Neutral Citation Number: [2010] IEHC 492

THE HIGH COURT

JUDICIAL REVIEW

2009 881 JR

BETWEEN

M. A. U., A. M. U., O. A. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), E. A. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), A. O. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.), AND A. A'A. O. U. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, M. A. U.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM (NO.1)

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 13th day of December, 2010

1. This application for leave to apply for judicial review raises an important net question of interpretation in respect of s. 3(1) of the Immigration Act 1999 ("the 1999 Act"). The applicants in the present proceedings comprise a husband and wife and four children. Two of the children are Irish citizens and the other four applicants are Nigerian citizens.

2. The mother, AMU, arrived in Ireland in 2002 and applied for asylum. The couple's first two children, OAU and EAU, are both Nigerian citizens and are aged 13 and 12 respectively. They have both lived in Ireland for the last eight years. The couple's third child, AOU, was born in Ireland on 25th July, 2002. He is an Irish citizen and is now aged 8 years. The couple's fourth child is also an Irish citizen and he was born on the 10th October, 2008.

3. In 2005, the mother and the Nigerian children obtained the benefit of the what has come to be known as the IBC 05 Scheme. They have thus have permission to remain in Ireland for the immediate future. The two Irish children have, of course - in common with all Irish citizens - the unqualified right to remain and reside in the State.

4. In August 2007 the father, MAU, arrived in the State and claimed asylum. That application was refused in January 2008. The father then made an application for subsidiary protection, together with submissions as to why he should not be deported. This application was refused in July 2008. In June 2009 the father made further submissions focussing on the nature of family unity which, they contended, was the essential premise of Article 41 of the Constitution. A deportation order was nonetheless made on 10th July, 2009. That order required the father to leave the State on a date specified in the notice to be served on him under s. 3 of the 1999 Act and "to remain thereafter out of the State." The validity of that order is challenged by all the applicants in the present proceedings.

5. As it happens, arguments based on Article 41 or Article 8 ECHR were not pressed at the oral hearing. In effect, the net issue - and, indeed, the only issue - which I am required to consider concerns the proper interpretation of the s. 3(1) of the 1999 Act. This sub-section provides:

> "Subject to the provisions of section 5 (prohibition of refoulement) of Refugee Act 1996 and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State." (emphasis supplied)

6. For the applicant, Mr. Anthony Collins SC contended that the Minister had acted *ultra vires* in that he had adopted a fixed policy position by making a deportation order which permanently barred him from the State, subject only to the possibility of revocation of the order under s. 3(11). It is thus contended that the Minister did not entertain the possibility of making a deportation order with less severe consequences by, for example, stipulating that the applicant leave the State for a period of five years.

7. For the respondent Mr. Moore did not dispute the contention that the Minister gave no consideration to the possibility of deporting the applicant for a lesser period. Nor did he really dispute but that if the Minister had a discretion in the matter, then he had acted *ultra vires* by adhering to a fixed policy position : cf. the judgment of Fennelly J. for the Supreme Court in *McCarron v. Kearney* [2010] IESC 45. His point, however, was that the Minister had no discretion in the matter.

8. This brings us directly to the question of whether the Minister had such a discretion. There is no doubt but that the Oireachtas could have provided expressly for a shorter period of exclusion had it so desired. There are, of course, other examples from comparable legislative regimes which do in fact so provide. Thus, as Mr. Collins SC, noted, Article 11(2) of Directive 2008/115/EC ("the Returns Directive") dealing with expulsion from the Schengen Zone provides:

> "The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may, however, exceed five years if the third country national represents a serious threat to public policy, public security or national security."

9. Whether the Oireachtas could have done so is not really the point. The real question is whether the Oireachtas has, in fact, done so. The first thing to note here is that the language of the deportation order faithfully follows the language of s. 3(1) itself. If, therefore, s. 3(1) admits of no discretion in the matter, then the deportation order is not *ultra vires* on this account.

10. Next, it should be observed that s. 3(1) permits the Minister to determine the time within which the proposed deportee should leave the State. The Minister here clearly has a discretion in respect of the time permitted to the deportee to arrange his or her

affairs here prior to the deportation order taking effect. This is normally a relatively short period of time, but it has not been unknown for the Minister to permit a proposed deportee somewhat longer periods in order, for example, to complete a course of education.

11. But if the Minister has been given a discretion in respect of this time period, I cannot see that the same is true in respect of the consequences of a deportation order. To my mind, s. 3(1) is unambiguous in its effect in that the subject of the order is required to leave the State within such period as may be specified in the order "and to remain thereafter out of the State." The word "thereafter" plainly refers to the period immediately after the temporal point when the deportee is required to leave the State.

12. While it seems that there is no direct authority on this point, it is nonetheless worth noting that in *JB v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296 - another Irish citizen child case - Cooke J. observed *en passant* that "once deported" the mother is "at least in principle…banned for life from re-entering the State." I respectfully agree. To my mind, it is clear beyond argument that the effect of s. 3(1) is that once the deportation order takes effect, the subject of that order must endure a life long exclusion from the State, subject only to the mitigating effects of s. 3(11).

13. The Minister, therefore, had no discretion in the matter. Thus, even if he had wanted to, the Minister had no power to stipulate a lesser period of exclusion in the deportation order itself. It follows that as the Minister had no discretion in the matter, the question of adhering to a fixed policy position simply does not arise. The Act itself specifies the consequences of a deportation order and takes the matter out of the Minister's hands.

14. In this regard, I am not unmindful of the fact that the children's constitutional rights under Article 41 to the care and company of their father will be seriously affected if the deportation goes ahead. The only point, however, which the applicant advanced in this respect was that s. 3(1) should be given a construction which best mitigated these adverse effects by interpreting it in a manner which admitted of such a discretion on the part of the Minister.

15. The limits to the double construction test are, of course, well established and a court cannot do actual violence to the statutory language in the name of a constitutional construction: see, *e.g.*, the comments of Ó Dálaigh C.J. *in Re Haughey* [1971] I.R. 217 at 251-252. As I have already made clear, in my view, s. 3(1) does not admit of any such alternative construction.

16. Since I am of the view that the only issue which the applicant is raising in these proceedings must be resolved against him, it follows that I must equally refuse leave to apply for judicial review.