Neutral Citation Number: [2011] IEHC 150

THE HIGH COURT

JUDICIAL REVIEW

2009 1248 JR

BETWEEN

C.K. (A MINOR ACTING BY HER FATHER AND NEXT FRIEND E.K.),

AND

A. K. (A MINOR ACTING BY HER FATHER AND NEXT FRIEND, E.K.)

AND

L. K. (A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, E. K.)

AND

E. K.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MR JUSTICE E. SMYTH, delivered on the 25th day of February 2011

1. This is an application for leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ('the Minister'), to issue a deportation order in respect of the fourth applicant on 15 October 2009 and notified to the applicant on 29 October 2009. The hearing took place on the 18th and 20th of January, 2011. Mr. Colm O'Dwyer B.L. appeared for the applicants and Ms. Cindy Carroll B.L. appeared for the respondent.

Factual Background

2. The fourth applicant, a national of Ghana, arrived in Ireland in 2000. At that time he was married to a South African national. The couple had one child, who was an Irish citizen as he was born in the State in 2000, prior to the constitutional amendment. Upon the birth of his son, the fourth applicant withdrew his application for asylum and applied for residency on the basis of his status as the parent of an Irish citizen child. He was granted permission to remain in the State on 19 April 2001. His personal circumstances changed when his son passed away in October 2000 and he separated from his wife in 2004. After a brief stay in Northern Ireland, the applicant returned to the State and began a relationship with an Irish citizen with whom he now has three children; the first three applicants. In 2005, the applicant was convicted in the District Court of a number of offences for driving without a licence and insurance; failing to produce a driving licence and insurance certificate; assault; and threatening and abusive behaviour. He was also charged with an offence of a more serious nature for which no conviction was recorded. Following his convictions, the respondent informed the applicant of his intention to revoke the applicant's permission to remain in the State in February 2006. On 2 April 2008, the applicant was issued with a 'proposal to deport' letter. Solicitors for the applicant made representations on his behalf for leave to remain in the State.

3. A deportation order was made in respect of the applicant on 15 October 2009, and notified to him on 29 October 2009. The examination of file stated that the substantial reason associated with the common good necessitating the deportation of E.K. was that "there is no less restrictive process available which would achieve the legitimate aim of the State to prevent disorder and crime and to protect the economic well-being of the country."

Summary of Submissions

4. The applicants' principal submission is that in circumstances where family rights are involved and the Minister is seeking to rely on the substantial reason of the prevention of crime and disorder in order to justify the making of a deportation order; the crime and disorder committed by the applicant must be of a very serious nature. It was argued that in *Boultif v Switzerland* [2001] 33 EHRR 50 and *Omojudi v United Kingdom* (Appl. No. 1820/08), the European Court of Human Rights considered this issue and found that in cases concerning crimes as serious as armed robbery and sexual offences respectively, it was disproportionate for the convicted individual to be excluded and family rights strongly interfered with. The applicant relied on two recent decisions of the High Court where it was argued that leave for judicial review was granted on similar grounds (*F.E. and Ors v MJELR* (Unreported, High Court, Hogan J., 11 January 2011) and a decision of Cooke J. in *F.M. v MJELR* (Unreported, High Court, 17 December 2010)).

5. The applicant further argued that the Minister has failed to consider the personal rights of the minor applicants and their right under Article 2 of the Constitution to 'be part of the Irish nation.' It was submitted that before the Minister could weigh the rights of the State against the rights of the fourth applicant, he was required to undertake a fact-specific analysis of the effects of the deportation on the citizen children, the Minister must then consider whether there is a grave and substantial reason to deport and that it is reasonable and proportionate to do so. In the facts of the instant case, following the deportation of their father, the minor children will not be able to reside in the State and enjoy the benefit of 'family life' and care of both parents. The applicants submitted that the Minister failed to consider properly the rights of the children to be reared and educated with due regard for their welfare, and failed to consider adequately the position of the children if they followed their father to Ghana. The applicants claimed it was not

reasonable or proportionate to state that the family could relocate to Ghana as the age of the children would make it difficult to adjust to life in that country; the education and opportunities for the children would not be of a similar level; the children could not grow up in the country of their citizenship and the children's mother is an Irish citizen who has never visited Africa.

6. Finally, the applicant disputed the Minister's finding that there was no less restrictive process available to the Minister in order to achieve the legitimate aim of preventing crime and disorder, arguing that the Minister had a number of options open to him which he had not considered, including offering the applicant conditional permission to remain in the State.

7. The respondent noted that the proceedings were brought outside of the statutory time–limit and objected to an extension of time arguing, *inter alia*, that no satisfactory explanation for delay was advanced and that the Court must have regard to the legislative scheme where applicants have 14 days to bring proceedings.

8. The respondent submitted that a consideration of the impact of the deportation of the fourth applicant on the minor applicants was carried out in a manner fully compliant with the requirements set down in the relevant case-law, in particular, the requirements of *Oguekwev MJELR* (Unreported, Supreme Court, 1 May 2008) and had due regard to the constitutional and conventional rights of the minor applicants. It was submitted that the Minister was required merely to consider representations made to him when reaching his decision and to notify the person concerned of that decision. The applicants had not made any suggestion to the Minister that the family would relocate to Ghana if the deportation of the fourth applicant occurred, nor was any information supplied to the Minister concerning the circumstances the family would face in Ghana compared to their circumstances in Ireland. It was submitted that in these circumstances, the question at issue was solely one of proportionality where the Minister must weigh the balance of the rights of the family against the rights of the State.

9. The respondent argued that the decision to issue a deportation order was a proportionate decision and was made in the correct exercise of the statutory power of the respondent to protect the borders of the State. It was noted that in *Omoregie v Norway* [2008] ECHR 761, the European Court of Human Rights found that protecting the economic well-being of the country constituted a legitimate aim of the State. The respondent further claimed that he was entitled to consider the applicant's criminal convictions (*Haghighi v Netherlands* (2009) 49 EHRR SE8). The applicant relied on the decision in *Grant v United Kingdom* (Application no. 10606/07), where, it was submitted, the European Court of Human rights found that the expulsion of a father with strong ties with the UK, was proportionate to the legitimate aim of 'the prevention of disorder and crime' and was necessary in a democratic society.

The Assessment of the Court

10. Before considering the matters relied on by the applicants in this case, an issue arises as to whether, if the court grants leave, an extension of time for the making of the application is required.

11. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 provides a 14 day time limit for persons wishing to apply for Judicial Review of certain decisions made under the provisions of the Refugee Act 1996 and the Immigration Act 1999, unless the court considers that there is "good and sufficient" reason for extending the time for making the application.

12. The deportation order was signed by the respondent on 15th October 2009, in respect of the fourth named applicant and sent to him by letter dated 29th October 2009. In his affidavit, the fourth named applicant, said that he received the deportation order on the 2nd November; that he made contact with his new solicitor and instructed her on the 4th November, 2009 to challenge the respondent's decision in the matter. Apparently, the fourth named applicant had previously been represented by another solicitor, so that his new solicitor had to take up his file and instruct counsel. As a result of advice from counsel further enquiries were made in the matter, including checking on previous convictions and draft proceedings were returned on 30th November, 2009.

13. The actual sequence of events as to how these proceedings progressed is not entirely clear. Mr. O'Dwyer, B.L. on behalf of the applicants says that an extension of time of approximately 14 days is required in this case, and that the proceedings were filed on the 2nd December 2009. Whereas Ms. Carroll (at least in her written submissions) seems to have been under the impression that they were drafted on 30th December 2009 and that they were not received until 13th January 2011. That seems unlikely, given that the Notice of Motion, the statement of grounds, and the affidavit of the fourth named applicant are dated 2nd December 2010. Nevertheless, the issue remains to be decided, and the question of whether the court should, in fact extend time, was strongly opposed by the respondent in this case.

14. The 14 day period commences the date upon which the person is notified of the decision or order in question. The assertion of the fourth named applicant that he received the deportation order on the 2nd November 2009 was not challenged, so I am satisfied that I can deem that date, i.e. the 2nd November 2009, as the date the Deportation Order was received by the fourth named applicant. That being the case, then if it is the fact, that the proceedings challenging the order were filed on 2nd December, 2009, then they were out of time, albeit by a relatively short period.

15. Nevertheless, the legislative policy in fixing a 14 day period clearly indicates an intention on the part of the Oireachtas that "applicants must act with great dispatch when considering whether or not to challenge a decision by way of judicial review, this being part of the legitimate objective for a democratic state to effectively control and regulate entry to the State by nationals of other countries". See the remarks of Peart J. in *F.A. v. Refugee Appeals Tribunal* [2007] IEHC 290, (unreported, High Court, Peart J., 27th July, 2007).

16. Ms. Carroll, argued that no proper explanation for delay was advanced; that the applicants have not shown any exceptional circumstances justifying an extension of time, and that there is no evidence that the applicants were badly advised by any previous legal advisors, and she also submitted, insofar as the three minor applicants are concerned, that the fact that an applicant is an infant is not such a fact of itself, to justify an extension of time over and above what would be afforded to an adult in equivalent circumstances.

17. The only explanation for the delay put forward by Mr. O'Dwyer was that the fourth named applicant had moved promptly to seek legal advice and that the cause of the delay was the time taken by his lawyers to consider legal issues. Mr. O'Dwyer said that the file had to be transferred between solicitors and details had to be checked, including the nature of the previous convictions.

18. In *F.A. v RAT*, Unreported, High Court 27th July 2007, Peart J. identified a number of factors in case law, which the court can consider in deciding whether there is good and sufficient reason for extending time in these cases. These were the period of the delay, the reason for the delay, the prima facie strength of the applicant's case, and any other personal circumstances affecting the applicant.

19. In *Kelly v Leitrim County Council*, Unreported, High Court, 27th January, 2005, Clarke J. referred to a number of matters which he

felt might be considered in applications for an extension of time. These were the time prescribed in the relevant statute, whether any third party rights were affected, the legislative policy, blameworthiness of the applicant, the nature of the rights involved, and the merits of the applicants' case. In addition to these matters, Peart J. in *F.A.* considered that the question of whether during the permitted time, the applicant had either made a decision to commence proceedings, or could reasonably be expected to have been able to decide to commence such proceedings is relevant as well, and that it may also be necessary to consider whether the applicant had legal advice available during the 14 day period should the applicant have wished to seek it.

20. In *J.A. v. Refugee Applications Commissioner* [2009] 2 I.R. 231, Irvine J. referred to similar matters, and also considered the extent to which an injustice might be perpetrated by failing to grant an extension of time.

21. In *S. v. The Minister for Justice Equality and Law Reform* (Unreported, Supreme Court, 5th March, 2002), Denham J. in outlining factors broadly similar to those cited above, also mentioned the question whether the reason for the delay may be largely attributable to the culpability of legal advisors, but in doing so, she noted that the fact that an applicant may not be to blame for delay, is not, of itself, a sufficient basis for disregarding a time limit for instituting proceedings. She stated at p. 167:-

> "The delay in issue is essentially delay by legal advisors. Legal advisors have a duty to act with expedition in these cases. In general, delay by legal advisors will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such a delay and to enable the matter to be considered further."

22. In *Re Article 26 v. The Illegal Immigrants (Trafficking) Bill*, 1999 [2000] 2 I.R. 360 at p. 389, the Supreme Court concluded:-

> "Certainly non-nationals who enter the State and seek asylum or refugee status face difficulties which are special to them. In many, if not most, cases, they will be strangers to its culture, its way of life and its languages. They maybe located a good distance away from the centre where decisions concerning them are taken and may be completely ignorant of the legal system. These and many other factors could combine to make it difficult to pursue applications for asylum or refugee status or, which is what the court is concerned with in this reference, to seek juridical review of administrative decisions affecting them. Indeed counsel for the Attorney General conceded that one could by no means exclude a combination of circumstances in a particular case which could result in an applicant not finding it possible to bring an application for leave to seek judicial review within the 14 day period."

23. Nevertheless, in upholding the reasonableness of the 14 day limitation period, the Supreme Court concluded that it was satisfied:-

> "That the discretion of the High Court to extend the 14 day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights".

24. In the light of the foregoing principles what is the position of the applicant in this case? I have outlined earlier, a sequence of events deposed to by the applicant after he received the deportation order on the 2nd November, and the steps, he says were taken by his solicitor leading up to the filing of the proceedings. On the face of it, (there is no evidence to the contrary), the applicant acted promptly and brought the matter to the attention of his solicitor well within the 14 day period. Clearly, the applicant had, at least from that time, formed the intention of taking whatever legal steps were open to him to contest the deportation order.

25. If it is the case, that the solicitor had to take up the file from the applicant's previous solicitors, (the court has not been told when that happened), and that it was necessary to follow up counsel's directions that the applicant's convictions be checked out, then it was open to the solicitor to apply for an extension of time within the 14 day period, on that, or some other relevant basis. The difficulty in this case, is that no explanation has been forthcoming setting out any circumstances of delay which arose in the legal process itself.

26. In *C.S. v. The Minister for Justice Equality and Law Reform, Ireland and the Attorney General* [2005] 1 I.R. 343 at p. 363 McGuinness J. stated:-

> "This court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself."

27. In *G.K. v. The Minister for Justice* [2002] 2 I.R. 418 at 423, Hardiman J. dealing with an application for an extension of time under Section 5(2)(a) of the Illegal Immigrants Trafficking Act 2000 stated:-

> "It is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the 14 day period and the reasons if any for it must be addressed."

The *C.S.* case involved an application for an extension of time, and it was one where the court expressed reservations about deficiencies in the conduct of the applicant's legal affairs by the solicitors.

28. In this case, the Court was slow to express reservations about the conduct of the applicant's legal affairs without the lawyers being given an opportunity to explain in an affidavit the circumstances of the delay in the legal process itself. The applicant has not explained the whole delay; only part of the delay. Until there was a more complete explanation, I considered that the limited explanation offered by the applicant to date was insufficient. Accordingly, therefore I directed that the applicants' present solicitors file an affidavit dealing with the delay in the legal process and indicating when they first became involved with the fourth named applicant in relation to his affairs, and when the applicant's previous solicitors came off record for him.

29. However, while the court awaited a fuller explanation of the reasons for delay, it was also necessary in accordance with the decision in *G.K. v. The Minister for Justice*, to have regard to the merits of the applicants' case. There are really two steps involved here: insofar as the application for an extension of time is concerned, then the onus on the applicant is to demonstrate arguable grounds, whereas, in relation to the application for leave, the requirement is to satisfy the court that there are "substantial grounds" for contending that the decision, termination, recommendation, refusal or order is invalid or ought to be quashed.

The prima facie strength of the applicants' case

30. The substantial reason identified by the Minister for the making of a deportation order in respect of the fourth named applicant is

that there is no less restrictive process available which would achieve the legitimate aim of the State to prevent disorder and crime and to protect the economic well being of the country, which is a substantial reason associated with the common good which requires the deportation of the fourth named applicant.

31. The main ground advanced on behalf of the applicant for disputing the lawfulness of the deportation order relates to the applicant's criminal offences for which he was sentenced in 2005. These are mainly road traffic offences but the applicant was also convicted of assault, contrary to Section 2 of the Non-Fatal Offences Against the Persons Act 1997 for which he received a sentence of four months imprisonment. He also received a sentence of three months imprisonment imposed on the same day, i.e. the 20th October 2005 for threatening/abusive/insulting behaviour in a public place, contrary to section 6 of the Criminal Justice (Public Order) Act 1994.

32. The applicant contends that the reliance placed by the Minister on these offences, in balancing the respective rights of the State and the applicants is disproportionate and unreasonable.

33. The applicant is also critical of the adequacy of the assessment by the Minister of other relevant facts and factors and that this is apparent from a review of the file note setting out the analysis prepared for the Minister. There is a file note of 17 pages prepared and signed by an Executive Officer in the respondent's department. This analysis is quite detailed covering broadly the following considerations: the factors required to be considered under Section 3(6), (a) to (k), of the Immigration Act 1999 as amended; consideration of the statutory prohibitions in Section 5 of the Act of 1996 (Refoulement) and Section 4 of the Criminal Justice (UN Convention Against Torture) 2000; and the respondent also considered the factors and interests arising under Article 8 of the ECHR and the constitutional rights of the Irish citizen children under Article 40, 41 and 42 of the Constitution.

34. The task facing the Minister in these cases is to consider the circumstances of each case by due inquiry in a fair and proper manner, as to the facts and factors affecting the family. It is however, important, to remember that save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of the applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.

35. In this case the representations furnished by the fourth named applicant were not very extensive. They are set out in the application of the 23rd April, 2008, for leave to remain in the State. They draw attention, *inter alia*, to the position the applicant held with Guinness, which he said he held until his registration card was not renewed. He admits his convictions and says that he deeply regrets them and, that he has paid his price to society. He says that he intends to abide by the laws of the State for the sake of his children who he wishes to maintain in the State. He says that he has become very integrated into the State and he has made many friends. He emphasises that every consideration should be given to the fact that the applicant's three children were born in Ireland and are Irish citizens and that it would be unfair and unjust that they should join him in Ghana should he be returned there.

36. The applicant did not provide any further details about his children; their health or their particular circumstances, or whether they have any special needs. He said that he continued to be in a relationship with their mother with whom he shares guardianship. Whether, in fact, the fourth named applicant is still in a relationship with the mother of his children, is unclear. Apparently, Messrs Colgan and Company, the applicant's previous solicitor, indicated to the respondent, that they would forward a letter from the applicant's partner in this regard, but, according to the file note, no such letter has been received by the department. I have noted that there is an undated and un-headed note exhibited with the grounding affidavit of the fourth named applicant, signed by an E.M., to the effect that she is still with the fourth named applicant, and that she has a sick child who attends the Central Remedial Clinic on an ongoing basis. I am assuming that this note was not before the Minister at the time of the original representation, and was not therefore something which he was obliged to consider at that time.

37. To obtain leave the applicant must show "substantial grounds". This is not a very onerous test. Leave should only be refused where the grounds relied on are not reasonable or are in "trivial or tenuous": *Z v. The Minister for Justice, Equality and Law Reform* [2002] 2 ILRM 215 at 222.

38. Mr. O'Dwyer was critical that a fact-specific analysis was not carried out in relation to the children. In the course of her judgment in *Oguekwe*, Denham J. affirmed the finding of Finlay Geoghegan J. in the High Court, that

> "The consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development and opportunities. This consideration relates not only to educational issues but also involves consideration of the attachment of the child to the community, and other matters referred to in Section 3 of the Act of 1999."

39. The information actually furnished in respect of the children was quite limited. Their ages were given and birth certificates were enclosed for C.K. and L.K. No details were furnished in relation to A.K.'s father, however Messrs Colgan and Company, solicitors for the applicants submitted that both parents were in the process of arranging to have the birth certificate amended in respect of A.K. to show the fourth named applicant as the father. According to the file note nothing further was received by the Department in relation to that matter.

40. Furthermore, no specific reference was made, or country of origin information furnished pointing to any specific problem the children might face in Ghana if they had to relocate with their father. It was the Minister who consulted country of origin information in order to assess the circumstances and conditions there, including educational standards and opportunities.

41. Mr. O'Dwyer submitted that the children would not have the same opportunities as other Irish citizen children who live in Ireland in terms of their education, development and access to healthcare. He referred to a 2005 UN report quoted in the UK Home Office Country Report that the net enrolment rate for secondary education is 30%, and therefore that it would be highly unlikely that the Irish citizen children would be able to attend secondary school in Ghana.

42. It is in fact clear from the file note that the Minister did have current information before him about the general education system in Ghana. The Minister must consider conditions in the country of origin insofar as they relate to the citizen child, but he is not obliged to speculate about individual circumstances where information about these circumstances is not provided to him. As Cooke J. in *Ofobuike (A Minor) and Others v. The Minister for Justice Equality and Law Reform* [2010] I.E.H.C. 89 stated

> "The fundamental obligation of the Minister is to make the appraisal in the light of the facts known to him and the representations made on behalf of the proposed deportee."

The obligation on the Minister was to carry out a general analysis of the educational and development opportunities that would be available to the child in the country of return.

43. In her judgment in *Oguekwe v. The Minister for Justice Equality and Law Reform* (Unreported, Supreme Court, 1 May 2008Denham J. stated

> "This general approach does not exclude a more detailed analysis in an exceptional case. The decision of the Minister is required to be proportionate and reasonable on the application as a whole and not on the specific factor of comparative educational systems".

There is nothing in this case, to suggest that it is an exceptional case, and therefore the Minister was entitled to approach the information he had on the basis of a general analysis.

44. It should be noted, that Articles 3 and 8 of the ECHR do not impose an obligation on the State to ensure that a person returned to a third country will enjoy the same medical, social or other forms of assistance and services provided in Ireland. As. Clark J.said in *M.B. v. Minister for Justice (*Unreported, High Court, Clark J., 30th July, 2010) at para. 36:

> "The Convention is essentially directed at the protection of civil and political rights and freedoms (see e.g., *N. v. United Kingdom* (2008) 47 EHRR 39 at 42-44) and does not extend to ensuring European-standard education and health services throughout the world. The extensive jurisprudence of the Strasbourg Court does not prohibit Contracting States from deporting persons to a third country that has an inferior health or education system."

45. Reviewing the analysis, it is clear that the Minister carefully considered all the circumstances of the family and the mother of the children that were known to the Minister at the time. The Minister is not entitled to speculate on hypothetical circumstances which were not brought to his attention in the representations.

46. The fourth named applicant says that it would be unreasonable and disproportionate to expect his children and partner to move to Ghana; they have lived all their lives in Ireland, they are Irish citizens who have never visited Africa and that his important relationship with his children will be interrupted.

47. However in *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1. Denham J. at p. 60 stated as follows:-

> "In these cases the two minor children are citizens of Ireland I am satisfied that as a consequence they are entitled to reside in Ireland. They also have the right to the society, the care and company of their parents. However, the rights of the children are not absolute. They are protected in a proportionate fashion. It does not follow from the rights of citizenship and residency of a minor child, that he has a right to society, the care and company of his parents in Ireland. Nor does it follow that the family of such a child as a unit has, or the parents or siblings have, a right to reside in Ireland."

48. The role of the Minister was clarified by Murray J. at p. 91 where he stated as follows:-

> "The rights do not confer on the non-national parents any constitutional or other right to remain in the State. The rights referred to are qualified in the sense that the respondent, having had due regard to those rights and taking account of all relevant factual circumstances, may decide, for good and sufficient reason, associated with the common good, that the non-national parents be deported, even if this necessarily has the effect that the child who is a citizen leaves the State with its parents. In deciding whether there is such and good reason in the interests of the common good for deporting the non-national parents, the respondent should ensure that his decision to deport in the circumstances of the case, is not disproportionate to the end sought to be achieved".

Examination of file

49. The executive officer who compiled the examination of file examined the applicants' rights under separate headings. It was accepted that if the Minister made a deportation order, this would engage E.K.'s right to respect for his private and family life under Article 8 ECHR. The officer noted that respect for the applicant's private life related to his work, and educational and social ties that he may have formed since he arrived in the State and recited the fourth applicant's personal circumstances. The officer referred to the State's right to control entry of non-nationals into territory, subject to its treaty obligations and considered issues of national security, public policy, the integrity of the immigration system, its consistency and fairness to persons and to the State, as well as issues relating to the common good. There then followed an extract from a Garda report which listed convictions recorded against the fourth named applicant as follows:

- 9/06/2005-no driving licence, contrary to Section 38(1) of the Road Traffic Act 1961, as amended-fine €100;
- 9/06/2005-failure to produce driving licence, contrary to Section 40(1)(a) of the Road Traffic Act 1961, as amended-fine €100;
- 9/06/2005-failure to produce insurance certificate, contrary to Section 69 (1) of the Road Traffic Act 1961, as amended-fine €100;
- 09/06/2005-no insurance, contrary to Section 56(1) and (3) of the Road Traffic Act 1961, as amended-Disqualification Order, consequentional. For 12 months. Endorsement Order 3 years. Fine €600;
- 20/10/2005 Sexual Assault/Indecency-this case was heard in conjunction with other matters on which he was convicted;
- 20/10/2005-assault, contrary to Section 2 of the Non-Fatal Offences Against the Persons Act 1997-sentenced to four months imprisonment;
- 20/10/2005-Threatening/Abusive/Insulting behaviour in a public place, contrary to Section 6 of the Public Order Act, 1994-setnenced to three months imprisonment;
- 15/11/2005-Threatening/Abusive/Insulting behaviour in a public place, contrary to Section 6 of the Public Order Act 1994-fine €100.

50. There was also reference to a separate Garda report on file, to the effect that on 08/01/2005 the fourth named applicant was detained having entered the Republic of Ireland from Northern Ireland without documents, and that he had admitted that he had been working and living in Northern Ireland since the 26th December 2004.

51. The officer considered the impact on the family if the applicant was deported. He referred, inter alia, to the applicant's previous marriage and subsequent new relationship with E.M. He also related how the child of the applicant's marriage to Ms. D.Z. had died of Sudden Infant Death Syndrome on 26th October 2000 at the age of four months. The officer noted that the fourth applicant now shares guardianship of three children with their mother, and that according to the District Court Order dated 4/04/2008 the children were residing with their mother. It was also noted that the department had yet to receive details of the registration of the birth of A.K. to show the applicant as the father, and that further, no letter had been received by the Department confirming that E.K. was still in a relationship with Ms. E.M.

52. The officer made a number of conclusions arising out of this consideration of the applicants' Article 8 ECHR rights, namely that the deportation order is in accordance with Irish law; that it pursues a pressing need and a legitimate aim of the State to prevent disorder and crime and to protect the economic well-being of the country; and that the order is necessary in a democratic society in pursuit of the aforementioned legitimate aim, is proportionate to that aim within the meaning of Article 8(2) ECHR, and no less restrictive process is available to achieve that aim. The officer also observed that given forecasts of further substantial economic contraction along with growing unemployment, that the applicant's chances of obtaining employment in the current economic climate were poor.

53. The officer then assessed the proportionality of the order. He referred to *R.(Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840, where, in the words of the officer, "the UK Court of Appeal found, inter alia, that the removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

54. The officer then referred to, what he understood, to the test applied when determining whether family life can be established elsewhere, and cited the ECtHR case of *Boultif v. Switzerland* [2001] 33 EHRR 50. He quoted from the decision that the "seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere factor that a person might face certain difficulties in accompanying his or her spouse, cannot in itself preclude expulsion". The officer then stated:-

> "In particular to be considered when determining whether there are any "insurmountable obstacles" to establishing family life elsewhere is whether, where an obstacle exists, realistically or reasonably, it is an obstacle which is able to be surmounted."

55. The officer made several more conclusions under this heading of proportionality. These included that having considered the applicants' personal history, the children are of an adaptable age should they relocate to Ghana and that they are entitled to Ghanaian citizenship; that the children would be in a position to pursue their education in Ghana; that no insurmountable obstacles prevent Ms E.M. or the citizen children travelling to Ghana to be with her family; and that the Minister is not obliged to respect the choice of residence of the fourth named applicant. The officer balanced the rights of the State with the rights of the individuals concerned and considered that the children have not established any substantial links or had an opportunity to integrate to any significant degree into Irish society. The officer again concluded that there was no less restrictive process to a deportation order available to achieve the legitimate aim of the State to prevent disorder and crime and to protect the economic well-being of the country.

56. The officer considered the constitutional rights of the children, correctly identifying those rights and acknowledged that as Irish citizens they have rights of residence in Ireland, the right to be reared and educated with due regard to their welfare, and the right to the society, care and company of their parents. The officer cited the Supreme Court decision in *A.O. and D.L. v MJELR* [2003] 1 IR 1, to the effect, that it does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland. Noting that there is an obligation, on the Minister to consider each case on its individual merits, the officer observed that the Minister is entitled to take into account the consequences of allowing a particular applicant to remain in the State where that would inevitably lead to similar decisions in other cases. He stated:-

> "If the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, even if that means in order to preserve the family unit the Irish citizen child must also leave the State, then that is an order he is entitled to make."

57. The prohibition on refoulement in Section 5 of the Refugee Act 1996 and the implications of Section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000 were also considered by the officer. Neither of these two aspects of the analysis is relevant to the issues in the present application.

58. The officer referred to humanitarian considerations under section 3(6) (h) of the Immigration Act, 1999, and noted E.K.'s personal circumstances. The officer again concluded that there is nothing to suggest that there any insurmountable obstacles to the family being able to establish family life in Ghana. The officer recommended, on the basis of the foregoing that the Minister make a deportation order in respect of E.K.

Deception

59. In the course of her submission Ms. Carroll who was for the respondent was critical of what she described as a lack of candour on the part of the fourth named applicant in his dealings with the State. She said that the applicant had deceived the authorities from an early stage and sought to gain by his deception.

60. It is true that the applicant did not inform the State of the death of his child until 2004. That was in breach of a term of his initial permission to remain in the State which required him to live in the same household as the child and discharge the role of parent. Correspondence to the department in 2003 and 2004 in relation to a renewal application to remain refers to the original permission to remain based on the parentage of an Irish born child, but makes no mention of the fact that the child is deceased. Nor did the fourth named applicant mention the child's death when he was questioned by immigration officers on the 8/1/05. Strictly speaking, the statement that he had been granted a right to remain based on the birth of an Irish born child was correct. One can speculate as to why the applicant was not more forthcoming with the information about the sad death of his child. However, it is possible that the early death of a young child affected the applicant and his wife to the extent that they were unable to cope with their personal tragedy, or come to terms with it. That maybe a benign speculation on the court's part. In any event, I am not satisfied that the evidence is sufficiently compelling in this case to conclude that it amounted to a deliberate deception of the authorities by the fourth named applicant.

61. In the light of the circumstances and factors which were considered in the file note by the officer, I am satisfied that the analysis in this case was detailed and that all the relevant considerations under Section 3(6) of the Act of 1999 were taken into account, and that the officer considered and weighed up the matters put to the Minister having regard to the rights of the family members under Article 8 of the Convention and to the constitutional rights of the Irish citizen children. A substantial reason associated with the common good was identified, namely the prevention of disorder and crime and the protection of the well-being of the country, and the officer gave appropriate consideration to the guidelines in the Act.

62. In ordinary circumstances it would be difficult to fault the officer's analysis in this case. However, as argued by both counsel for the applicants and the respondent the contentious issue in the case is really one of proportionality.

63. In his submission, counsel for the fourth named applicant said that the reality of the decision to deport the fourth named applicant, is that his permission to remain was revoked because of his criminal convictions and that an examination of the file bears this out. It is clear from the letter informing the fourth named applicant that his permission to remain was revoked because (a) he was in breach of the conditions of his permission to remain in the State and (b) that he was showing a pattern of personal behaviour contrary to public policy.

64. While it is true that the substantial reasons identified in the file note refer to the need to protect the economic well-being of the country, in addition to the aim of preventing crime and disorder, I am satisfied that a general reading of the file and the contents of the letter, revoking the fourth named applicant's permission to remain, gives credence to counsel's submission that the real reason why the permission was being revoked, and ultimately for the making of the deportation order, was the convictions of the applicant in 2005. Mr. O'Dwyer submitted that these offences and the penalties and sentences imposed were not sufficiently serious or grave to justify the applicant's deportation and thus the measure taken by the Minister is disproportionate to the legitimate aim being pursued.

65. Counsel noted that the applicant had not committed any further offences since 2005, and that, apart from reciting a list of the applicant's convictions, there is no apparent analysis from the file note of the seriousness or gravity of the offences; nor does it appear that weight was given to the time which elapsed since the offences were committed and the applicant's conduct during that period, which are some of the criteria mentioned in *Boultif* which the ECtHR held should be addressed in assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. What the file actually notes is that:-

> "[E.K.] has been convicted of multiple offences, which has resulted in [E.K.] being imprisoned. Therefore public policy regarding the prevention of disorder and crime has a bearing on this case. "

66. Counsel submitted that there was inadequate consideration of a right protected under paragraph 1 of Article 8 and referred to *Boultif v. Switzerland* [2001] 33 EHRR 50. In that decision the Court recalled that it is a matter for the Contracting States to maintain public order in particular by exercising their right, as a matter of well established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, it is clear from the decision, that when they seek to do so, in a situation which may interfere with the right protected under paragraph 1 of Article 8, then the decision must be justified by a pressing social need and in particular, proportionate to the legitimate aim pursued. In that case the court held that the decision not to renew a resident's permit for an Algerian citizen interfered with his right to respect for family life within the meaning of Article 8(1) of the Convention and was disproportionate even though he had committed serious criminal offences while residing in Switzerland, which included possession of weapons, robbery and damage to property. Indeed the ECHR noted in its decision that the Zürich Court of Appeal considered in its judgment in January 1997 that the applicant's culpability was severe, and drew attention to the brutal manner in which the offence concerned had been committed. The decision of the court was that it would be difficult for his wife, a Swiss citizen, to follow him to Algeria as she had no ties with that country, had not visited there and did not speak Arabic and Mr. Boultif would therefore be

> "subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live with his family outside Switzerland --- "on the other hand, he presented only a limited danger to public order".

67. In arriving at its decision in *Boultif* the ECHR examined in detail the relevant criteria for consideration when assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria include the following:

> - the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which from he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> - the nationalities of the various persons concerned;
>
> - the applicant's family situation such as the length of the marriage, and other factors expressing the effectiveness of a couples family life;
>
> - whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> - whether there are children of the marriage, and if so their age;
>
> - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. The court also highlighted the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> - the solidity of social, cultural and family ties that the host country and with the country of destination.

68. There is no doubt that the State has a right to deport aliens convicted of criminal offences. Furthermore, I am satisfied, that it does not follow from the fact that offences may fall at the lower end of the spectrum of gravity or seriousness e.g. that they are minor offences or indictable offences triable summarily, that such offences, depending on the particular circumstances of the case cannot form an appropriate basis on public policy grounds for the making of a deportation order, where it is necessary in the reasonable interests of the prevention of disorder and crime.

69. It is apparent from a review of the Strasbourg case law that this public policy matter has been the subject of a number of decisions by the European Court of Human Rights. Indeed the issue has recently been considered in two Irish cases involving applications for leave to apply for judicial review. They are *F.E. and B.E.* and *M.A.E. v. The Minister for Justice Equality and Law Reform*, an unreported judgment of Mr. Justice Hogan dated 11th January, 2011, and *F.M. & G. v. Minister for Justice Equality and Law Reform*, unreported judgment of Mr. Justice Cooke dated 17th December, 2010.

70. In *F.E. & B.E. v. Minister for Justice Equality and Law Reform* leave was allowed in a case where the applicant had been convicted of sexual assault following a full trial, and had been sentenced to 18 months imprisonment and registered as a sex offender. In *F.M. & C v. Minister for Justice Equality and Law Reform* the second named applicant, had by January 2004 accumulated some 32 convictions for various offences, since his arrival in the State in 1997, and had come to the adverse attention of the Gardai on 19 occasions during the period of his temporary leave from prison. The Garda report in that case furnished to the Minister contained the conclusion: "it is evident that this man is a habitual criminal, carries offensive weapons, is a drug user and has a propensity towards violence". In both of these cases the Minister made a deportation order on the basis of the criminal record of the applicants, and in both cases leave was given.

71. In *Omojudi v. UK* [2009] ECHR 1942, (2009) 51 EHRR 10 (a case referred to by Hogan J. in *F.E. & B.E. v. Minister for Justice Equality and Law Reform*), a Nigerian national had lived in the UK from 1983 until his deportation in 2008. He was married to a Nigerian national and they had three children. In 1989 he was convicted of theft and sentenced to four years imprisonment, and when in October 1995 he claimed asylum, his application was refused for non-compliance. Subsequently, as a result of a further application the applicant and his wife were granted indefinite leave to remain. However in November, 2006 the applicant was convicted of a sexual assault and sentenced to 15 months imprisonment, with half to be spent in custody and half on licence, and he was registered as a sex offender. His offence was regarded by the sentencing judge as a "gross sexual intrusion into the private life of a woman by someone in a position of trust". However the judge reduced the sentence and did not recommend the applicant for deportation. However the Secretary of State for the Home Department made a deportation order on the 31st March, 2007, on the basis that deportation was necessary for the prevention of disorder and crime and for the protection of health and morals.

72. The European Court nevertheless concluded that the deportation order constituted a disproportionate interference with the applicant's Article 8 ECHR rights. The court took into account the fact that he had largely stayed out of trouble (for the exception of a number of driving offences, none of which resulted in a prison sentence). This case can be distinguished from cases such as *Grant v. The United Kingdom* (2009) ECHR 26, the reason being, that in Grant the court had held that there had been no Convention violation where a habitual offender from Jamaica had been deported on public policy grounds from the UK after a lengthy stay in that country-the basis for the decision being apparently, that the applicant in Grant was a habitual offender and there was no prolonged period during which he was out of prison and did not offend. This was a factor, as Hogan J. pointed out in his consideration of the decision in *Omojudi*, which was not present in that latter case.

73. What is clear from the jurisprudence of the ECHR in these cases and indeed from the facts of the Irish cases to which I have referred, is that each case must be determined on its own facts and that factors such as those outlined in *Boultif* are relevant when assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. The jurisprudence highlights the need for a careful and discriminating analysis of the factors considered by the adjudicating body, including, any aggravating or mitigating circumstances in the commission of the offence itself and in relation to the behaviour and attitude of the offender, and the period over which the offences were committed.

74. In drawing attention to the criteria in *Boultif*, counsel for the applicant asked the court to take into consideration that most of the applicant's convictions were for minor offences under Road Traffic legislation. Also, that the two offences for which custodial sentences were imposed are indictable offences which can be tried summarily, and appear to have been sentenced at the lower end of the spectrum of custodial sentences which can be imposed for these offences, and that no account was taken of the applicant's good behaviour after 2005.

75. In this regard, there is one further matter, to which I should draw attention, and that is, that in the list of the applicant's convictions, there is also mentioned of charges for sexual assault and indecency which are referred to as having been heard in conjunction with other matters on which the applicant was convicted. There is no record that the applicant was convicted of these charges, if they were in fact laid. Clearly, in that event the applicant must have been, either acquitted of these charges, or the charges were not pursued. The fact that they are listed among the applicant's previous convictions, however, may indicate that the respondent attached some weight to these charges, even though the applicant was not convicted of them. If that were indeed, the case, then it is arguable that if weight was attached to such charges, then that would constitute a breach of the applicant's right to the presumption of innocence, which is a personal right, to which the applicant is entitled. This was not a matter addressed by counsel, but it seems to me, that it may have significance in considering whether the applicant's conclusions in this regard flowed rationally from the premise. Apart from these offences, there was nothing in the evidence before the court to suggest that the applicant has been in trouble with the criminal law since 2005.

76. In *S.O. and Others v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 343, Cooke J. having reviewed the judgments of Fennelly J. and Murray C.J. in *Meadows v. The Minister for Justice, Equality and Law Reform* Unreported, Supreme Court, 21st January 2010, stated *inter alia*,

> "If on an application for leave made on notice to a decision maker a substantial ground for the grant of leave is to be made out based upon an alleged lack of proportionality it is insufficient, in the judgment of the court, merely to disagree with the balance struck in the impugned decision; or to assert that the result is untenable because greater weight or significance should have be given to some factors or less to others. It is at least necessary to demonstrate the existence of some specific factor which was material to the balancing exercise made which is demonstrably wrong or absent; or to identify some consideration which has been relied upon as material and which is irrelevant or has been improperly considered."

77. Mr. O'Dwyer submits that he has identified specific factors which were material to the balancing exercise required of the Minister and which were not properly considered. Needless to say, the court is not concerned in this case with the merits of the decision, but with the lawfulness of the process by which it has been reached. The court has to consider whether there are substantial grounds for arguing whether the decision is legally flawed, or that the balancing exercise which the State must carry out between the rights of the applicants and the rights of the State is so disproportionate as to make the decision irrational or unreasonable in terms of the test laid down in *O'Keeffe v An Bord Pleanála* [1993] IR 39 and *The State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] I.R. 642. The applicants contend that it is not apparent from the file note that relevant criteria such as the gravity and seriousness of the offences committed by the fourth named applicant, or the length of time which has elapsed since the commission of these offences were given adequate consideration by the respondent, or that having regard to the several factors outlined in *Boultif,* that the

respondent carried out any or any proper analysis of these matters. Clearly, if the applicant is correct, then these are factors material to the balancing exercise which the respondent must embark upon in the assessment of proportionality where it is sought to deport for criminal activity.

78. While the status of the relationship of the fourth named applicant with Ms. E.M., and her intentions in this matter are unclear, I am mindful that there are three young citizen children who have constitutional rights of residence in Ireland and to the company and parentage of their parents. As mentioned earlier these rights are not absolute, but it must also be borne in mind, in *O & O v. The Minister for Justice, Equality and Law Reform*, Unreported judgment of Cooke J. dated 13th January 2010:

> "While the existence of these rights does not preclude the exercise of the power to make a deportation order under Section 3 of the 1999 Act in the case of the non-national parent of an Irish child, it follows with equal clarity from case law and particularly from the two judgments of the Supreme Court delivered on 1st May, 2008, in the cases of *Dimbo* and *Oguekwe* that the Minister must exercise the power consistently with and not in breach of the constitutionally protected rights of the child and of the family members, in a manner which is compliant with the obligations created for him under Section 3 of the ECHR Act 2003."

It is uncontested in this case that the family has established a family life in Ireland:-

> that the father has been given joint guardianship of his children by the District Court, and that a decision to deport him will have an impact on family life and affect constitutional and convention rights. Counsel for the applicants has also stressed the significance of the permanence of an Irish deportation order. The duration of deportation or exclusion orders have been a consideration for the ECHR in some cases. The fact that there was no time limit on an exclusion order was held to be a disproportionate interference, and breach of Article 8, in *Yilmaz v. Germany* (2004) 38 EHRR 23, having regard to the applicant's family situation in that case, and particularly because of the young age of the applicant's son. However, the fact that the applicant, in that case had unlimited permission to reside in Germany distinguishes it from the instant case. The duration of a deportation order was also a factor in the consideration of the ECHR in the case of *Grant v. The UK* and also in the case of *Unur v. The Netherlands* [2006] ECHR 873.

79. Accordingly and in the circumstances of this particular case, and without commenting on the likelihood of success at a substantive hearing, I am satisfied that the applicants have established a substantial grounds for leave to argue that the Minister's decision should be quashed.

80. However, this is not the end of the matter. I directed that an affidavit be filed explaining the circumstances of the delay in the legal process, I would not finalise the judgment in this case until I considered whether circumstances existed to excuse the delay. For that reason it was premature to consider whether a position of the minor applicants, *vis a vis* an extension of time was a distinct issue in this matter. I note that the minor applicants in this case had legal representation available to them over the period in respect of which the extension of time was sought and that all applicants, including the fourth named applicant are represented by the same solicitor.

81. I was very reluctant to jeopardise their position in this matter, but I note that in *J.A. v. The Refugee Applications Commissioner* [2009] 2 I.R. 231, Irvine J. held that the statutory time limits in section 5(2) should be reasonably strictly applied in circumstances where a minor had legal representation available to him over the period in respect of which the extension of time was sought.

82. Accordingly, I adjourned this matter for consideration of the affidavit and in respect of any further matters that may be relevant.

83. On the adjourned date having considered an affidavit from the applicants' solicitor explaining the circumstances of the delay in the legal process, the Court was satisfied that it should grant an extension of time. Leave was granted to apply for an order of certiorari for judicial review quashing the deportation order made against the fourth applicant on 15 October 2009, which issued to the fourth applicant on 29 October 2009.

84. Relief was granted on the following ground:

> i. That the conclusion reached in balancing the impact of the deportation upon the rights, interests and welfare of the first, second and third applicants as Irish citizens and family members is disproportionate and unreasonable in law in that mistaken and irrational weight has been given to the criminal record of the fourth named applicant.