Neutral Citation No. [2011] IEHC 282

THE HIGH COURT

JUDICIAL REVIEW

2010 731 JR

BETWEEN:

E.G.L. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND J.M.L.)

AND

O.L. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND J.M.L.)

AND

L.L. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND J.M.L.)

AND

P.L. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND J.M.L.)

AND

J.M.L

AND

I.A.L.

APPLICANTS

-AND-

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

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Seán Ryan delivered on the 14th day of February 2011

1. The applicants seek an injunction restraining the deportation of the father of the first, second, third and fourth infant applicants. The father is the fifth applicant and his wife and the mother of the children is the sixth applicant. He made an unsuccessful application for asylum and then made representations to the Minister under s.3 of the Immigration Act, 1999 for permission to remain in the State. The Minister refused and made a deportation order on the 19th May, 2010. The first applicant is an infant Irish citizen, having been born in the State.

2. The parents lived together as a family unit in Nigeria with two children. Ms. L. came to Ireland and gave birth to the first applicant, E., on the 11th February 2003. Ms. L. has IBC/05 permission. Some four years and three months later Mr L. arrived. A fourth child, the third applicant, who is not a citizen, was born here on 14th February 2008. The father has three other children from a previous marriage. The youngest is aged 17 and they live in Nigeria.

3. The grounding statement seeks *inter alia*, *certiorari* to quash the deportation order. The Statement of Grounds sets out a multiplicity of objections in 34 paragraphs but in written submissions and oral argument these were reduced to a lesser but still formidable catalogue. Many of the arguments raise legal points of general application or that are common to many other cases and which have been canvassed in previous cases. Some have been repeatedly rejected by this Court. This does not mean that they will all inevitably fail in this case, although negative precedents obviously impact on the issue of whether there is a fair question to be tried.

4. The applicants have also put before the court a report from a consultant psychiatrist in support of the claim for an injunction. Her evidence is that the children applicants will suffer serious consequences if their father is returned to Nigeria on foot of the deportation order. She thinks that will be the case, even if it subsequently transpires that he is permitted to come back to the country.

5. In seeking this interlocutory relief, counsel for the applicants recognised that recent decisions of this Court made it difficult for his client to stay his removal pending the hearing of the leave application. He therefore sought to distinguish the case on the facts by relying on the psychiatrist's report.

6. In *Akpata,* the Court considered it "unnecessary to determine the present application by reference to the first limb of the Campus Oil test" and approached the injunction application by addressing the balance of convenience and adequacy of damages on the assumption that a fair issue had been made out as to substantial ground. Cooke J said:

> "The present application turns rather on the two other limbs of the test, namely, the questions as to whether the balance of convenience lies with granting or refusing an injunction and whether damages would adequately remedy any detriment caused to the party concerned, depending on whether the injunction is refused or granted."

7. The learned judge said that the applicants' presence at the hearing of the leave proceedings was not necessary because it was a matter for legal argument only. They did not have any right to be in the State and were here unlawfully.

> "In these circumstances, in the judgment of the Court, where the grant or refusal of an interlocutory injunction involves choosing between declining on the one hand to interfere with operation of a statutory decision which is, like the order in the Campus Oil case, valid until the contrary is established; and on the other hand, compelling the Minister to accept the continuation of an illegal situation; the balance of convenience lies with refusing the injunction. Allowing the existing measure to remain without interference does not bring about any irreparable or irreversible situation". [para 16]

8. On the adequacy of damages, Cooke J said:

> "As already pointed out, if the Minister decides to implement the deportation orders prior to the hearing, the effect is to return the three applicants concerned to the position they were in the years 2003 to 2006. Should the need arise the Court can by appropriate relief require the Minister to readmit them to the State. The father is not entitled to work in the State, although he may well be entitled to do so in Nigeria. Thus, the immediate losses resulting from a refusal of an injunction are likely to be confined to any expenses incurred in returning to the State and any costs they may incur in re-establishing themselves in Nigeria which they would not otherwise incur here." [para 20]

9. The Court then considered the submission that "the more important issue is the irreparable harm that may be done in the form of the emotional or psychological damage to the first and second named applicants by the sudden removal of the father and the two brothers, with whom they have lived since 2006 and in the case of the second named applicant since his birth in 2009."

> "This proposition is not in fact supported by any evidence and is based upon what counsel has suggested was an "obvious and commonsense" view. In the judgment of the Court, this apprehension is both speculative and inconsistent with the applicants' own approach to their family life. The first named applicant lived without her father until three years old at the choice and insistence of the parents and has had the company of her father only since 2006. The second named applicant is only twenty months old. Many families, for economic or other reasons cope with circumstances in which one parent may be absent for lengthy periods of time, in a foreign posting, in military service or working at sea. It does not follow as a matter of general knowledge that emotional stress or psychological damage always results." [para 22]

10. This is the point that the applicants seek to answer by introducing the psychiatrist's report.

11. The same judge considered the first limb of the *Campus Oil* test in its relevance to another deportation injunction case in *A.P.A. (*20th day July, 2010) Cooke J rejected the argument that an applicant who had instituted proceedings to quash a deportation order in time was entitled to remain in the State until the leave application was decided. At para 16 (e) of the judgment, he said:

> "(e) When the application for leave to seek judicial review commenced with the 14 day period comes before the Court or upon an earlier application on the part of the Minister to have the proceeding dismissed as unfounded, any continuing restraint upon the implementation of the deportation order is dependent upon the applicant establishing an entitlement to an interlocutory injunction to restrain deportation. This follows from Order 84, r. 20 (7) of the Rules of the Superior Courts which provides that where an order of *certiorari* is sought the grant of leave only operates as a stay where "the Court so directs":

12. The Court then turned to the claim that the applicants had made out a fair question to be tried in an application that has striking similarity to the present case:

> "It remains therefore to determine whether in this instance a case for the grant of an interlocutory injunction has been made out. The immediate issue, accordingly, is whether a fair issue to be tried is raised as to the existence of a substantial ground as to why the deportation decision ought to be quashed and, if so, whether damages would be an adequate remedy if the injunction is refused and the father succeeds in the application for judicial review having been deported in the meantime." [para 19]

13. Cooke J described the basis of the claim to overturn the deportation order:

> "Although the Statement of Grounds puts forward a total of 32 grounds in support of the reliefs claimed, many of them are of a very general, even generic, type and lacking in any particularity by reference to the reasons relied upon by the Minister for his decision in the file note. As such, they are incapable of constituting the basis for an application for judicial review. In arguing the case, however, counsel for the applicants focussed on the lack of reasonableness in the analysis made by the Minister in the memorandum and the disproportionality of the conclusion reached in balancing the interests of the State in implementing the deportation against the rights of the applicants to respect for their family life and the private life of the third named applicant together with the constitutional rights of the first named applicant as an Irish born child. In addition, counsel took issue with a number of specific aspects of the file note such as the absence of any consideration of the interests of the second named applicant as stepdaughter of the father; the fact that his position as a failed asylum seeker appears to be held against him unfairly when the Minister has looked in detail at the substantive rights under Article 8 of the Convention; and the failure, in breach of fair procedures, to inform the applicants that the father would not be permitted to re-enter the State if he opted to apply for humanitarian leave to remain in response to the proposal letter." [para 20]

14. Speaking generally about the standard of proof in judicial review of deportation orders, the Court said that it was not sufficient simply to complain in general terms that:

> "The conclusion reached is unreasonable, unbalanced or disproportionate. It must be borne in mind that when considering the possible deportation of a non-national which will separate the deportee from family members who are settled residents in the State or Irish citizens, the judgment which falls to be made as to whether the interests of the State should prevail over the rights and interests of those concerned, falls to be made by the Minister. As the Supreme Court has emphasised, the analysis and assessment must be made objectively and reasonably and must arrive at a proportionate result. It

remains, however, an assessment and judgment that must be made by the Minister and the High Court cannot substitute its own evaluation and conclusion. It can quash the deportation order if it is shown to have been made in a manner which is legally flawed including that it is unlawful by reason of the clear disproportionality of its effect. In order to establish an entitlement to an order of *certiorari* in such circumstances, however, it is necessary to demonstrate that the approach by which the conclusion has been reached on the part of the Minister and which has produced the disproportionate or unreasonable conclusion has been vitiated by one or more material defects in the approach to the analysis and appraisal such as, for example, some specific mistake whether of fact or law; some significant failure to consider a factor required to be taken into account; or an influential reliance placed upon some irrelevant consideration." [para 22]

15. The facts of the present case, briefly described at the beginning of this judgment, are not unusual and bear comparison to those considered in *A.P.A.* where Cooke J said that it was:

> "Not a case in which any serious issue could be said to be raised by reference to the assessment made in the memorandum or the conclusion reached in relation to the factors required to be taken into account by reference to Article 8 of the Convention. In the application of Article 8 to cases involving the refusal of entry to or the expulsion of a family member, the predominant consideration is the degree to which the family life alleged to be interfered with is demonstrated to be a settled one established in the Contracting State. According to the representations made on their behalf by Ceemax & Co., solicitors, on 18th February, 2008, the father and mother started living together in Nigeria in 1997 and married there in a traditional ceremony in 1998. They lived together as a couple until the mother came to Ireland in 2003 when she was already pregnant with their first child. As already mentioned, they voluntarily lived apart for a period of four years until the father's arrival in the State in 2007 during which their only child was born in Ireland. The father having arrived in the State illegally in order to join the mother and Irish daughter and having made what appears to have been an unfounded application for asylum, it could not be said that such family life as they have had together in the State since 2007 has any of the qualities of duration and permanence in the State which would give rise to a right to protection under Article 8. As the file note explains, the father and mother are entitled to reside in Nigeria as are the two daughters: it is the clearly established case law relating to Article 8 that the Contracting States are not in such circumstances obliged to respect choices of matrimonial residence made by non-nationals. In circumstances where the mother deliberately chose to separate herself from the father in 2003, it could not be said to be unreasonable or disproportionate to return the applicants to the status quo they created for themselves in that year when the mother left Nigeria by deporting the father."

16. The Court concluded its judgment in that case:

> "For all of these reasons the Court is satisfied that no fair issue has been established for trial in this case. Moreover, even if it could be said that any one of the arguments advanced could so qualify, it is clear that this is a case in which damages would in any event be an adequate remedy. The father is illegally present in the State and the deportation order is to be taken as valid until it is proved otherwise. The implementation of the deportation order restores the applicants to the position in which they were prior to the father's illegal entry into the State. Should the deportation order ultimately be quashed in a successful outcome to the judicial review application, the cost of returning him to the State and any loss incurred through the temporary disruption of their family life in circumstances where the third named applicant is not in employment and contributing to living expenses, can clearly be compensated for by an award of damages."

17. The applicants made the preliminary submission that it is a breach of fair procedures, and Article 13 of the European Convention on Human Rights, to deport a person who has initiated judicial review proceedings prior to the hearing of his application for leave to apply for judicial review. This point was rejected by Cooke J in *A.P.A.* They submitted that a fair issue to be tried was whether judicial review constitutes an effective remedy as required by Article 13 ECHR. This argument has failed on numerous occasions in this Court. Clark J. in *Balogun v MJELR,* stated that the Article 13 argument was untenable and in *Darimola v MJELR* (Unreported, High Court, 30 July 2010), that it was "manifestly wrong." I listed some of the many other rejections in my judgment in *Ologunola* (7th February 2011).

18. This question may also present a significant procedural problem. Cooke J has held that s.5 of the ECHR Act 2003 makes it necessary to exhaust other remedies first, which means that the Constitution should first be invoked. I respectfully agree. But that is not the only difficulty. It seems to me that this issue may not be justiciable at all in judicial review proceedings. Judicial review is scrutiny of administrative and some other decisions to ensure that they have been taken in accordance with law, which includes Constitutional norms such as proportionality and fairness of procedures. If the decision or ruling or determination was made otherwise than in compliance with the canons of proper procedure, it will be quashed and sent back for fresh examination and decision. The challenge to deportation decisions and orders based on Art. 13 and alleged lack of effective remedy seems to me to fall outside this scheme. The remedy available in judicial review is to have the decision set aside and to have a new examination and determination. This could not happen if the Court found the whole procedure to be inadequate. If a deportation order is set aside on this ground, there is nothing the Minister can do to remedy the deficiency. He must observe and operate the existing legislation and is incapable by himself of putting a new procedure in place. That is a matter for legislation to be enacted by the Oireachtas. An applicant is of course free to institute plenary proceedings to claim that the s.3 scheme is in breach of Art 13 and to seek a declaration of incompatibility. It is unnecessary to decide the point but it seems to me that it is questionable whether condemnation of the entire statutory procedure, which the Minister is in no position to alter, is justiciable in judicial review and whether it requires a separate action to be brought against the State.

19. The applicants cited specific complaints relating to the consideration of the application made under section 3 of the Immigration Act, 1999, in particular

> (a) the mother's intention of remaining with the family in the State in the event of deportation of the father/husband was not taken into account
>
> (b) the husband's declaration that he would obtain health insurance was not considered
>
> (c) the decision was based on a mistake of fact concerning the provision of free education in Nigeria
>
> (d) the mother is the breadwinner and the father's employment prospects should not have been taken into account (this is obviously wrong because s. 3(6) of the Immigration Act requires the Minister to take the applicants employment prospects into account);

20. They argued that the infant citizen's rights under the Constitution were not considered in a manner required by law. The

respondent argued that the decision to make a deportation order against the father was proportionate in the context of upholding the integrity of the immigration system of the State. The section 3 examination shows that detailed consideration was given to the potential effect of deportation on the applicants' family life. The factors relevant to the private life and family life of the applicants were identified and considered. There was a full consideration of the statutory factors outlined in s.3(6) of the 1999 Act and the memorandum records the relevant features of the family as made available to the Minster through the representations and the documents submitted. The respondent submitted that all relevant factors were explicitly weighed in the balance by reference to the principle of proportionality. The file examination on which the impugned decision was based is in a form which is intended to comply with the considerations enumerated by Denham J in the non-exhaustive list in *Oguekwe/Dimbo*.

21. The applicants have not raised a serious question to be tried in respect of the consideration of the case on any of their points. They complain that the Minister did not take into account the representation that the rest of the family intended to remain in the State if the fifth applicant were to be deported. But there is a section of the file report expressly devoted to the impact of deportation on family life and whether such interference would offend Art. 8 of the Convention. The question of health insurance was minor and the decision cannot be invalidated because this matter did not receive specific discussion and recording in the report. The fact that a person who is not entitled to be in the State expresses an intention in representations to obtain health insurance is not likely to tip any balance of rights and humanitarian concerns against the State's right to protect its borders. The alleged error of fact is dubious, it is not obligatory on the Minister to contrast education facilities and the absence of free primary education in Nigeria was not put before the Minister in representations. The employment prospects of an applicant for permission to remain are expressly required to be taken into account by s. 3(6) of the Act.

22. Other arguments advanced by the applicants in regard to breach of fair procedures, that the private life rights of the applicants were not taken into account, that here was no proper consideration of the constitutional, convention or charter rights of the infant citizen and that the best interests of the children were not considered are similar and in some instances the same as those described by Cooke J in *Akpotor* as "of a very general, even generic, type and lacking in any particularity by reference to the reasons relied upon by the Minister for his decision in the file note. As such, they are incapable of constituting the basis for an application for judicial review." They have been considered many times in judgments of this Court. I referred to some of the authorities in my judgment in *Ologunola* (7th February 2011).

23. The applicants relied on arguments of general application that have been debated in previous cases. They alleged breaches of Article 24(3) of the Charter of Fundamental Rights of the European Union, of "the derivative right of residence of a parent of the Union citizen as referred to in the recent Advocate General's opinion in *Zambrano*"; of the European Social Charter and the Guardianship of Infants Act, 1964.

24. This motion came before me at a time when I was hearing a series of cases in which similar arguments were being advanced. Some new or relatively new issues were raised, including the impact of the Advocate General's Opinion in *Zambrano* in the European Court of Justice. I postponed my decision in this application until I had delivered judgments in those leave applications, which I did on 7th February. The first of those cases is *Ologunola.* I refused leave in those cases and I refer to the judgments for the reasoning which equally applies in this application.

25. In the result, the applicants have not in my view satisfied the first limb of the *Campus Oil* test. In respect of the other requirements, I am in agreement with the decision and judgment of Cooke J as cited above. I would also like to add a comment on the psychiatric report that the applicants relied on.

26. It seems that the applicants' advisers were put in mind of such a report by a comment by Cooke J in *Akpata* that there was no evidence as to any adverse consequences which might affect the balance of convenience. So they engaged a psychiatrist, who visited the family and observed them for an hour and then furnished her report. I have to say that I have reservations about the cogency of this evidence. I intend no criticism of the doctor in what I am saying. Nor do I condemn the applicants' legal advisers. But I do think that the project was somewhat misguided. The doctor visited the family to assess the likely impact of deportation on them. They were obliged in the circumstances to demonstrate the extent of their distress at the proposed removal of the father. I am not at all satisfied that this was fair to them. The doctor was also in a circumstance of considerable embarrassment as she observed the family's manifestations of concern about this potential future event. In a word, I think the doctor was put in an impossible position. In the result I do not think that this evidence distinguishes this case because the result would have been the same with any family that was observed in similar circumstances.

27. My conclusion for these reasons is that the applicants are not entitled to an injunction.