Neutral Citation Number: [2010] IEHC 521

THE HIGH COURT

JUDICIAL REVIEW

2009 764 JR

D. O., T. O. AND D. O. (THREE MINORS SUING BY THEIR MOTHER AND NEXT FRIEND G. O.), G. O. AND S. O.

APPLICANTS

AND

MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

AND

THE ATTORNEY GENERAL AND THE HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Ryan delivered the 15th December 2010

1. This is an application for leave to bring judicial review proceedings to challenge the Minister's refusal to revoke a deportation order made in respect of the fifth applicant, who is the husband of the fourth applicant, the stepfather of the first applicant and the father of the second and third applicants. Mr. Michael McNamara B.L. appeared for the applicants. The respondent was put on notice of the leave application and was represented by Ms. Fiona O'Sullivan B.L.

Background.

2. The fifth applicant, a 32 year old national of Ghana, arrived in the State in October 2003. His application for asylum was rejected. In September, 2004, he made an application to the Minister for leave to remain in the State on humanitarian grounds. This was unsuccessful and, on the 19`h November, 2004, the Minister signed a deportation order in respect of him. In January, 2007 he married the fourth applicant, a national of Nigeria who has permission remain in the State under the IBC/05 scheme by virtue of her Irish citizen child (the first applicant herein) who was born in the State in April, 2003. The fourth applicant gave birth to the second applicant in February, 2007 and the third applicant in August, 2008 (the latter is an Irish citizen).

3. Subsequently, the fifth applicant's solicitor applied to the Minister to have the deportation order revoked pursuant to s. 3(1 1) of the Immigration Act 1999 on the basis of a significant change in circumstances. The representations made to the Minister included the following:

- The fifth applicant married the fourth applicant in January, 2007.
- The fourth applicant has the right to reside in the State by virtue of her parentage of the first applicant, an Irish citizen.
- The couple live together with the first applicant child and their two marital children, the second and third applicants, who were born in February, 2007 and July, 2008 respectively. The third applicant is an Irish citizen.
- The fifth applicant is actively involved in the rearing and upbringing of the third applicant, is the parent of the second applicant and is in loco parentis to the first applicant.
- The fifth applicant ought to be granted permission to remain so that he may continue with certainty and security of residency within the family home as husband to his wife and father to his children.
- The fifth applicant is anxious to engage in employment and relieve his wife of the heavy burden of working while trying to nurse an infant and raise two other children. He is very confident of obtaining employment and being in a position to support his family.

The application was supported by various documents, including a copy of the couple's marriage certificate, the second applicant's birth certificate and the third applicant's passport.

4. In a decision communicated by letter dated the 3rd July, 2009, the Minister declined to revoke the deportation order. A file analysis prepared by an official in the Minister's department sets out the reasons for the decision. The document summarises the background to the decision and the submissions made on the fifth applicant's behalf to the Minister. It then considers the fifth applicant's case in relation to Article 8 of the European Convention on Human Rights. It concludes that a decision to deport the fifth applicant would not engage his private rights. On the matter of the applicants' family rights, it is noted that the fifth applicant married the fourth applicant in 2007 and that they have had two children together, one of whom is an Irish citizen. It is also noted that the fifth applicant claims to be in loco parentis to the first applicant, also an Irish citizen. By way of conclusion, it is acknowledged that a decision to affirm the fifth applicant's deportation would interfere with the applicants' family rights. However, such interference is in accordance with the law, pursues a pressing need and legitimate aim - viz. the maintenance and control of the State's borders and the operation of a regulated system for the control, processing and monitoring of non-nationals - and is necessary in a democratic society, is in pursuit of a pressing social need and is proportionate to the legitimate aim being pursued.

5. Under the heading of proportionality it is noted that at the time of his marriage the fifth applicant had no legal entitlement to remain in the State and the fourth applicant would have been fully aware of the fifth applicant's precarious immigration status. As regards the applicant children, the document states that all three are entitled to both Nigerian and Ghanaian citizenship under the respective constitutions of those countries. It is further stated that the children are of an adaptable age and that the Minister is not obliged to respect the choice of residence of the fifth applicant. The report then considers the constitutional rights of the Irish citizen children, namely the first and third applicants, while noting that these rights must be weighed against the rights of the State.

6. By way of general conclusion, the report provides: "there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria or Ghana ... if the Minister affirms the deportation order in respect of [the fifth

applicant], there is no less restrictive process available which 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. This therefore exists as a substantial reason associated with the common good which requires that the deportation order made in respect of [the fifth applicant] be affirmed."

The Applicable Burden and the Scope for Review.
7. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 does not apply to these proceedings. Thus, the burden on the applicants is merely to make a case that is stateable or arguable as per *G v. Director of Public Prosecutions* [1994] 1 I.R. 374. This notwithstanding, the role of this Court in reviewing a Minister's refusal to revoke a deportation order is a limited one. This reflects the fact that the inquiry that the Minister must make in the context of an application to revoke is itself confined. In *O.A.D. v. Minister for Justice* (Unreported, High Court, 3rd May, 2006) [2006] I.E.H.C. 140 O'Neill J. summarised the position as follows:

> "It is clear that the nature and extent of the inquiry which is appropriate in this later phase of the process, thus described, is significantly more restricted than for example in the asylum phase. Likewise the extent of review of the later phase is undoubtedly more restrictive than in the earlier phase."

8. The nature of the consideration that the Minister must undertake in the context of a s. 3(11) application was summarised by Cooke J. in the case of *M.A. v. Minister for Justice* (Unreported, High Court, 17th December, 2009):

> "When an application to revoke is made to the Minister under s. 3(11) of the Act, the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation order was made, no change of circumstance has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin ... Once it is clear to the court that the Minister has properly discharged those two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with."

Error of Fact.
9. The first aspect of the Minister's decision with which the applicants take issue concerns an alleged error of fact. At p. 5 of the analysis document it is stated:

> "According to the Constitution of Ghana of April 1992 a child, with at least one of whose parents or grandparents is a citizen of Ghana, regardless of the child's country of birth is entitled to the citizenship of Ghana. Therefore, [the first applicant] is also entitled to the citizenship of Ghana."

It is argued that this conclusion is erroneous because the fifth applicant, a Ghanaian citizen, is not the first applicant's parent but rather her step-father. As a matter of fact, no evidence has been adduced to show that she is not entitled to Ghanaian citizenship but taking the applicants' complaint at its highest and accepting that the Minister erred in fact, I do not think it can be said that it was a fundamental error of fact. The Minister's conclusion was that the family could be expected to relocate to Ghana or Nigeria. Thus, it is clear that even if the Minister had thought the family could not be expected to move to Ghana, they could be expected to relocate to Nigeria and he would have affirmed the deportation order on that basis. I am not satisfied that the applicants have an arguable case in relation to this ground.

Proportionality.
In *Meadows v. Minister for Justice* [2010] IESC 3, Murray C.J. discussed the Minister's function and the impact of proportionality.

> "In virtually every case there will be some humanitarian consideration and, unlike s. 5, even if he is of the opinion that there are humanitarian considerations which tend to support a claim that a deportee be permitted to remain, even temporarily he is not bound to accede to such a request since he has to balance those considerations with broader public policy considerations which may not be personal to the person concerned. It is evident from the terms of the decision that he took all the relevant considerations into account but explained that "the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State".
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> "This is quintessentially a discretionary matter for the Minister in which he has to weigh competing interests and only the Minister, who has responsibility for public policy in this area, is in principle in a position to decide where that balance lies. One cannot rule out that there might be exceptional circumstances in which the principle of proportionality might arise but as a general rule the principle of proportionality would not arise for consideration in such cases and in any event the appellant has not shown that there is any basis for considering that there was any lack of proportionality in the decision taken by the Minister in this particular respect."

10. Cooke J. in *S.O. v. Minister for Justice* (Unreported, High Court, 1St October, 2010) [2010] I.E.H.C. 343 considered proportionality post-Meadows. At para. 48 of his judgment, he said:

> "The significance of the *Meadows* judgment lies not in any alteration of the O'Keeffe test of unreasonableness in favour of the so called 'anxious scrutiny test' - which the Supreme Court explicitly rejects - but in the clarification that the principle of proportionality is applicable as a facet of that test. The lack of proportionality in a decision is not defined as a new or separate ground of illegality. It is identified as one of the factors which may render a decision illegal as unreasonable in the sense of the pre-existing law where the decision under examination bears upon the constitutional or fundamental rights of the persons to whom the decision is addressed."

11. In the present case, the applicants say that the Minister's decision to affirm the deportation of the fifth applicant was disproportionate. In particular, they say the Minister erred in concluding that "there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its borders and operate a regulated system for control, processing and monitoring of non-national persons in the State." The applicants argue that there were less restrictive processes at the Minister's disposal, in particular under s. 5(1)(f) and (h) of the Aliens Act 1935. These provisions authorise the Minister to require aliens to reside or remain in particular districts or places in the State and to comply with provisions as to registration, change of abode, travelling, employment, occupation and other "like matters". Mr McNamara, for the applicants, opened a number of authorities to the Court exploring the nature of the proportionality principle, including its origins in German law. He also referred to the seminal Irish case of *Heaney v. Ireland* [1994] 3 I.R. 593 where one of the criteria advanced by Costello J. was that where a right was to be restricted, the means chosen by the decision-maker must impair that right as little as possible. In the present case, Mr. McNamara

says that the applicants' rights were excessively impaired and measures under the 1935 Act would have been more appropriate.

12. I do not think that the Aliens Act, 1935 has any relevance to this case and the argument has an air of unreality about it. It is impossible to see how allowing the fifth applicant to remain in the State but restricting his choice of residence, employment and travel opportunities under s. 5 would achieve any useful objective in terms of the State's interests. Indeed, if he were to be permitted to remain, it is difficult to see how such proposed restrictions could be justified.

13. Ms O'Sullivan, Counsel for the Minister, submitted that on an earlier occasion„when the deportation order was being considered, the fifth applicant had been offered the opportunity to leave the State voluntarily, in which case he would not have been issued with a deportation order and could have applied to re-enter Ireland at a future date. The fact that he declined this offer and persisted in his claim to remain in the State meant that, once his claim was rejected, the Minister was left with no less restrictive measure other than to make a deportation order. As Murray J. (as he then was) observed in *A. O. & D.L. v. Minister for Justice* [2003] 1 I.R. 1 at p. 92:- "The respondent had a stark choice to make, either to deport or not to deport. There is no halfway house."

14. The Minister has to perform the balancing exercise between the applicant family's humanitarian considerations and the interests of the State. In the present case, the applicants have not made out an arguable case that the Minister acted unreasonably as regards the proportionality of his decision.

Procedural Safeguards and Article 8 ECHR.
15. One of the reliefs for which the applicants seek leave to pursue is a declaration that the Immigration Act 1999 is incompatible with the European Convention on Human Rights by reason of its failure to provide for an independent review mechanism for decisions made by the Minister under section 3. The adequacy of judicial review as a remedy for proposed deportees has arisen in a number of cases of late, most notably in *M. B. v. Minister for Justice* (Unreported, High Court, Clark J., 30th July, 2010) [2010] I.E.H.C. 320 and *J.B. (A Minor) v. Minister for Justice* (Unreported, High Court, Cooke J., 14th July, 2010) [2010] I.E.H.C. 296. In no such case has judicial review ever been found to fall short of what is required under the Convention. However, whereas these cases considered the matter in the context of Article 13, in the within proceedings the applicants are approaching the issue from a different angle, arguing that the absence of an independent mechanism whereby the proportionality of a Minister's decision can be reviewed is in breach of the procedural safeguards required under Article 8.

16. The applicants rely on the decision of the European Court of Human Rights in *McCann v. United Kingdom* (2008) 47 E.H.R.R. 40. The case concerned a complaint brought by a local authority tenant who was the subject of eviction proceedings. The local authority, in the course of the eviction procedure that it had adopted, did not appear to have given any consideration to Mr. McCann's right to respect for his home. The Court was of the view that any person at risk of losing his home should be able to have the proportionality of the measure determined by an independent tribunal, even if, under domestic law, the right of occupation had come to an end. The Court found that the lack of adequate safeguards available to Mr. McCann gave rise to a breach of Article 8 of the Convention. As regards the availability of judicial review; the Court held as follows (at para. 53 of its judgment):

> "As in *Connors*, the `procedural safeguards' required by Article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority's decisions. Judicial review procedure is not well-adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Article 8 § 2 to the legitimate aims pursued."

17. 1 do not think that the procedural framework governing the deportation process in this jurisdiction bears much resemblance to the eviction procedure at issue in McCann. The Minister's decision to affirm the deportation of the fifth applicant involved a balancing exercise where the rights of all the applicants were considered vis-a-vis the rights of the State to control its borders and regulate immigration. The reasons for the decision were in writing and communicated to the applicants. This is in stark contrast to the case of *McCann*. where it seems the decision-maker made no attempt to consider the applicant's rights in pursuing his eviction. As regards the role of judicial review, as Cooke J. observed in *M.B.,* the judicial branch of this State is constitutionally established as independent and the High Court is therefore an independent authority. Judicial review in its modern form is a flexible remedy and one in which proportionality plays a part.

18. This case is accordingly to be distinguished from the Strasbourg authority of *McCann* and I am not satisfied that any arguable case has been made out as regards Article 8 of the Convention. I would also note that, in addition to the substantive shortcomings of the applicants' arguments on Article 8, as a matter of procedure a declaration of incompatibility under s. 5 of the 2003 Act may only be made where no other legal remedy is adequate and available.

Conclusion.
19. The Minister has discharged his duty in considering the s. 3(l l) application that was made to him. Having regard to the submissions made to the Minister his examination went beyond what was required of him in considering an application to revoke. I am not satisfied that the applicants have identified any irregularity or error in the decision that gives rise to an arguable case for judicial review. The application for leave is therefore refused.