Neutral Citation Number: [2010] IEHC 355

THE HIGH COURT

JUDICIAL REVIEW

2009 1174 JR

BETWEEN

WILLIAMS UGBO AND ANN BUCKLEY

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

DECISION OF MR. JUSTICE HANNA, delivered on the 27th day of July, 2010

1. By decision dated the 5th March, 2010, this Court refused to grant leave to the applicants to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister") to make a deportation order against the first named applicant. The applicants now seek a certificate of leave to appeal to the Supreme Court, pursuant to s. 5(3) of the Illegal Immigrants (Trafficking) Act 2000.

2. The point of law that the applicants wish this Court to certify is as follows:

> *"Was the High Court correct in finding that it was precluded from taking into account material which was not before the Minister when he was considering whether to issue a deportation order in respect of the first named applicant?*
>
> *If so, is judicial review an effective remedy within the meaning of Article 13 of the European Convention on Human Rights in circumstances where:*
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> > *(i) the Court is precluded from taking into account any facts or factors relating to the alleged violation of the Applicant's family or private rights which were not put before the Minister by the Applicants when application was made by the first Applicant for leave to remain temporarily in the State; and*
> >
> > *(ii) the instigation of such proceedings is not suspensory of the execution of a deportation order other than at the discretion of the Court?"*

3. The applicants argue that this point of law arises from paragraphs 30 and 33 of the decision of this Court. Those paragraphs indicate that leave was refused on the ground that the Minister failed to have regard to the applicants' rights under Article 8 of the European Convention on Human Rights (ECHR) because the Minister had before him no submissions or evidence in relation the difficulties that might be faced by the wife in Nigeria. The submissions made in relation to Article 8 at the leave hearing were grounded on additional facts set out in the wife's affidavit. In a postscript to its judgment, the Court noted that it could not take account of those additional facts because they were not before the Minister at the relevant time, and suggested that the additional facts could ground an application for revocation of the deportation order pursuant to s. 3(11) of the Immigration Act 1999.

4. It is of some significance that the applicants have since applied for revocation of the deportation order. The Court understands that additional information and updated country of origin information has been furnished to the Minister in support of that application, upon which no decision had yet been taken as of the date of the hearing of this application for the certificate of leave.

The Applicants' Submissions

5. Article 13 of the ECHR guarantees to those whose Convention rights and freedoms are violated the right to an "effective remedy" before a national authority. As the Court understands it, the applicants' argument is that judicial review proceedings do not constitute an "effective remedy" for the alleged violation of their Article 8 rights, because:-

- The court is concerned only with the legality of the Minister's decision and has no function in assessing the merits of the applicant's case;
- The court cannot take into account material which was not before the Minister;
- The court has no jurisdiction to alter the Minister's decision and can only quash the decision;
- The applicant does not have a fair and reasonable opportunity of refuting the facts; and
- Judicial review is not suspensory of the deportation order

6. The applicants rely *inter alia* on the judgment of Fennelly J. in *Meadows v. The Minister for Justice, Equality and Law Reform & Others* (Unreported, Supreme Court, 21st January, 2010) and the decisions of the European Court of Human Rights ("ECtHR") in

Vilvarajah v. The U.K. (1992) 14 E.H.R.R. 248 (in particular, the partly dissenting opinion of Judge Walsh); *Smith and Grady v. U.K.* (1999) 29 E.H.R.R. 493; *C.G. & Others v. Bulgaria* (2008) 47 E.H.R.R. 51; and *Abdolkhani & Karimnia v. Turkey* (Application No. 30471/08, judgment of 22nd September, 2009). The applicants also rely on *Izhevbekhai (P.E.I.) & Others v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 23 (30th January, 2008), where Feeney J. had regard to information which was not before the Minister but found it to be irrelevant.

7. As to the interpretation of s. 5(3) of the Act of 2000, the applicants rely in particular on the principles set out in *Glancré Teoranta v. Mayo County Council* [2006] I.E.H.C. 250 and *Raiu v. Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 26th February, 2003).

The Respondents' Submissions
8. The respondents note that the "effective remedy" argument was not raised at the leave stage and though it was raised in the applicants' original statement of grounds, it was not included in their draft amended statement of grounds which was prepared after the delivery of the Supreme Court's judgment in *Meadows*. As a result, the Court did not rule on the "effective remedy" issue and it is therefore inappropriate to grant a certificate on a point of law relating to that issue as the appeal would be the first occasion on which the issue was raised. It would be more appropriate to wait until the issue is dealt with properly at first instance; the question of a certificate might then arise and could be considered at that point.

9. The respondents further noted that in *Izhevbekhai v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, Feeney J., 13th March, 2008), Feeney J. refused to grant a certificate on effectively the same issue. It is argued that nothing has changed very substantially since then and that Fennelly J. in *Meadows* affirmed that, properly understood, the *O'Keeffe* test in judicial review proceedings provides an effective remedy sufficient for the purposes of Article 13.

DECISION
10. The principles applicable to the grant or refusal of a certificate under s. 5(3) (a) are well established and do not require to be set out at any length here. The foremost question for the Court is whether is whether or not a point of law of exceptional public importance arises out of its decision of the 5th March, 2010.

11. The principles distilled by MacMenamin J. in *Glancré* and recently applied in the asylum and immigration context by Cooke J. in *Radzuik (I.R.) v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 510 (26th November, 2009) are clear. In order for a certificate to be warranted under s. 5(3) (a), the law must be shown to be in such a state of uncertainty such that it is in the common good that the law be clarified in order to enable the courts to administer that law not only in the instant, but in future cases. In the judgment of the Court, the applicants have not satisfied this requirement. The authorities relied upon by the applicants do not demonstrate any dispute as to whether the judicial review is an effective remedy for a violation of Article 8, within the meaning of Article 13 of the ECHR. Rather, it seems to the Court that the state of the law is perfectly clear from the judgment of Fennelly J. in *Meadows*.

12. In his majority judgment, Fennelly J. considered a series of ECtHR decisions on the sufficiency of the English standard of judicial review for the purposes of Article 13 of the ECHR. He noted that in *Soering v. U.K.* (1989) 11 E.H.R.R. 439, *Vilvarajah v. U.K.* (1992) 14 E.H.R.R. 248 and *Bensaid v. U.K.* (2001) 33 E.H.R.R. 10, the ECtHR was persuaded to accept the effectiveness of judicial review in English law because the English courts applied "anxious scrutiny" to decisions where an applicant's life or liberty may be at risk contrary to Article 3 of the ECHR. Thus, the ECtHR had accepted the adequacy of the traditional judicial review standard, subject to its modern development in the direction of "anxious scrutiny." This was not invariably the case, Fennelly J. noted, and in *Smith and Grady v. UK* (2000) 29 E.H.R.R. 493, the ECtHR found the traditional "irrationality" test to be wanting because the threshold was placed so high that it effectively excluded consideration by the domestic courts of the question of whether the interference with the applicants' Article 8 rights answered a pressing social need or was proportionate to the national security and public order aims pursued.

13. At paragraphs 64-72 of his judgment, Fennelly J. went on to assess the sufficiency of the standard of judicial review applied in Ireland. He noted that the test set out in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 is not an inflexible test and that while, on the one hand, the courts are traditionally slow to interfere with decisions regarding technical or administrative matters, on the other hand they are naturally more cautious, deliberate and hesitant when considering a decision which may trench upon the rights or interests of affected persons. Where the decision may affect rights or interests, Fennelly J. noted, the courts will have regard to the context of the decision and will balance the need to make the particular decision against the effects of the decision on the rights of affected persons.

14. Fennelly J. noted that the respondents had accepted that where fundamental rights are at stake, the courts may subject administrative decisions to particularly careful and thorough review, within the parameters of the traditional standard of judicial review as set out *O'Keeffe v An Bord Pleanála* [1993] I.R. 39. In other words, the courts– when applying the *O'Keeffe* test – may have regard to the subject matter and consequences of the decision under review and may subject the materials which were before the decision-maker to a particularly careful and thorough review. Fennelly J. also noted the applicant's submission that the principle of proportionality and in particular the notion of the least intrusive interference with constitutional rights can operate within the confines of the *O'Keeffe* and *Keegan* test. In those circumstances he concluded at paragraph 67:-

> "67. […] I do not consider it necessary to change the [*Keegan* or *O'Keeffe*] test. Properly understood, it is capable of according an appropriate level of protection of fundamental rights. The test as enunciated by Henchy J and as explained by Finlay C.J. in *O'Keeffe* lays down a correct rule for the relationship between the courts and administrative bodies. Properly interpreted and applied, it is sufficiently flexible to provide an appropriate level of judicial review of all types of decision. The proposition of the respondents, quoted at paragraph 65, is a restatement, without using the word, of the principle of proportionality. The courts have always examined decisions in context against their surrounding circumstances.
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> 68. Where decisions encroach upon fundamental rights guaranteed by the Constitution, it is the duty of the decision-maker to take account of and to give due consideration to those rights. There is nothing new about this. […]"

15. At paragraph 70, he reiterated that the *Keegan* and *O'Keeffe* test is "*sufficiently responsive to the needs of any particular case*."

16. Thus, as the Court understands it, the judgment of Fennelly J. leaves no doubt that a flexible application of the traditional *O'Keeffe* and *Keegan* test (incorporating the principle of proportionality and the notion of least intrusive interference with constitutional rights) renders judicial review an effective remedy for the purposes of Article 13 of the ECHR.

17. The applicants have sought to rely on a series of ECtHR decisions where a breach of Article 13 was identified, and to apply the

principles established by the ECtHR in those cases to the present case. However, a careful consideration of those decisions reveals no meaningful comparison between the domestic remedies found to be in breach of Article 13 therein, and the system of judicial review operated in Ireland. For example, there are sizeable disparities between the judicial review procedure found wanting in *C.G. & Others v. Bulgaria* (2008) 47 E.H.R.R. 51 and the system of judicial review operated in this jurisdiction. In *C.G.*, the Bulgarian courts carried out a review of an expulsion order made in 2005 against the applicant (a Turkish national granted a permanent residence permit in 1992 on the basis of his marriage to a Bulgarian citizen). The applicant was informed that the expulsion order was made on national security grounds, but he was not informed of the facts grounding that decision. The authorities put before the reviewing court a document containing information whose source was unknown, and general conclusions based on facts not made known to the court. The courts upheld the expulsion decision on the basis of that document, without scrutinising the factual basis for the decision and without assessing whether it was justified under Article 8(2) of the ECHR. It was in those specific circumstances that the ECtHR found the domestic judicial review proceedings to be an ineffective remedy.

18. It is hardly necessary to note that the nature of the review available in the Irish courts in respect of the Minister's decision to make a deportation order is fundamentally different to that described in *C.G.* As was noted by Fennelly J. in *Meadows*, the Irish courts will subject the Minister's decision to careful analysis. The courts will scrutinise the adequacy of the reasons given for the Minister's decision, having regard to the factual matrix of the case, and will assess the legality and reasonableness (including the proportionality) of the decision, having regard to the applicant's constitutional and Convention rights. For those reasons, the *C.G.* decision cannot assist the applicants.

19. Even more marked differences are identifiable between the remedies criticised in *Abdolkhani & Karimnia v. Turkey* and those available in this jurisdiction. The applicants in that case were Iranian nationals recognised by the UNHCR as refugees in Iraq, who entered Turkey illegally. The Turkish authorities immediately deported them to Iraq, without their statements being taken by border officials and without a formal deportation decision being taken. The ECtHR held at § 111 that "*even if they had sought asylum when they entered Turkey, there are reasons to believe that their requests would not have been officially recorded.*" They immediately re-entered Turkey and were arrested and detained. They made oral and written submissions to the police and clearly indicated that they were refugees under the UNHCR's mandate. They requested a residence permit but the police did not process their request. They were not given access to a lawyer after they were arrested and charged, though they asked for a lawyer, and the director of a human rights association was refused access to them. They were tried and convicted for illegal entry into Turkey and they informed the magistrate that they risked being killed in Iran. The magistrate did not take statements from them regarding the risks which they would allegedly face, and merely noted that they would be deported. They were not notified either of the decision to deport them or of the reasons for the planned deportation.

20. Having regard to this sequence of events, the ECtHR found that the Turkish authorities had prevented the applicants from raising their allegations under Article 3 with the national authorities. The ECtHR further held:

> "116. What is more, the applicants could not apply to the administrative and judicial authorities for annulment of the decision to deport them to Iraq or Iran as they were never served with the deportation orders made in their respect. Nor were they notified of the reasons for their threatened removal from Turkey. In any case, judicial review in deportation cases in Turkey cannot be regarded as an effective remedy since an application for annulment of a deportation order does not have suspensive effect unless the administrative court specifically orders a stay of execution of that order (see paragraph 59 above).
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> 117. In the light of the above, the Court concludes that, in the circumstances of the case, the applicants were not afforded an effective and accessible remedy in relation to their complaints under Article 3 of the Convention as their allegation that their removal to Iran or Iraq would have consequences contrary to this provision was never examined by the national authorities. There has accordingly been a violation of Article 13 of the Convention."

21. It is self-evident that the domestic remedies found to be lacking in *Abdolkhan*i were of a wholly different quality to the remedies available to asylum seekers in this jurisdiction. Indeed, it seems to the Court that the differences are such that it is difficult to discern the rationale underpinning the applicants' reliance on that decision. Perhaps the most immediately striking of those differences is the fact that in *Abdolkhani* the Turkish authorities neglected or omitted to consider the applicants' allegations of violation of Article 3 at any time. In contrast, in the present case, the Minister fully considered the applicants' allegation that the deportation would violate their Article 8 rights and this Court subsequently reviewed the Minister's consideration of that allegation.

22. Quite apart from the obvious differences, it is important to note that in *Bensaid v. U.K.* (2001) 33 E.H.R.R. 10, the ECtHR held at § 53 that "*The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention.*" This, it seems to the Court, represents a further distinguishing factor between the present case and *Abdolkhani* which affects the applicability of the principles applied by the ECtHR in the latter to the present case. In *Abdolkhani*, the ECtHR found that substantial grounds had been shown for believing that the applicants would, if deported, face a real risk of being subjected to torture or ill treatment contrary to Article 3 of the ECHR. The ECtHR took account of "the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised" when assessing the arguments made in relation to Article 13, and it was in that context that the ECtHR found that a remedy with automatic suspensive effect would be required under Article 13. Without in any way seeking to undermine the importance of the right to respect for private and family life, it seems clear that the allegation made in the present case, i.e. that the deportation would violate Article 8 of the Convention, does not carry consequences of the same potentially irreversible nature as a violation of Article 3 in *Abdolkhani.* This seems to the Court to be among the most significant factors distinguishing the *Abdolkhani* case from the present.

23. It seems clear to the Court that the differences outlined above between the present case and the authorities relied upon by the applicants illustrate the danger in subtracting a sentence from a decision of the ECtHR out of context, and seeking to apply that sentence as a guiding principle to every remedy in every Contracting State for every violation of the Convention. In sum, the Court is satisfied that the authorities relied upon by the applicants do not demonstrate any uncertainty as to the sufficiency of the judicial review system operating in this jurisdiction as an effective remedy. The absence of any uncertainty on the matter is affirmed by the judgment of Fennelly J. in *Meadows*. As the Court understands that judgment, it clarifies that the *O'Keeffe* test, as applied in Ireland, is sufficiently similar to the "anxious scrutiny" standard applied in *Soering*, *Vilvarajah* and *Bensaid* and sufficiently different to the orthodox standard applied in *Smith and Grady* as to dispel any doubts as to its compatibility with Article 13. The Court therefore finds that the applicants have not demonstrated that the grant of a certificate is warranted.

24. A further consideration which fortifies the Court in its view is that in *Chahal v. United Kingdom* (1997) 23 E.H.R.R. 413, at § 145, the ECtHR found that in certain circumstances, the aggregate of remedies provided by national law may satisfy the requirements of Article 13. Judicial review is not the only remedy that is available to an applicant under Irish law for a violation of Article 8 of the ECHR in the Minister's decision to deport. An alternative remedy lies in s. 3(11) of the Immigration Act 1999, which allows for an

application for revocation of the extant deportation order to be made, supported by additional information bolstering, updating or altering their original representations in relation to their Article 8 rights. As noted above, the applicants have made a s. 3(11) application since the leave decision was delivered. It is of considerable relevance that if the decision that issues on that application is negative, the applicants will be at liberty to issue fresh judicial review proceedings.

25. Finally, the Court notes that to grant a certificate in these circumstances would be to permit to the applicants to make an entirely new case on "appeal", in respect of a ground on which leave was never sought at first instance. This would appear to circumvent the spirit and purpose of s. 5 of the Act of 2000 insofar as it would permit the applicants to sidestep the statutory obligation to issue proceedings within the 14-day statutory time-frame and to establish "substantial grounds" before the High Court. It would also mean that on "appeal", the Supreme Court would be faced with an issue that has neither been considered nor determined at first instance. It seems to the Court that this is a fact which militates against the grant of a certificate. As was suggested by the respondents, it would appear more appropriate for the issue to be argued and determined at first instance before a certificate is contemplated.

Conclusion

26. In the light of the foregoing and mindful of the principle noted in *Glancré* that the jurisdiction to grant a certificate should be exercised sparingly, the Court is not satisfied that the point of law identified by the applicants warrants certification under s. 5(3) of the Act of 2000, and the application is therefore refused.