Neutral Citation Number: [2009] IEHC 528

THE HIGH COURT

JUDICIAL REVIEW

2009 376 JR

BETWEEN:

ELENA NKEM FALVEY

(a minor suing by her father and next friend, STEVE CHIDI IWUOMA)

NATHAN EZE IWUOMA

(a minor suing by her father and next friend, STEVE CHIDI IWUOMA)

STEVE CHIDI IWUOMA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

ATTORNEY GENERAL

HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT by Ms. Justice Dunne on the 4th day of December, 2009

This is an application for leave to issue judicial review proceedings seeking an order of Certiorari quashing the deportation order made in respect of the third named applicant herein by the respondent on the 18th February 2009 dated the 13th March 2009 and received on 18th March 2009.

The grounds upon which the relief claimed is sought could be summarised as follows:

1. The deportation of the third named applicant would be in breach of the constitutional and legal rights of the applicants and in particular the rights of the first and second named applicants as citizen children as provided for by article 40 of the Constitution and article 8 of the European Convention on Human Rights.

2. No proper consideration was given to the rights of the first and second named applicants under article 40 of the Constitution and to the rights of the applicants collectively under article 8 of the European Convention on Human Rights.

3. No proper consideration was given to whether the deportation of the third named applicant would be proportionate in its effect on the applicants individually and collectively.

4. The respondent has failed to consider the facts of the applicants case by an appropriate enquiry in a fair and proper manner as to the facts and factors affecting the family.

A number of other general grounds are referred to in the amended statement required to ground the application for judicial review herein. There was a ground in relation to procedural safeguards but it was not pursued before me. Finally, there was also an application for injunctive relief to restrain the respondent from acting on foot of the deportation order but that relief was refused and the third named applicant has been deported.

Background

The third named applicant is a native of Nigeria born on 20th September 1986. He is now 23 years of age. He came to the state on 4th June 2003 and applied for asylum. A recommendation was made by the Refugee Applications Commissioner that he should not be declared to be a refugee. On appeal to the Refugee Appeals Tribunal, the recommendation was affirmed and this decision was communicated to the third named applicant by letter dated 16th March 2004.

On 29th January 2005, the first named applicant was born. She is the daughter of Helen Falvey who has sworn an affidavit herein and the third named applicant. The third named applicant was appointed guardian of the child by order of the District Court made on the 12th December 2005.

An application for leave to remain in the state was made on behalf of the third named applicant to the respondent by letter of 16th February 2005 and by a subsequent letter of 29th May 2005.

On 8th July 2005 the third named applicant married Linda Duggan. A further application for permission to remain in the

state on foot of his marriage was made by letter of 26th July 2005. The marriage no longer subsists.

The third named applicant stated in his grounding affidavit that he received no response to the applications for leave to remain until he received notice of the making of the deportation order by letter of 13th March 2009.

The second named applicant was born on 29th January 2008. His mother is Rebecca Waldron and the third named applicant is his father. Ms. Waldron has also sworn an affidavit herein. The third named applicant was appointed guardian of the second named applicant by order of the District Court made on the 21st October 2008.

The third named applicant has stated that he was involved with the upbringing of Elena and Nathan and that he saw them regularly. I should add that the affidavits of Helen Falvey and Rebecca Waldron confirm that the third named applicant is the father of their respective children and they also outline the level of his involvement with the respective children.

The third named applicant also made an application for subsidiary protection but he was unsuccessful in that application.

Finally, the third named applicant has a number of convictions to which I will refer later.

The Impugned Decision
I want to refer briefly to the impugned decision. The examination of file under s. 3 of the Immigration Act 1999, as amended, was enclosed with the letter which contained the deportation order. That document contained some 12 pages and set out the matters required to be considered by the respondent. I do not propose to refer to that document *in extenso*. However in the course of the arguments before me, reference was made to a passage at p. 10 of the examination. It would be helpful to refer to that passage at this point:

> "Having considered all of the above factors relating to the position of the family, and in particular Elena Nkem Falvey and Nathan Eze Waldron, who are Irish citizens, it would appear that the applicant is playing a role in both of his children's lives. However the applicant has come to the adverse attention of the Gardai during his time in the state. On 28/08/07 the applicant was convicted under the Theft Act 2001-using false instrument and was sentenced to 4 months in St Patrick's Institute. On 7/3/07 the applicant was convicted of unlawful possession of drugs contrary to s. 3, Misuse of Drugs Act and fined €150. There is also a document on file stating that the applicant was in possession of and using false Belgian documents (passport, driving licence and identity card) in the name of Momoh Kanu, and was on bail from Limerick District Court to 27/09/07 on fraud charges. The applicant has been given an individual assessment and due process in all respects. Having read and considered all of the factors outlined above relating to the position of the family, and in particular Elena Nkem Falvey and Nathan Eze Waldron, are Irish born children, (*sic*) as well as factors relating to the rights of the state, it is submitted that if a deportation order was signed in respect of the applicant, there is no less restrictive processes 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 is a substantial reason associated with the common good which requires the deportation of Steve Chidi Iwuoma."

The passage quoted above, was described by counsel for the applicants as "the core of the application".

Submissions
Written and oral submissions were presented to the court. Mr. Sexton S.C. on behalf of the applicants noted that the respondent had accepted that the third named applicant played a role in the lives of his children, the first and second named applicants. He looked to the reasons given by the respondent as set out in the examination of file and said that the reasons could be summarised as being the criminal convictions of the third named applicant and the need for border controls. It was conceded that these were real reasons to be considered by the respondent but it was questioned whether given those reasons, the decision of the respondent to deport the third named applicant was proportionate. The question was posed as to whether there was any less restrictive way of dealing with the criminal offending of the third named applicant. Counsel examined the nature of the relevant offences and argued that the reasons given, having regard to the nature of the offences involved was not sufficient to outweigh the rights of the children. He concluded that the respondent's decision to deport the third named applicant was disproportionate having regard to the nature of the criminal offences involved and bearing in mind the rights of the children.

By way of response, Mr. O'Reilly, on behalf of the respondent, pointed out that a very detailed and thorough examination of file took place before the deportation order was made. There was no suggestion of any inadequacy on the part of the respondent in relation to the criteria provided for in s. 3 of the Immigration Act 1999 (as amended).

It was pointed out that the arguments of the applicants rested on a critical point, namely, that the deportation of the third named applicant was due to the criminal offences. Counsel took issue with this proposition and said that it was not a fair representation of the examination of file to say that the decision of the respondent is predicated on the criminal convictions. Consequently, he argued that the application for leave to apply for judicial review is not well founded.

In the course of his arguments, Mr. O'Reilly referred to the affidavits sworn herein by the mothers of the first and second named applicants and noted the reliance placed on those by the third named applicant. He stated that it was not for an individual to force the respondent's hand in circumstances where it was stated by Ms. Falvey that she would not take Elena to visit her father in Nigeria and by Ms Waldron that she is anxious that her son would have a relationship with his father and would like him to be returned to this country for that reason. He contended that this was in essence a case involving a choice of residence by the applicants as opposed to a case involving an interference with Article 8 rights under the European Convention on Human Rights.

Finally it was contended that this was a case in which the respondent had considered all of the necessary criteria in compliance with the provisions of the 1999 Act and cases such as *Dimbo v Minister for Equality, Justice and Law Reform* [2008] IESC 26 and *Oguekwe v Minister for Equality, Justice and Law Reform* [2008] IESC 25. It was submitted that the court was in fact being asked to act as a court of appeal from the decision of the respondent, something which was beyond the bounds of an application for leave to apply for judicial review.

The Law
I was referred to a number of helpful authorities in the course of the submissions in this case. At the outset, it is

important to bear in mind that the third named applicant in this case has been through the asylum process and has now arrived at the point of challenging the deportation order, which has, in fact, been executed. Reference is made in the respondent's written submissions to the case of *Kouyape v The Minister for Justice, Equality and Law Reform* [2005] IEHC 380, in which Clarke J. made the following comments:

> "The grounds upon which a decision by the Minister to make a deportation order can be challenged in the case of a failed asylum seeker are necessarily limited. Without being exhaustive, it seems to me that it would require very special circumstances for such a review to be possible unless it can be shown that:
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> (a) the Minister did not consider whether the provisions of s. 5 [prohibiting refoulement to a country where someone might be persecuted or subjected to a serious attack] applied. Where the Minister says that he did so consider this section, and in the absence of evidence to the contrary, this will be established.
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> (b) the Minister could not reasonably have come to the view which he did. It is unlikely that such circumstances could arise in practice in most cases of failed asylum seekers given that there will already be a determination after a quasi judicial process which will in substance amount to a finding that the prohibition contained in s. 5 does not arise. However, it should be noted that it is incumbent on the Minister to consider any matters which have come to his attention (whether by way of submissions or representations on behalf of the applicant or otherwise) which would tend to show a change in circumstances from the position which prevailed at the time of the original decision.
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> (c) the Minister did not afford the applicant a statutory entitlement to make representations on the so-called "humanitarian grounds" or,
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> (d) the Minister did not consider any such representations made within the terms of the statute, or factors as set out in s. 3(6) of the 1999 Act, or (possibly) the Minister could not reasonably have come to the conclusion which he did in relation to those factors."

I was also referred to the decision in the case of *Kozhukarov & Ors v. The Minister for Justice Equality and Law Reform* [2005] IEHC 424. In that case, Clarke J. also considered the approach of the Minister in making a deportation order. In that case, Clarke J commented as follows:

> ". . . It is, therefore, possible that there may be cases where a person would, quite properly, be refused refugee status but would nonetheless be entitled to require the Minister to refrain from deporting them under s. 4 of the 2000 Act. Should a case to that effect be made to the minister then the minister must, of course, fully and properly consider any such case and may not, in those unusual circumstances, be entitled, in so considering, to place the same weight that would otherwise attach to the failure of the same applicant to succeed in persuading the relevant statutory bodies as to his or her entitlement to refugee status. Similar considerations may apply in respect of family or other rights guaranteed by the European Convention for the protection of human rights and fundamental freedoms ("the convention"). It seems to me that it is arguable, sufficient for the purposes of leave that, in principle, an independent ground for seeking to challenge a deportation order (that is to say a ground independent of any contention that the Minister failed to properly consider s. 3(6) of the 1999 Act) may be to the effect that the making of a deportation order by the Minister in all the circumstances of the case concerned would amount to an impermissible infringement of the rights which the party concerned might have under the Convention. While, as I pointed out in *Kouaype*, the weighting of the various matters specified in s. 3(6) of the 1999 Act, it is, in accordance with the authorities cited in that case and as a matter of pure domestic law, entirely a matter for the Minister, that does not mean that there are not cases where, in order that he act in a manner sufficient to ensure that the state comply with its obligations under the Convention as brought into effect in domestic law, the Minister may be obliged, as a matter of Irish law, to refrain from making the deportation order concerned or, in appropriate cases may be obliged to revoke such an order."

It was contended on behalf of the respondent in the course of the written submissions that the two cases referred to above indicate how the court should examine the Minister's consideration prior to the making of a deportation order. I agree with that contention. It is, I think, clear from those authorities that the court should consider how the Minister has balanced the competing rights in a given case of the applicant/applicants against the entitlement of the State to control its immigration policy. Those cases also make it clear that the grounds upon which a deportation order in respect of a failed asylum seeker can be challenged must necessarily be limited.

I now want to refer briefly to the *Oguekwe* case referred to above. In that case, Denham J. at para. 21, stated:

> "The High Court stated:
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> 'It is not in dispute that the discretion given to [the Minister] by s. 3 of the act of 1999 is further constrained by the obligation to exercise that power, in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order. It is further not in dispute that the power of the Minister is also constrained by the provisions of s. 3 of the European Convention on Human Rights Act 2003.'
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> I agree with the learning High Court judge, and would affirm this approach."

Denham J. went on to refer to the personal constitutional rights of the citizen child which the Minister was obliged to have regard to. She pointed out that those rights had to be weighed and balanced in all the circumstances of the case.

I think it is important at this point to note that in the course of the decision of the respondent in this case as set out in the examination of file, the respondent has looked at the family and domestic circumstances of the third named applicant and noted at p.8 of the Examination of File under the heading, "Consideration under Article 8 of the European Convention on Human Rights" as follows:

> "If the Minister signs a deportation order in respect of Steve Chidi Iwuoma, this decision would engage his rights to

respect for private and family life under Article 8(1) of the ECHR"

Subsequently, a full consideration of the constitutional rights of the Irish born citizen children, namely, the first and second named applicants, was carried out. No issue has been raised as to the adequacy of this consideration.

Reference was also made in the course of argument to the case of *H.L.Y. and Others v. Minister for Justice, Equality and Law Reform*, [2009] IEHC 96. That was also an application for leave to challenge the Minister's decision to make a deportation order. In that case, Mr. Y., the subject of the deportation order, had a minor conviction. Emphasis was placed by Mr. Sexton on a comment made in the course of the ex tempore judgement at p. 9 as follows:

> "Equally, looking at that, I feel there is insufficient reference to whether there is any less restrictive way of dealing with what seems to me is a minor criminal offence committed on one occasion by Mr. P.Y."

Unfortunately, the judgement referred to does not make it clear what weight was attached to the criminal conviction in the course of the examination of file in that case. It appears to have been concerned with a person who was originally lawfully in the state but whose position subsequently became irregular. (He came to study English but wasn't studying English at the place he had stated but was working). He was not in the position of the third named applicant in this case, a failed asylum seeker. I have to say that it is difficult to place the sentence from the judgement referred to by Mr. Sexton and set out above in context such that it could assist the Court in this decision.

I was referred by the respondent to the decision in the case of *Grant v. United Kingdom*, [2009] ECHR 26. That case concerned a man who had been born in Jamaica in 1960. He arrived in the United Kingdom in 1974 with one of his brothers to join his mother who was already there. He had substantial family connections with the United Kingdom but had no surviving relatives in Jamaica. Between 1991 and 2006, he amassed a total of 32 convictions in respect of 52 offences. On 30th May 2006, a deportation order was made against him, stating that in view of his conviction for robbery of 29th January 2003, it was conducive to the public good to do so. Following a review of that decision which failed, Mr. Grant was deported.

In that case, the Court examined the Article 8 rights of the applicant. It was stated at paras. 40-41:

> "40. The time span during which the offences occurred is one factor which distinguishes this case from *Maslov v. Austria* (cited above), where the Court found a violation of Article 8. In *Maslov*, the applicant had convictions for burglary, extortion and assault, which he had committed during a 15 month period in order to finance his drug consumption. The court found that the decisive feature in that case was the young age at which the applicant committed the offences (he was still a minor) and the non-violent nature of the offences (see *Maslov*, cited above, para. 81). In the present case, although the applicant's offences are mostly non-violent, he has a much longer pattern of offending and the offences he committed were not 'acts of juvenile delinquency'.
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> The court accepts that the applicant has lived for a considerable length of time in the United Kingdom, although it could not be said that he spent the major part of his childhood or youth there. His mother and two of his brothers live in the United Kingdom, and he has fathered four children, all of whom are British citizens. His children are 25, 24, 18 and 12 years old. He also has a grand child by his eldest son. In the circumstances, the court considers that he has strong ties with the United Kingdom. Nevertheless, it cannot overlook the fact that the applicant has never cohabited with any of his children. Three of his children have now reached the age of majority, and although the applicant remains in contact with them, they are in no way dependent upon him. His youngest daughter, with whom the court has found that he enjoyed family life in the United Kingdom, currently resides with her mother and her mother's husband. Without underestimating the disruptive effect that the applicant's deportation has had, and will continue to have, on Naomi's life, it is unlikely to have had the same impact as it would if the applicant and his daughter had been living together as a family. Contact by telephone and e-mail could easily be maintained from Jamaica, and there would be nothing to prevent Naomi, or indeed any of the applicant's children or relatives in the United Kingdom, from travelling to Jamaica to visit him.
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> 41. The court recognises that 34 years have passed since the applicant last lived in Jamaica. As a consequence, the court accepts that he does not have strong social or family ties to Jamaica. On the other hand it is clear from statements that have been made that some of his family members in the United Kingdom have maintained friends and contacts there, and it is unlikely that the applicant has found himself to be completely isolated. As the language spoken in Jamaica is English, there is no language barrier which would create difficulties for the applicant in establishing himself or finding employment. The court is therefore not persuaded that the applicant has become so estranged from Jamaica that he would no longer be able to settle there."

The court in that case concluded that a fair balance was struck and that the applicant's deportation from the United Kingdom was proportionate to the legitimate aim pursued and therefore necessary in a democratic society.

It is interesting to note the length of time the applicant in that case had been in the United Kingdom, the strength of his family ties there and the nature of his convictions. The convictions were more serious and more numerous than those of the third named applicant herein. I think it also has to be borne in mind that the applicant in that case was not a failed asylum seeker.

In the case of *Osunde & Ors. v. Minister for Justice, Equality and Law Reform*, (Unreported, High Court, 14th October, 2009), Cooke J. at para. 41 noted:

> "However, as that précis of the Minister's reasons follows in the letter after the express reference to the enclosed copy of the full analysis in the file examination notes, it is clearly necessary to consider the grounds now advanced by reference to the full reasoning and consideration given to the case as disclosed by the content of the letter of 15 May, 2008 with the enclosures when taken as a whole."

Relying on that passage, it was emphasised by counsel on behalf of the respondent that it was necessary to have regard to the whole of the examination file. I agree. That passage indicates the correct approach of the court in considering a case such as this. One must consider the grounds advanced by the applicant by reference to the full reasoning and consideration given to the case in the examination of file.

I was also referred to the decision in *Olorunfumi v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 11th March 2009), a decision of Charleton J. In that case Charleton J. in turn referred to the decision in the case of *Agbonlahor v. Minister for Justice,* (Unreported, High Court, April 2007), a decision of Feeney J. in which he stated at p. 21 as follows:

> "In considering immigration law under article 8, the European Court has focused on an analysis of the individual facts in each particular case to ascertain whether the individuals asserting breach of rights are in truth asserting a choice of the state in which they would like to reside, as opposed to an interference by the state with their rights under Article 8"

Feeney J. in *Agbonlahor* went on to say at p. 19 of that case:

> "It is also of significance that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a state might be prevented from exercising the state's unquestioned entitlement to impose immigration control."

Decision
I think that it is clear from the authorities referred to above that the function of the court in judicial review proceedings in relation to a deportation order made by the Minister is "necessarily limited". The function of the court is not to act as a court of appeal from the decision of the Minister. Equally, it is clear that the applicants in any given case and, in particular, the third named applicant herein are not entitled to assert a choice of residence, having failed in an application for asylum.

It is also clear from the authorities referred to above, that in a case such as this, it is necessary for the court in an application for leave to apply for judicial review to carefully consider the grounds relied on by the applicants with reference to the entire examination of file before the Minister.

The main argument put forward in this case is that the respondent, in making the deportation order, acted disproportionately. The relevant issue in this case, it was argued, turned on the weight placed by the respondent on the criminal convictions of the third named applicant and the Convention rights of all of the applicants.

I agree with the view that the criminal convictions of the third named applicant and the rights of the first and second named applicants are relevant factors to be weighed in the balance by the respondent. However, they are not the only factors. Not only are they not the only factors to be weighed in the balance, it is clear from the s. 3 examination of file in this matter that these were not the only factors weighed in the balance by the respondent. If I return to the paragraph which was described by Mr. Sexton on behalf of the applicants as being at the core of this application, it will be noted that the paragraph which is set out above begins with the following words:

> "Having considered all of the above factors relating to the position of the family. . . ."

That paragraph then goes on to consider the criminal convictions of the third named applicant. The respondent continued in that paragraph by saying:

> "having read and considered all of the factors outlined above relating to the position of the family, and in particular Elena Nkem Falvey and Nathan Eze Waldron, Irish born children, as well as factors relating to the right of the State, it is submitted that if a deportation order is signed in respect of the 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 is a substantial reason associated with the common good which requires the deportation of Steve Chidi Iwuoma."

It is clear from the passages referred to above that the respondent considered and weighed in the balance other factors. Those factors were the matters comprised in s. 3(6) of the Immigration Act 1999, (as amended). In addition to those factors a number of other issues were considered by the Minister. They included the issue of children in Nigeria, the treatment and return of Nigerian failed asylum seekers and other matters derived from country of origin information set out and referred to in the course of the examination of file. An extensive consideration under Article 8 of the European Convention on Human Rights was then carried out. There was also a passage headed "Proportionality" which looked at the fact that the immigration policy of the State does not necessarily become unlawful on the basis that its implementation may or will interfere with family life. The decision then went on to examine the constitutional rights of the first and second named applicants. Without going through the s. 3 examination of file exhaustively, it is clear that the factors taken into consideration by the respondent went beyond examining solely the criminal convictions of the third named applicant. A key factor weighed in the balance by the respondent is the right 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, something which the respondent is entitled to do. If this was a case in which the third named applicant had no criminal convictions, and the decision made by the respondent was made on the basis of the state's right to maintain control of its own borders and to maintain and operate a regulated system for control, processing and monitoring of non-national persons in the state it would be difficult to see what, if anything, was wrong with the decision of the respondent. The case of *Grant v. United Kingdom* referred to above is of some interest. The facts and circumstances of that case are somewhat different. As I pointed out above, that was not a case involving a failed asylum seeker. It concerned someone who had spent a considerable period of time in the United Kingdom. He also had significant ties in that jurisdiction. Yet, he was deported and the European Court of Justice found that a fair balance had been struck in that case. Accordingly there was no violation of Article 8 of the Convention.

I cannot find support for the arguments on behalf of the applicants in the case of *H.L.Y. and Others v. Minister for Justice, Equality and Law Reform* referred to above. As pointed out above, that case is of limited assistance for the reason I have already explained.

In all the circumstances, I am not satisfied that the applicants in this case have set out substantial grounds for leave to apply for judicial review. I cannot see any basis for complaint as to the manner in which the minister weighed the various factors to be considered before making a deportation order. It is not a case in which the minister had regard only to the criminal convictions of the third named applicant or acted disproportionately in the weight attached to those convictions. The examination of file shows a careful and extensive examination of the rights of the applicants, their circumstances and the effect on them of a deportation order. Nothing was left undone that should have been done and nothing was done that should not have been done in the examination of file. It was a comprehensive examination of all relevant factors and there is nothing to suggest that the Minister gave undue weight to any one factor or acted disproportionately in any way. Accordingly I must refuse this application.