Neutral Citation [2016] IEHC 474

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 492 JR]

BETWEEN

P.S.M.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The applicant and his wife, who are both South African, married in that country in 1998. They came to Ireland in 1999.

2. The applicant's wife has a daughter from a previous relationship, born in 1991.

3. The applicant and his wife had two children in the State, born in 2000 and 2005. Both of these children are Irish citizens, as is the applicant's step-daughter.

4. The applicant applied for and was refused refugee status. He appealed to the Refugee Appeals Tribunal, which rejected the appeal in August 2000 as being manifestly unfounded.

5. In September, 2001 the applicant was given leave to remain in the State on the basis of being the father of an Irish-born citizen child.

6. As a result of an incident that took place in 2006, the applicant was charged with an offence in relation to the possession and sale of cannabis for sale and supply.

7. He was refused a certificate of naturalisation in 2007 on the grounds of not having the required period of residence.

8. A second application for naturalisation was refused in 2010, without any reasons being given.

9. In March, 2010 the applicant was convicted following a trial by jury and was sentenced to seven years imprisonment.

10. In 2012 he made an application for a certificate that a miscarriage of justice had occurred, although at no stage had he appealed the original conviction to the Court of Criminal Appeal.

11. On 1st February, 2013 the applicant's permission to be in the State expired (while he was in custody) and he has been illegally in the State ever since.

12. The applicant was permitted to participate in a community release scheme in 2013.

13. On 29th July, 2014 the Minister issued a proposal to deport the applicant.

14. The applicant made representations as to why he should not be deported dated 31st July, 2014 and 10th April, 2015.

15. On 1st December, 2014 the applicant was granted enhanced remission by the Irish Prison Service with the approval of the Minister, in respect of the balance of his sentence.

16. An examination of file was prepared dated 26th June, 2015 recommending deportation. A deportation order was duly made on 5th August, 2015.

17. The applicant's wife remains in the State and has permission to do so. A naturalisation application made by her is pending.

18. The present application for relief by way of judicial review quashing the deportation order was instituted on 27th August, 2015, when leave was granted by Faherty J. to bring the proceedings.

Procedural questions

19. In the statement of opposition, Mr. Cormac Ó Dúlacháin S.C. (with Mr. Dermot Manning B.L.) for the respondent pleaded that the application was out of time by reference to a fourteen day time limit. The time limit had been changed to 28 days prior to the initiation of the proceedings. The application is not out of time.

20. At the hearing, Mr. Ó Dúlacháin also confirmed that an undertaking that was given not to deport the applicant would be continued up to the determination of the judicial review proceedings by the High Court.

21. An issue also arose to the fact that the applicant's wife, children and step-daughter are not parties to the proceedings. In those circumstances, Mr. Ó Dúlacháin submits that the applicant can only assert his own right to the society of other family members, but not the rights of those family members as such. Though that submission appears to me to be well-founded, I am not sure that in the circumstances of this case anything decisive turns on the distinction.

22. Finally a further issue arose during the hearing as to whether the family was still intact, and if so why two different addresses were being used within a relatively short time by the two different spouses. I gave the applicant liberty to file a further affidavit clarifying this matter, at which point it emerged for the first time, and contrary to the position initially put forward on behalf of the applicant, that the spouses were in fact living at separate addresses.

Is the decision disproportionate or does it fail to correctly assess proportionality?
23. Mr. Colm O'Dwyer S.C. (with Anthony Hanrahan B.L.) in a very able submission contends that the proportionality analysis in the Minister's decision is defective, both as to process and as to outcome.

24. It is clear that persons who are not settled migrants, and whose status in the country is precarious or unlawful, can assert minimal, if any, family rights as regards the period of such precarious residence (whether under art. 8 of the ECHR or Article 41 of the Constitution): see *P.O. v. Minister for Justice, Equality and Law Reform* [2015] IESC 64 (Unreported, Supreme Court, 16th July, 2015) and *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 192 (Unreported, Court of Appeal, 12th July, 2015) *per* Finlay Geoghegan J. para. 41 and *Costello-Roberts v. United Kingdom* (1993) 19 E.H.R.R. 112 (Application no. 13134/87, 25th March, 1993), except perhaps in exceptional circumstances.

25. On the other hand, persons who are settled migrants may in certain circumstances have private or family rights which may be engaged by a deportation decision. In that regard Mr. O'Dwyer relies heavily on *A.A. v. United Kingdom* [2011] ECHR 1345 (Application no. 8000/08, European Court of Human Rights, 20th September, 2011) where it was held that the deportation of the applicant offender would contravene art. 8. However, that was in the context of special circumstances, including significant delay on the part of the United Kingdom authorites, who failed to deport him for a 3 ½ year period (see para. 66).

26. Looking at an assessment of factors such as those set out in *Üner v. The Netherlands* (2007) 45 4 E.H.R.R. 14 (Application no. 46410/99, 18th October, 2006) at paras. 57 and 58, it is true that a number of the factors referred to by the European Court such as the length of the applicant's stay in the country from which he or she is to be expelled, militate against expulsion. However, other factors are considerably less favourable to the applicant, such as the nature and seriousness of the offence committed by him, and indeed the time which has elapsed since the offence was committed. By contrast with *A.A.,* there is no lengthy period of indolence on the part of the State in this case. The State is acting promptly during the applicant's incarceration, and is not standing idly by while he continues to build up family and private life. Furthermore, the ages of the children are another factor to be considered. In this case, two of the three children in the family as a whole are beyond the stage of being, in principle, dependent on the applicant.

27. As regards the effect of the deportation on the family, the material submitted by the applicant to the Minister does not clearly set out why the family could not move to South Africa as a unit. The letters from the applicant's wife and children are surprisingly skeletal and lacking in detail given what are said to be the serious consequences for the family of the deportation.

28. It has been suggested in case law that state action which has the effect of separating spouses must be backed by a "*compelling justification*" (see *X.A. v Minister for Justice, Equality and Law Reform* [2011] IEHC 397 (Unreported, High Court, Hogan J., 25th October 2011), as cited in *Ford v. Minister for Justice and Equality* [2015] IEHC 720 (Unreported, High Court, Eagar J., 19th November 2015) and also referred to in *P.S. and B.E. v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 92 (Unreported, High Court, Hogan J., 23rd March, 2011) followed by Mac Eochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] 2 I.L.R.M. 302 at para.40. In this context however, much depends on the circumstances. It is not appropriate or possible to generalise by laying down a broad proposition that "*compelling justification*" is always necessary. For example, in the case of a person who is already living under the shadow of deportation prior to marriage, the mere fact of getting married could not rationally have the effect of automatically conferring on such a person an immunity from deportation absent compelling justification. No immigration control system could survive such a doctrine. Nor could compelling justification seriously be required to separate spouses who married for the primary purpose of conferring an immigration advantage on one of them.

29. Assuming however in ease of the applicant that the deportation of the applicant in the present circumstances would require compelling justification, it must be recognised that the assessment of whether such justification exists is primarily, and certainly in the first instance, a matter for the Minister. The court could only intervene if that proportionality assessment was clearly irrational, discriminatory, or unlawful in some other way.

30. In the present case the Minister's analysis identifies what Mr. Ó Dúlacháin calls a "*composite reason*" for deportation, which reflects;

(a) the seriousness of the offence;

(b) the failure to acknowledge responsibility for the offence;

(c) the possibility that the economic difficulties caused by the conviction would create a potential for future criminality;

(d) the prospect that the conviction will create employment difficulties rendering it more likely that the applicant will be a burden on the State,

(e) that this matter, as Mr. Ó Dúlacháin puts it, is "*not solely about this applicant*" and that offending "*has consequences*"; and

(f) the fact that the offending was a breach of an express condition of the applicant's permission to be in the State.

31. Is this analysis manifestly unreasonable? I think not. Of course, it is a shame that the applicant will now be separated from his family, but he should have thought about their rights and interests prior to his offending behaviour.

32. In this regard, the applicant relies on art. 27(2) of Directive 2004/38/EC of the European Council and of the Parliament on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (free movement directive), reg. 20(1)(b) of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015); *P.R. v. Minister for Justice and Equality* [2015] IEHC 201 (Unreported, High Court, 24th March, 2015), *per* McDermott J. at para. 45; Case C-30/77, *Regina v. Bouchereau* [1977] E.C.R. 1999 (27th October, 1977) at paras. 28 and 29. However, the free movement directive deals with consequences of offending in a limited and special context, namely for the purpose of restricting free movement rights. The principles in that context cannot be generalised to restrain the deportation of persons such as this applicant in a non-EU law context.

33. Mr. O'Dwyer also submits that the pertinent rights are not identified, but the analysis specifically refers to Article 41 of the Constitution.

34. Mr. O'Dwyer also complains about a typographical error where incorrect names for the children are used. This does not seem to me to be a fundamental error given that the correct names are used in the rest of the analysis.

35. Mr. O'Dwyer submits that the children should not be punished for the "sins of the father" as it was in effect suggested by Hogan J. in *E.A. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 371 (Unreported, High Court, 7th September, 2012); and *X.A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 397 (Unreported, High Court, Hogan J., 25th October, 2011). He further relies on the reference by Hogan J. in *Oboh v. Minister for Justice, Equality and Law Reform* [2011] IEHC 102 (Unreported, High Court, 2nd March, 2011) at para. 18 to the proposition that "*children must where possible be shielded from the consequences of behaviour of their parent or parents*".

36. While it is sometimes said that in particular contexts, children should not be visited with "*the consequences of their parent's wrongdoing*" *per* Hogan J. in *Chigaru v. Minister for Justice and Equality* [2015] IECA 167 (Unreported, Court of Appeal, 27th July, 2015), it does not follow that there must always be such an immunity from consequences.

37. I read the references that have been made from time to time in caselaw to "sins of the father" and to shielding the children from the consequences of parental behaviour more as decorative rhetorical flourishes rather than setting out a legal rule. Clearly there is no general legal rule where children must be shielded from the consequences of behaviour of their parents. For example, there is no way to shield children from the consequences of financial irresponsibility by parents which might result in reduced family income, dissipated family assets, or loss of the family home. There is no way of shielding children from the consequences of parental behaviour which results in the imprisonment of one of the parents, or their extradition or rendition to another jurisdiction. Nor is there any requirement or desirability that children be shielded from the consequences of good decisions by parents, which might redound to the benefit of the child and put him or her at a "discriminatory" advantage compared to a peer. Indeed Article 43.1.2° of the Constitution protects the right to bequeath and inherit property, which is a principal form of ensuring that children are entitled to take the benefit of the consequences of prudent behaviour by their parents. Only a dystopian, totalitarian society would attempt to shield children from the consequences of the behaviour of their parents to the extent of precluding them from taking the benefit of such behaviour.

38. Why then should it be suggested that as a matter of law, in the context of deportation and deportation alone, children must be shielded from the consequences of parental behaviour? Such a spurious and bespoke legal doctrine would be the logical equivalent of the "*restricted railroad ticket, good for this day and train only*" referred to in *Smyth v. Allwright*, 321, U.S. 649, 669 (1944) (Roberts J. (dissenting)) and cited by Murray J. (dissenting) in *The People (D.P.P.) v. J.C.* [2015] IESC 31 (Unreported, Supreme Court, 15th April, 2015) at para. 1.

39. I do not read the case law as laying down any general rule of law to this effect. Any such approach would in my view be clearly unsound as a matter of legal principle. Such a proposed rule of law as submitted on behalf of the applicant would simply be a jurisprudential Indian rope trick, thrown in the air without any visible means of support. Sentiments of sympathy for affected children are all well and good but such sentiments do not warrant a transfer to the judiciary of the function of making executive decisions.

40. No error in the process of assessment of proportionality has been demonstrated. How the balance is to be struck is primarily a matter for the Minister. The decision of the Minister in that regard does not appear to me to be manifestly irrational or otherwise unlawful so as to permit me to interfere with it. On the contrary, it is manifestly reasonable. Serious offending requires serious consequences.

41. Even the *X.A.* case, which is the high water mark of the applicant's submission, acknowledges that immigration control factors can outweigh family rights (at para. 21).

42. It is interesting to note that in the recent decision of *Secretary of State for the Home Department v. Suckoo* [2016] EWCA Civ 39 at para. 39, Simon L.J. commented in the context of English legislation on this issue that "*[t]he public interest in deportation of foreign criminals and article. 8 rights are not held in a suspenseful balance. As this Court has repeatedly reiterated, albeit using different language, the scales are weighed in favour of deportation unless 'there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation'* per *Lord Dyson M.R. in M.F.* (Nigeria) at 46; *there must be 'something very compelling' to outweigh that public interest,* per *Richards L.J. in* M.A. (Somalia) v. Secretary of State for the Home Department *[2015] EWCA Civ 48 at para. 17".*

43. Thus, it is not the case in the U.K. that deportation of a foreign criminal which separates him from his family is unlawful in the absence of "compelling justification". Rather, it is the case that compelling justification is required before it can be shown that deportation of a foreign criminal, even where it interferes with family rights, is unlawful. Admittedly this is in the context of specific English legislation but it is legislation that must have been considered by the U.K. Parliament to have been compatible with art. 8 of the ECHR. The fact that U.K. legislation implements a presumption in favour of deportation in such cases (s. 32(5) of the Borders Act 2007 and rule 398 of the Immigration Rules) means the U.K. legal position is not an exact analogy but is instructive nonetheless. If the U.K. position is consistent with the ECHR, as I consider it is, then the Minister here must be entitled under the ECHR to adopt an approach that yields a similar outcome (*e.g.*, by considering a serious conviction as a compelling reason for deportation) even without an express legislative framework compelling her to do so.

Was the decision to afford enhanced remission to the applicant inconsistent with the contention that deportation is necessary to prevent crime?

44. One of the odd features of this case is that the Department of Justice and Equality, through the Irish Prison Service, was affording the applicant enhanced remission in recognition of a reduced risk of re-offending and in recognition of his efforts at rehabilitation, in circumstances where:-

> (a) the Department does not appear to have made any efforts to establish whether the applicant, in fact, accepted his guilt; or to check whether he had appealed his conviction or lodged an application for a certificate relating to a miscarriage of justice; and
>
> (b) the Department failed to have regard to the fact that at the same time as it was giving the applicant enhanced remission it was also proposing his deportation.

45. Mr. Ó Dúlacháin's submission that the Department had no way of knowing that one and the same applicant was involved in these two processes, is completely unconvincing, and indeed unacceptable in any coherent and joined-up system of public administration. It

is not too much to ask that before a prisoner is afforded a rehabilitative benefit some step is taken to ascertain formally whether he or she accepts responsibility for the offence. Why not simply ask them? Nor is it too much to ask that before a non-national prisoner is released, some inquiry is made within the same Department as to what the fate of that prisoner is to be in terms of deportation or otherwise and that the release is co-ordinated with any such proposal. A system which fails to carry out these sort of basic checks is in danger of being viewed as flawed, if not negligent or even dysfunctional.

46. There is therefore quite some validity to Mr. O'Dwyer's complaint that there is a tension between the Department's decision to approve enhanced remission for the applicant on the basis of a reduced risk of reoffending, as against its decision to deport the applicant on grounds including possible future criminality.

47. Mr. O'Dwyer relies on *Ryan v. Governor of Midlands Prison* [2014] IEHC 657 (Unreported, High Court, Barrett J., 2nd July, 2014) at para. 7 to demonstrate that the Minister regarded enhanced remission at the time as a concession to be used "*sparingly and in the most exceptional cases*", albeit that a wider view is taken now.

48. However, I am not convinced that this tension has spilled over into illegality warranting a quashing of the decision. The deportation decision does not appear to be based on a high risk of reoffending, and indeed the applicant's submission (that a low risk has been accepted by the Department) is expressly acknowledged. Rather the decision is based on a basket of factors, including the historical seriousness of the offence, the failure to acknowledge guilt, the employment difficulties created by the conviction, and to an extent, the public policy element. It is legitimate for the State to take a hard line in respect of deportation of offenders, at least those convicted on indictment. Deportation of such offenders sends a strong message in the public interest *pour encourager les autres*.

Is the decision invalid by reason of reliance on the fact that the applicant is maintaining his innocence?
49. Mr. O'Dwyer complains that the Minister invalidly had regard to the fact that the applicant is maintaining his innocence and pursuing a miscarriage of justice application. He complains that the decision in this regard is a "*second punishment*".

50. The deportation decision is not a second punishment. It is a civil consequence of the applicant's offending behaviour.

51. Criminal conduct may have severe civil consequences, including liability in damages to any injured party, disqualifications of one kind or another whether related to particular employments, activities, licences or otherwise, liability for costs of the investigation, prosecution and potentially even detention of the defendant, confiscation of the proceeds of crime, unworthiness to succeed, reporting and registration requirements, injunctive relief limiting future conduct, attachment of assets and income, freezing orders preventing dealing with property, adverse publicising and notice being given of the conviction whether online or otherwise and deportation from the State. None of these matters constitute punishment. They are all simply the civil consequences of the defendant's wrongful act. In many respects it could be said that defendants in general face far too few such consequences, but a laxity in imposing such consequences does not create any right that they will not be visited upon any particular applicant to the fullest extent, nor any right to criminal due process in what remains a civil or administrative context albeit one stemming from an unlawful act that constitutes an offence.

52. As a matter of generality, a person who accepts responsibility for their offending behaviour is more likely to rehabilitate themselves and less likely to reoffend than a person who denies responsibility for that behaviour. For that reason, it is permissible, rational and lawful for the Minister to have regard to the applicant's continued denial of guilt as a factor adverse to the applicant in the deportation context.

53. Mr. O'Dwyer relies on *R. v. Secretary of State for the Home Department ex parte Hepworth* [1997] EWHC Admin 324, in which Laws J. held that it was generally unlawful for the parole board to deny a recommendation for parole on the ground only that the prisoner continues to deny his guilt. However, at the same time, it was also recognised that in some cases, particularly in cases of serious persistent violent or sexual crime, continued denial of guilt will almost invariably mean a higher risk which would warrant refusal of parole. While one can readily appreciate the undesirability of being seen to oppress convicted persons simply because they wish to continue to raise issues about their convictions, I do not accept that there is any unlawfulness in taking denial of guilt into account, and therefore would not accept the approach in *Hepworth.* In principle, a failure to accept responsibility for offending behaviour is distinctly relevant to the questions of rehabilitation and future risk.

Order
54. For the foregoing reasons, I will order:-

(a) that the application be dismissed;

(b) that the respondent be released from her undertaking not to deport the applicant, with effect from the oral pronouncement of this judgment;

(c) that the matter be adjourned for a date to be fixed for any leave to appeal application, which must be accompanied by advance notice of the text of the proposed questions supported by written submissions.