996 by two officers of the Repatriation Unit; at that stage, no consideration was given to the position of his daughter. A deportation order was made on 20th January, 2006, which was notified to him by letter dated 1st February, 2006. That letter directed him to report to the Garda National Immigration Bureau (GNIB) on 9th February, 2006, but he failed to do so and was classed as an evader. He was at large for some 18 months, during which time he appears to have worked illegally, first as a building contractor and later as a gardener. He was apprehended by the Gardaí in August, 2008 in Waterford when stopped for not wearing a seat belt in the back of a car. He was asked for ID and then transferred to Cloverhill Prison where he was detained for the purpose of deportation.

5. On 12th September 2008, the applicants' solicitors made an application on behalf of the second named applicant under s. 3(11) of the Refugee Act 1996, seeking the revocation of the deportation order. In a decision dated 10th October, 2008, the Minister decided to affirm the deportation order. The second named applicant was granted conditional release on 13th October, 2008, and, following the refusal of this Court to grant an interlocutory injunction restraining his deportation, he was deported on 24th October, 2008, to the UK and from there to Georgia.

**The Section 3(11) Application**

6. Revocation of the deportation order was sought on the basis of what his solicitors presented as the "changed circumstances" of the second named applicant in the light of the birth of his two Irish citizen children. It was indicated in the first set of representations faxed to the Minister on the morning of 12th September, 2008, that he had "involvement and contact" with both children and had instructed the RLS in respect to formalising Access and Custody Orders in the District Court. Enclosed was a letter written by R.'s mother (M.) on 4th September, 2008, indicating that he and R. are very close and that he has regular contact with R. (apart from 5 months spent by mother and daughter in Australia in 2007, during which time he was in email and telephone contact with them). M. stated that her husband, who she married in June, 2008, has taken on a parenting role with respect to R. while accepting the relationship that she has with the second named applicant.

7. On the afternoon of 12th September, 2008, the applicants' solicitors forwarded more detailed submissions, addressing the best interests of the Irish citizen children, the applicants' constitutional and Convention rights, the obligation to give a "substantial reason" for the deportation of the parent of an Irish-born child, the rights of the State, and humanitarian considerations. Appended thereto was a Statutory Declaration of the second named applicant's joint-guardianship of R., and two letters of reference to the effect that he has a strong relationship with his children.

8. On 19th September, 2008, the applicants' solicitors forwarded a letter written by L.'s mother (L.K.), setting out the second named applicant's close relationship with L. and also with L.K.'s son from a previous relationship. That letter noted that L. was withdrawn as she had not seen her father for some time. On 24th September, 2008, the solicitors forwarded copies of District Court applications made with respect to the guardianship of L. and on 1st October, 2008, they forwarded a further letter of reference which indicated that the second named applicant had been working occasionally as a gardener since being laid off as a building contractor.

**Consideration of the Application for Revocation**

9. An officer of Repatriation Unit analysed the application for revocation on 8th October, 2008. In the document containing his analysis, the officer set out the second named applicant's background, and made express reference to each of the documents submitted in support of the application, and to the nature of the representations made by the second named applicant's solicitors on his behalf. The officer went on to assess the file under s. 5 of the Refugee Act 1996; nothing turns on that section of the analysis in the within proceedings. He then gave separate consideration to the rights of the second named applicant and his children under Article 8 of the European Convention on Human Rights, and the constitutional rights of the Irish-born children.

10. The officer's recommendation was affirmed by a Higher Executive Officer on the same day and, on the following day, by an Associate Principal Officer (APO) of the Repatriation Unit. This was affirmed by the Minister on the same date.

**The Applicants' Submissions**

11. The applicants contend that the Minister erred as follows:-

- a. Failure to properly weigh and consider the family rights of the applicants under the Constitution and the Convention.
- b. Failure to provide a "substantial reason" associated with the common good for the deportation; and
- c. Error of fact as to the role played by the second named applicant in his children's lives;
- d. Failure to consider that residency has been granted to thousands of parents of Irish citizen children under the IBC/05 Scheme.

12. Complaint (a) is the primary submission and constitutes the essence of the applicants' claim; (b), (c) and (d) are subsidiary complaints.

**(a) Treatment of constitutional and Convention rights**

13. It is contended that the Minister failed to have adequate regard to the individual circumstances of his Irish citizen children, their relationship with their father and/or the impact that his proposed deportation would have upon them. It is argued that the deportation of their father would constitute a very high level of interference with the Irish citizen children's family rights, given that it would be unreasonable to expect them to move to Georgia in the light of the political situation and instability in that State, and that the proposed deportation would therefore result in an absolute separation of the children from their father. It is argued that the Minister was, therefore, obliged to expressly consider the constitutional and Convention rights of the children. Reliance is placed in particular on *O.E. and Anor. v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 68, and *Oguekwe & Ors v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25.

**(b) "Substantial Reason"**

14. In *Oguekwe* [2008] IESC 25, Denham J. in the Supreme Court held that "[t]here should be a substantial reason given for making an order of deportation of a parent of an Irish born child." The applicants submit that no "substantial reason" was given in the present case. Reliance is placed on *Amadasun v. The Minister for Justice, Equality and Law Reform* [2004] IEHC 378, where Peart J. held that it is insufficient, when giving reasons for the deportation of the parent of an Irish born child, to refer to "the general or formulaic reference to the upholding of the integrity of the immigration system".

**(c) "Active Role"**

15. The applicants complain that the analysing officer concluded that "there is no evidence to show that [the second named applicant] has an active role in both children's lives"; it is said that this conclusion is unreasonable in the sense that it is contrary to the evidence that was submitted to the Minister which, according to the applicants, demonstrates that he does play an active role in the children's lives.

**(d) The IBC/05 Scheme**

16. It is submitted that the Minister has provided no reason why, in the light of the IBC/05 Scheme, it is proportionate to deport the second named applicant. In this regard, reliance is placed in particular on the decision of the European Court of Human Rights in *Boultif v. Switzerland* (2001) 33 EHRR 1179 and *Üner v. The Netherlands* (App No. 46410/99, judgment of 18th October, 2006 [GC]).

**The Respondent's Submissions**

17. The respondent contends that the Minister and his agents acted reasonably and rationally, in accordance with fair procedures and within jurisdiction.

**(a) Treatment of constitutional and Convention Rights**

18. It is argued that the Minister's obligation to consider constitutional and Convention rights may be sufficiently fulfilled by having regard to the factual matrix of the case, without having express regard to the relevant Articles of the Constitution or of the Convention. Reliance is placed on *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] I.L.R.M. 593 and *O.O. & Ors v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 307.

**(b) "Substantial Reason"**

19. It is argued that the Minister did provide a "substantial" reason for the deportation of the second named applicant, following due consideration of the factors relating to the rights of the State, the second named applicant, and his Irish citizen children. It is pointed out that the second named applicant has acted in a manner that seems to frustrate the Minister's power to enforce the extant deportation order, by delaying until "the eleventh hour" before seeking to have the order revoked, by evading deportation, and by working illegally throughout the period of his evasion. Reliance is again placed on the analysis carried out by this Court in *O.O. & Ors v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 307 with respect to the requirements of the common good, and it is argued that *Amadasun* can be distinguished – as it was in *G.O. & Ors v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 190 – on the basis that it was a leave application.

**(c) "Active Role"**

20. It is submitted that the Minister properly considered the evidence that was before him, and it is argued that the decision must be read in the round. It is noted that the conclusion as to the role played in his daughters' lives must be viewed in the light of the preceding statement: "[h]aving considered all the above matters". It is pointed out that the conclusion was followed by a reference to the fact that the second named applicant does not reside with his daughters, and that he was not in the full-time care and company of his daughters, and that he only became or sought to become their guardian after the Minister sought to enforce the deportation order against him. It is further contended that the Minister was acting rationally, reasonably and within jurisdiction when taking the view that the second named applicant's role was not an "active" one by comparison to a father who lives with his children and their mother, and plays a fathering role on a day-to-day basis.

**(d) The IBC/05 Scheme**

21. The respondent contends that the IBC/05 Scheme was administrative in nature, and ended on 31st March, 2005. It is submitted that there was no legal requirement for the Minister to have had regard to that Scheme, or to the fact that a number of the parents of Irish-born children were granted leave to remain in the State on foot of the Scheme, when considering the application for revocation herein.

**The Court's Assessment**

22. At the outset, I would stress, as I did in *O.O. & Ors v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 307, that the Court's assessment of the arguments in this case is informed by the fundamental principle that the rights of Irish citizen children

must be balanced against the right of the State to maintain the integrity of the State's immigration laws (see, among others, *Osheku v. Ireland* [1986] I.R. 733; *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593; *Laurentiu v. The Minister for Justice, Equality and Law Reform* [1999] 4 I.R. 26; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1).

#### **(a) Treatment of constitutional and Convention rights**

23. There is no question but that the second named applicant's daughters, as Irish citizens, enjoy a number of personal rights under the Constitution, and the right to respect for their private and family life under Article 8 of the European Convention on Human Rights. I accept the applicants' submissions that the obligations that were set out by the Supreme Court in *Oguekwe* [2008] IESC 25 with respect to the consideration of those rights apply in the present case, which – like those cases – involves the deportation of the parent of an Irish citizen child. I do not, however, accept the applicants' submission that the analysis carried out by the Minister did not fulfil the obligations set out in *Oguekwe*; on the contrary, I am of the view that account was taken of each and every representation made to the Minister. Detailed and comprehensive analysis of the evidence that was before the Minister was carried out and the analysing officer conducted a thorough and fair balancing of the applicants' family rights with the rights of the State and the interests of the common good.

24. The departmental analysis, dated 8th October, 2008, runs to seven pages in length and its contents merit citation in the context of the applicants' complaints. The officer noted in the introductory section that the second named applicant is the father of two Irish citizen children whose mothers are also Irish citizens, that the children's mothers stated that they would like the ongoing contact with the applicant to continue, and that he has been made joint-guardian of his younger daughter, R.

25. After the analysis of the file with respect to *refoulement*, the officer carried out a detailed analysis of the competing interests that arise under Article 8 of the Convention. He accepted that the proposed deportation may engage the second named applicant's right to respect for his private and family life under Article 8. It is accepted that the deportation may constitute an interference with his right to respect for private life, but it is found that such interference would not have consequences of such gravity as potentially to engage the operation of Article 8. It is further accepted that the deportation may interfere with his right to respect for *family life* with his two Irish citizen children. The officer noted, however, that the deportation would be in accordance with law; it would pursue the legitimate aim of the State to maintain control of its own borders and to operate a regulated system for control, processing and monitoring of non-national persons in the State; and it would be necessary in a democratic society in pursuit of the said legitimate aim. He does not leave his analysis there, however, but instead turns to assess the "Proportionality" of the deportation under Article 8.

26. The officer then went on to assess the "*Constitutional rights of the Irish Born Children*". He noted that the children have rights under Article 40 of the Constitution, to reside in the State, to be reared and educated with due regard to their welfare, and to the care, society and company of their parents. He noted that consideration has been given to the children's rights in the analysis carried out with respect to Article 8, and that their Article 40 rights are not absolute but, rather, must be balanced against the rights of the State. He observed that it does not flow from the children's constitutional rights that their parents or siblings can reside in Ireland; rather, the Minister must assess whether the common good requires their deportation. The officer reiterated the conclusion reached following a balancing of the competing interests under Article 8, with respect to the common good.

27. An Associate Principal Officer (APO) made a handwritten note observing that although "there are family issues here", the second named applicant had "flouted the asylum process by evading". The APO therefore recommended that the Minister should affirm the deportation order to preserve the integrity of the asylum process.

28. In the light of the foregoing, it is, in my view, beyond doubt that adequate consideration was given to the constitutional and Convention rights of the applicants.

#### **(b) "Substantial Reason"**

29. When assessing the "*Proportionality*" of the proposed deportation under Article 8, the analysing officer cited the rights of the State to control the entry, presence and exit of foreign nationals, the integrity of the immigration system, and the common good. He then set out in detail the nature of relationship between the second named applicant with each of his Irish citizen children, noting in each instance that he does not reside with his daughters, that the children do not enjoy the full time care and company of their father, and that he only recently became the legal guardian of R., and only recently sought to become L.'s guardian. In each instance, he observed that if the children's mothers remained in Ireland, the deportation would not have the same impact as it would if the child was older and had been living with her mother and father as a family. Thereafter, he reiterated what he has already said in respect of the rights of the State, adding that "[i]t is also in the interest of the common good to uphold the integrity of the asylum and immigration procedures in the State."

30. In his "*Conclusion*" on Article 8, the officer noted as follows:-

"Having considered all of the above factors relating to the position of the family and in particular [L. and R.], who are Irish citizen children, there is no evidence to show that [the second named applicant] has had an active role in both children's lives."

31. The officer then summarised what he has already noted, i.e. that the second named applicant had only become a legal guardian to R. the previous month, albeit that she was nearly two years of age, and had only applied to become guardian of L. a fortnight earlier, although she was nearly four years of age. He also noted that there was no evidence of any formal custody agreement. He then pointed out that the second named applicant had evaded deportation in "flagrant disrespect of the deportation order against him", and that he had been illegally working in the State. Finally, he noted that he had weighed and considered all factors relating to the position of the family as well as factors relating to the rights of the State, and reached the conclusion that there was "no less restrictive process" available that would achieve "the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State". He expressly stated that the foregoing was "a substantial reason associated with the common good" in favour of the proposed deportation.

32. I am satisfied that the officer provided a "substantial reason" for the deportation of the second named applicant in the terms set out in *Oguekwe* [2008] IESC 25 and *Amadasun* [2004] IEHC 378. I do not consider that the reason given could be described as a formulaic or generalised sentence; rather, it was the result of a clear and considered step-by-step analysis of the various factors that must be weighed in the balance, a thorough discussion of each factor individually (including the factors relating to the rights of the State), and a balancing of those factors against one another. It is important to recall in this regard that it is for the Minister to determine where the balance lies; the role of the Court is to assess whether the balancing exercise was carried out in accordance *inter alia* with natural and constitutional justice, and I am of the view that it was.

**(c) "Active Role"**

33. It is insufficient for the applicants to select one sentence and rely upon that sentence in isolation from the rest of the decision as the basis for their contention that the Minister failed to give adequate consideration to the family rights of the second named applicant and his children. As is now well established, decisions must be read as a whole and must not be parsed or analysed word for word or sentence by sentence in order to discern some possible infelicity in the choice of words or phrases used (see *G.T. v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 287).

34. The Minister's determination that there is no evidence that the second named applicant plays an active role in his children's lives must be read in the light of the analysis that went before the determination and the observations that followed it, which are set out above. In my view, the Minister's officer correctly identified the nature of the second named applicant's relationship with his daughters throughout the decision, having taken account of all the representations made on behalf of the applicants on the subject. It is immaterial whether or not this Court would employ the same formulation of words to characterise that relationship; what is relevant is that the impugned determination does not detract from or prove fatal to the reasonableness or rationality of the decision when viewed in the round.

**(d) The IBC/05 Scheme**

35. I see no merit whatsoever in the applicants' submissions with respect to the IBC/05 Scheme. As the respondent has submitted that Scheme did not apply to the second named applicant. It does not follow from the fact that the Minister decided to grant rights to a certain group of people under an administrative scheme that he was acting improperly with respect to all persons who fell outside of the scheme, or that there was any legal requirement for the Minister to take account of the terms of the Scheme when assessing the rights of those persons falling outside its parameters.

**Conclusion**

36. In the light of the foregoing, I am satisfied that the Minister did not err when refusing to revoke the deportation order that was made in respect of the second named applicant; rather, I am convinced that the Minister acted rationally and reasonably, in accordance with natural and constitutional justice. Accordingly, I must refuse the relief sought.