Neutral Citation Number: [2011] IEHC 31

THE HIGH COURT

2009 763 JR

BETWEEN

IS (A MINOR SUING BY HER MOTHER AND NEXT FRIEND AS),

AS (A MINOR SUING BY HER MOTHER AND NEXT FRIEND AS)

AND AS

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 21st January, 2011

1. In these judicial review proceedings the applicants have brought a motion whereby they seek to amend the grounds by which they challenge the validity of a deportation order made by the Minister for Justice, Equality and Law Reform. As we shall presently see, this motion in fact presents a vitally important issue of law concerning the inter-action of the Constitution and the European Convention of Human Rights. Before examining this question it is necessary first to set out briefly the background to these proceedings.

2. The first applicant is an Irish citizen who born here on 24th September, 2003. The second applicant and third applicants are Nigerian nationals. The first and second applicants are the children of the third applicant. In June, 2009 the Minister for Justice, Equality and Law Reform made separate deportation orders in respect of the second and third applicants. The validity of these deportation orders is the critical issue at the heart of these proceedings.

3. In the proceedings as originally constituted the applicants contended that their right to an effective remedy contained in Article 13 ECHR had been infringed in that the common law substantive judicial rules (review for reasonableness, rationality and proportionality) did not allow (or, at least, did not sufficiently allow) the High Court when exercising its supervisory jurisdiction to engage in a merits based review of these decision. These rules were said to be legally defective in other respects in that, for example, it is contended that, unlike the present law and practice in judicial review matters, this Court should have the right to receive and consider additional evidence over and above that which was before the Minister when he made the original deportation orders.

4. To that end, the applicants sought a declaration of incompatibility under s. 5(1) of the European Convention of Human Rights Act 2003 ("the 2003 Act") in respect of these common law rules. When this case was first opened before me, I raised the question with counsel for both parties as to whether the applicants were entitled to seek this relief on a free standing basis or whether, alternatively, they were first obliged, consistently with the language of s. 5(1) itself, to demonstrate first that no other remedy was, in the language of the sub-section, "adequate and available". The proceedings were then adjourned to enable the applicants to bring a motion whereby, even at this very late stage, they could apply to amend the proceedings to enable them to challenge the constitutionality of the common law rules. This is the motion before me now in which I am required to consider the question of whether the pleadings should be so amended.

Section 5(1) of the 2003 Act

5. Perhaps the first thing to consider for this purpose is whether these applicants would be in a position to seek a declaration of incompatibility in the absence of a challenge to the constitutionality of the common law judicial review rules. Of course, it is clear from the Supreme Court's decision in *McD v. L.* [2009] IESC 81 that the European Convention of Human Rights ("ECHR") does not have direct effect in Irish law and that the Constitution remains the primary vehicle whereby fundamental rights are to be secured and vindicated. Indeed, the Long Title to the 2003 Act says as much. Moreover, as both Murray C.J. and Fennelly J. pointed out in *McD. v. L,* the ECHR is only law to the extent and insofar as the Oireachtas has so determined pursuant to Article 29.6 of the Constitution. Thus, in the words of Murray C.J.:-

> "....the Convention is not directly applicable as part of the law of the State and may only be relied upon in the circumstances specified in the European Convention on Human Rights Act of 2003."

6. As I observed in my own judgment in *RX v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446, the Oireachtas did not intend that the ECHR should operate as a form of parallel constitution which in some way supplanted the Constitution or vied for supremacy in the hierarchy of legal norms created by the Constitution. If that had been intended, then a constitutional amendment along the lines of Article 29.4.6 - such as was done to secure the supremacy and direct effect of the EU law - would have been necessary. In the absence of such a constitutional amendment, the Oireachtas must therefore be taken to have intended that recourse to the ECHR would operate at sub-constitutional level as form of supplementary protection in the - hopefully rare - event that the Constitution's protections fell short of the standards required by the ECHR itself.

7. This is reflected in the language of s. 5(1) of the 2003 Act itself:-

> "In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the

Convention provisions."

8. The phrase "rule of law" is defined by s. 1 of the 2003 Act as including the common law.

9. It follows that this Court is not permitted by statute to grant a declaration of incompatibility unless it is clear that "no other legal remedy is adequate and available." This accordingly requires the Court - if necessary of its own motion - to ascertain whether such a remedy is adequate and available. Putting this another way, it means that the Court cannot contemplate granting a declaration of incompatibility unless it is clear that the applicant has exhausted his or her remedies available in domestic law in general and constitutional law in particular.

Do these Applicants have another Legal Remedy which is Adequate and Available?

10. As these applicants contend that the existing common law judicial review rules are inadequate to protect their constitutional and ECHR rights, the question arises for the purposes of s. 5(1) of the 2003 Act as to whether Irish law provides another legal remedy for this purpose which is adequate and available. There is, of course, such a remedy available to the applicants, namely, to contend that these common law rules are themselves unconstitutional.

11. Article 34.3.1 of the Constitution provides that the High Court is:-

> "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."

12. The fact that this Court is given an express constitutional jurisdiction to determine "all matters and questions whether of law or fact" in and of itself ensures that litigants are guaranteed an effective remedy in respect of all justiciable questions. But, of course, the matter does not rest there, since Article 40.3.1 also provides that:-

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

13. Article 40.3.2 further provides that:-

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

14. These inter-locking provisions ensure - among many other things - that the State guarantees all litigants that they will have an effective legal remedy so far as it is practicable to do so. Indeed, it would be difficult to conceive of a more extensive guarantee of an effective remedy than the one actually provided by these provisions, given that the State is thereby committed "as far as practicable…..to vindicate" the rights in question.

15. These basic and elementary principles are attested by a wealth of case-law. As early as 1942 this Court held that a provision of the Land Law (Ireland) Act 1881, which sought to ensure that decisions of the Land Commission were immune from judicial review by the High Court was unconstitutional as inconsistent with Article 34.3.1: see *Re Loftus Bryan's Estate* [1942] I.R. 185. In *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345, Kenny J. held that a provision of the Courts of Justice Act 1924 which stipulated that actions against Minister required to be authorized by the fiat of the Attorney General was unconstitutional. In *Byrne v. Ireland* [1972] I.R. 241 the Supreme Court went even further and held that the common law rule whereby the State was immune from suit was inconsistent with Article 40.3.1. Hard on the heels of *Byrne v. Ireland* came the decision in *Meskell v. CIE* [1973] I.R. 121, which established that, where necessary, the courts would modify or extend the parameters of existing tort law to enable a litigant to recover damages for a breach of constitutional rights where that existing law did not sufficiently or adequately protect the right in question. The *Meskell* doctrine has itself spawned significant subsequent case-law, of which important decisions such as *Grant v. Roche Products* [2008] IESC 35, [2008] 4 I.R. 679 and *Herrity v. Independent Newspapers Ltd.* [2008] IEHC 249 are just some contemporary examples. Indeed, while the judgment of Hardiman J. in *Grant* discusses in considerable detail the importance of the concept of the vindication of rights in Article 40.3.2 in the context of actions in tort, these principles are certainly applicable by analogy to other areas of the law so far as issue of the effectiveness of the remedy is concerned.

16. Not content with this, the courts have also held that limitation periods which were unfair or did not adequately protect a right of access to the courts were unconstitutional: see, *e.g., O'Brien v. Keogh* [1972] I.R. 144 and *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545. Statutory restrictions on the granting of substantive relief by, *e.g.,* preventing the granting of bail in certain types of cases have also been held to be unconstitutional: see *Re McAllister* [1973] I.R. 238. Rules of evidence which were in themselves arbitrary or which unfairly impeded the reception of relevant evidence have also been held to be invalid: see, *e.g., Murphy v. Dublin Corporation* [1972] I.R. 215 and *S. v. S.* [1983] I.R. 68. Legislation which was found unfairly to impede the right of access to the courts by limiting the substantive grounds of challenge has also been held to be unconstitutional: see *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 I.R. 275. Finally, and for good measure, it may be noted that well in advance of the *Factortame* litigation, the Supreme Court held that the courts enjoyed a jurisdiction to restrain the operation of a statute pending the outcome of a challenge to its constitutional validity: see *Pesca Valentia Ltd. v. Minister for Fisheries* [1985] I.R. 193.

17. These examples - which are certainly by no means exhaustive - all share one common theme, namely, that the courts will ensure the remedies available to a litigant are effective to protect the rights at issue and that our procedural law (including all legislation restricting or regulating access to the courts) respects basic fairness of procedures and is neither arbitrary or unfair. Article 34.3.1, Article 40.3.1 and Article 40.3.2 thus reflect the same basic premise as that contained in Article 13 ECHR, *i.e.*, the guarantee of an effective remedy. That, after all, is the central premise what the express words of Article 40.3 - the vindication of rights in the case of injustice done - are all about.

18. It follows that the applicants have another remedy which is adequate and available to them, namely, to challenge the constitutionality of the common law judicial rules. If those rules are unfair or fail adequately to provide an appropriate remedy to ensure that the State "respects" and "vindicates" substantive rights, then these rules will be found to be unconstitutional. Of course, if the constitutionality of these rules had already been challenged and upheld in other cases, then this remedy might be said not to "available" in the sense of s. 5(1) of the 2003 Act. This question does not, however, arise since all parties are agreed that the constitutionality of these rules have never been challenged or determined in any other litigation.

19. It follows that this Court has no jurisdiction to grant a declaration of incompatibility under s. 5(1) of the 2003 Act unless and until the constitutional question has been disposed of adversely to the applicants' contentions. To do otherwise would be to by-pass a statutory pre-condition to the exercise of this very important jurisdiction and to admit by the back door a variant of the direct effect

fallacy which has been so firmly scotched by the Supreme Court in *McD. v. L.*

20. I have to confess that, in view of the express language of these constitutional provisions coupled with this wealth of case-law, the applicants' failure to challenge the constitutionality of these common law rules while at the same time maintaining an Article 13 ECHR challenge seems surprising. This is especially so when one recalls that the whole object of these proceedings is to challenge the validity of the underlying deportation orders. Yet s. 5(2)(a) of the 2003 Act expressly provides that a finding of incompatibility does not in itself affect the validity of the impugned provision or rule of law, nor, for that matter, the underlying administrative decision taken pursuant to that provision, as this sub-section provides:-

> "(2) A declaration of incompatibility—
>
> (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made…"

21. Accordingly, even if this Court were to grant a declaration of incompatibility, then, certainly as a matter of strict law, it would affect not one whit the validity of the underlying deportation order or, for that matter, the validity of these common law rules to which they most strongly object. Such a declaration of incompatibility would, of course, have to be laid before the Houses of the Oireachtas in accordance with the 2003 Act and it may be assumed that the Oireachtas would at some stage ultimately act on foot of that declaration. Section 5(2)(a) nevertheless makes it clear that the validity of any statutory provision or any rule of law remains entirely unaffected by such a declaration of incompatibility.

22. It was not for nothing that Professor Marshall famously described the declaration of incompatibility as "a species of booby prize": see "*Two Kinds of Incompatibility*: *More About Section 3 of the Human Rights Act*" [1999] Public Law 377 at 382. Furthermore, as Murray C.J. observed in *McD. v. L.*:-

> "Other than the making of a declaration of compatibility any benefit to a claimant is discretionary and extra judicial. The declaration does not affect the validity or enforcement of any statutory provision or rule of law."

23. Of course, as is too well known to require elaboration, it is otherwise with a declaration of unconstitutionality. As the Supreme Court made clear in both *Murphy v. Attorney General* [1982] I.R. 241 and *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 2 I.R. 262, a declaration of unconstitutionality has *erga omnes* effect by crystallizing the invalidity of the law in question at the date of the judicial decision. Such a declaration generally amounts to what Henchy J. described in *Murphy* ([1982] I.R. 241 at 307) as a "judicial death certificate." Accordingly, insofar as the common law rules of judicial review contain restrictions which denied the applicants an effective remedy, these would be swept aside with immediate effect by a declaration of unconstitutionality - assuming such were to be granted - thus leaving the applicants completely free to pursue the judicial review proceedings, shorn of the present restrictions to the common law rules of which they complain.

24. But surprising or otherwise, the applicants have very frankly acknowledged that these issues - specifically the jurisdictional issue contained in s. 5(1) of the 2003 Act - did not occur to them until it was raised by me in the course of oral argument. It would be only fair to record that this issue does not ever appear to have been raised by the respondents until the question of a possible amendment of pleadings came in view.

Whether the Amendment should be Permitted?

25. These proceedings were commenced by motion on 5th October 2009. There is no doubt but that the present application to amend is well out of time. Given the statutory time limit of two weeks prescribed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, normally one could not even countenance an application to amend at this late stage by reference to the principles articulated by the Supreme Court in cases such as *GK v. Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 401.

26. A further consideration is that the nature of the proposed amendment is potentially prejudicial to the respondents. For the reasons just mentioned, if the amendment were to be allowed, the Minister must now face the prospect that the validity of common law rules which are fundamental to the operation of the entire asylum and immigration system (and much else besides) would now be put in jeopardy. A declaration of incompatibility would not present the same legal headache for the respondents, for such a declaration would not affect the existing proceedings (or other proceedings presently in being) and it would afford the Oireachtas a (relatively) leisurely opportunity to deliberate on the type of future legislative changes that would be necessary to ensure conformity with such a declaration.

27. While an amendment at this late stage is, in many respect, entirely unsatisfactory, I have nonetheless with much hesitation come to the conclusion that there are two very special reasons - practically unique to this case - why such an amendment should be allowed. First, the applicants have always maintained that the existing common law rules were basically inadequate to secure an effective remedy: the proposed amendments would - more or less - simply allow them to make the same case by reference to the Constitution. Viewed from that perspective, the amendment merely amplifies the case which the applicants have always been making and in that sense it cannot be regarded as an entirely new ground of challenge.

28. Second, the amendment is necessary by virtue of the view which I have taken of the jurisdictional limits of the power to grant a declaration of incompatibility contained in s. 5(1) and, specifically, the fact that the court can only grant the applicants such a declaration in circumstances where their constitutional remedies have been exhausted. Of course, I am conscious of the fact that there are other decisions of this Court where the Article 13 ECHR effective remedy point has been canvassed: see, *e.g.*, the decision of Cooke J. in *B. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296. But in none of these cases was the Court's attention directed by either party to the jurisdictional bar contained in s. 5(1) of the 2003 Act or the general implications of *McD v. L.* in respects of arguments of this nature. In these circumstances, these applicants might have been forgiven for thinking that they would be free to raise the effective remedy point without any question of the need for an amendment of the pleadings. These highly special circumstances outweigh, in my view, the question of potential prejudice to the respondents.

The EU law argument

29. The applicants also seek an amendment of the pleadings whereby they seek to rely on the provisions of the EU Charter of Fundamental Rights ("EUCFR") (particularly Article 24) in order to asset on the part of the mother a derivative right of residence in the State during the minority of the first article. Article 24 provides:

> "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

30. Of course, the applicants would doubtless wish to argue that the deportation of a parent would infringe Article 24(3) EUCFR, since - on one view - such a deportation would frustrate the right of the child to maintain "direct contact" with the departing parent.

31. Critically, of course, Article 52(1) EUFCR makes it plain that the application of the Charter is not free standing and it applies to Member States only when they are "implementing" Union law. At first blush, it might be thought the deportation of a third country national to that third country is wholly internal to this State and raises no question of Union law which falls to be "implemented" by Ireland. If this is correct, then the Charter would simply have no application to a case of this kind.

32. I appreciate that in her opinion of September 30, 2010 in Case C-34/09 *Zambrano* Advocate General Sharpston appears to have taken a somewhat different view of these (admittedly complex) issues. The judgment of the Court of Justice in this case will doubtless be awaited with considerable interest.

33. The applicants contend that they have been prompted to seek the amendment in the light of the discussion contained in the Advocate General's opinion. It may be observed, however, that the Charter has been in force since 1st December 2009, yet the first application to amend was moved almost a year later. Furthermore, any arguments based on the Charter were there to be made from the outset and while the opinion of Advocate General Sharpston in *Zambrano* may have brought matters to the fore, the question of the scope of the application of the Charter has been the matter of heated debate in legal circles for many years.

34. Even more critically, the applicants had never previously raised any questions of EU law or the possible application of the Charter. In this respect, their position stands in direct contrast to the Article 13 ECHR argument, where at all times they sought to contend that judicial review was not an adequate remedy and the amendment simply allows them to contend that these rules are unconstitutional as well.

35. In these circumstances, the special and almost unique factors present in the case of the constitutional argument do not apply in the case of the application to amend to respect of the arguments based on the Charter and I accordingly propose to refuse this particular application to amend.

Conclusions

36. In conclusion, therefore, and for the reasons just stated, I propose to allow the amend insofar as the applicants thereby seek to contend that the common law judicial rules are unconstitutional and to disallow the application insofar as it concerns reliance on the Charter.