## THE HIGH COURT

## JUDICIAL REVIEW

[2016 No. 118 J.R.]

**BETWEEN** 

I.D., L.S.

AND

# I.D. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND

L.S.)

**APPLICANTS** 

AND

# THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

**RESPONDENT** 

## JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of Janaury, 2016

## **Issues**

- 1. The applicants are challenging the affirmation of a deportation order against the first named applicant of the respondent on 28th January, 2016. The initial deportation order is dated 23rd April, 2014. The first named applicant applied for a review of the deportation order on 2nd December, 2014 pursuant to the provisions of s. 3 (11) of the Immigration Act 1999.
- 2. Although initially there were eight grounds for the application for judicial review, subsequently grounds 6 and 8 were accepted as no longer available because of current jurisprudence. Further, at the opening of the matter which was heard on 24th November, 2016 the matter proceeded on the basis of an effective failure by the respondent to consider the constitutional rights of the third named applicant to the care and society of her father, the first named applicant, being Ground no. 1. In addition, the applicants continued to maintain ground no. 3, namely that an undated letter from Tusla was not considered by the respondent in the decision notwithstanding that same was dispatched to the respondent on 10th December. 2015.

## **Background**

- 3. The first named applicant is a Nigerian national born in December, 1987. He commenced a relationship with the second named applicant on or about January, 2014 and they commenced co-habitation in or about February, 2014. The third named applicant was born to the first and second named applicants in July, 2015.
- 4. The first named applicant came to Ireland on 7th February, 2012 and made an application for asylum on 8th February, 2012 which was refused and he was afforded a three option letter on 29th June, 2012 and again on 24th July, 2012. He subsequently attempted to make an application for subsidiary protection on 27th May, 2014 however this was not entertained.
- 5. A deportation order was made against the first named applicant on 23rd April, 2014 and thereafter there was a failed attempt to deport him on 3rd December, 2014. On 2nd December, 2014 the first named applicant applied for a review of the deportation order, at that time limited to an assertion of serious harm if he was returned. The first named applicant did advise the respondent that he was in a relationship with the second named applicant and they were living together. The second named applicant furnished the respondent with a letter in support of the revocation of the deportation order. On the 12th December, 2014 solicitors on behalf of the applicants advised the respondent that the second named applicant was pregnant with the first named applicant's child. In that letter of 16th December, 2014 it was indicated that the application to revoke would also be founded on the rights of the unborn child, constitutional and Article 8 rights and the Zambrano judgment. In a letter from the Chief State Solicitor's Office on 30th July, 2015 reference is made to the letter of 16th December, 2014 and the fact that no further representations had been submitted and therefore a request was made to submit detailed representations on foot of the information provided inter alia in the letter of 16th December, 2014.
- 6. Subsequently the birth certificate and passport of the third named applicant were furnished to the respondent. In addition, under cover letter of 4th November, 2015, a Tusla letter bearing date 1st September, 2015 was furnished and subsequently on 10th December, 2015 a further Tusla letter, undated, was furnished to the respondent.
- 7. The relevant portion of the Tusla letter of 1st September, 2015 was to effect that:-
  - "I. [the first named applicant] has played a parenting role with the two children within the home."
- 8. In the second undated Tusla document, they submit the portion of the letter which states:-
  - "I. plays a very important role in caring for both girls and has been seen to take an active role in parenting."
- 9. The following case law, together with the various judgments therein referred to, was relied upon by both parties namely:
  - a. Oguekwe v. Minister for Justice [2008] 3 I.R. 795 (the Supreme Court)
  - b. Ubelase v. Minister for Justice [2010] IEHC 371 (being a judgment of Clark J. in the High Court).
  - c. Shadiat Bot v. Minister for Justice (Clarke J., 20th May 2010)
  - d. E.B. (a minor) v. Minister for Justice [2016] IEHC 531 (a judgment of Faherty J. in the High Court)

#### Case law

Oguekwe v. Minister for Justice

- 10. The applicant relies on this case to the effect that the respondent must consider the circumstances of a foreign national parent of a citizen child in each case of deportation by due inquiry in a fair and proper manner as to the factors affecting the family. The applicant asserts that in that case minimal submissions were made to the effect that if the applicant was sent back this would divide his family and his Irish son would have to leave the country and it would not be safe for him. The wife and son also wrote to the Minister.
- 11. In the course of her judgment Denham J. stated that the constitutional right of the Irish citizen child was a right to live in the State and be reared and educated. It was also held that where, as in the case before the Court, the parents were married the child has rights as an individual derived from being a member of a family within the meaning of Article 41. Denham J. acknowledged that such rights were not absolute and they had to be weighed and balanced in all of the circumstances of the case. At para. 61 Denham J. indicated that she was satisfied that the decision making process should identify a substantial reason which requires the deportation of a foreign national parent of an Irish born citizen and the Minister is required to make a reasonable and proportionate decision. At para. 68 the judgment indicates that the extent of the consideration will depend on the facts of the case including the age of the child. A formal approach with specific questions as had been required by the High Court was deemed unnecessary. The Court went on at para. 85 of the judgment to set out a non-exhaustive list of matters which might assist matters relevant for consideration by the Minister when making a decision as to deportation under s. 3 of the 1999 Act of a parent of an Irish born citizen child
- 12. Of the 16 enumerated matters referred to, the applicants are relying in particular, on Item 6(c) which is to the effect:-

"The Minister should consider expressly the constitutional rights, including the personal rights, of the Irish born child, including the right to the society, care and company of his parents."

The applicants further rely on matter no. 7 which is to the effect that the Minister should also consider the Convention rights of the applicants and these may to some extent be considered together with the constitutional rights.

13. The respondent also relies on this judgment and in particular in relation to that portion that provides that save for exceptional circumstances the respondent is not required to enquire into matters other than those sent to him by and on behalf of the applicants or on file in the Department. The respondent also relies on para. 68 of the judgment of Denham J. to the effect that the extent of the consideration will depend upon the facts of each case. The respondent points to para. 72 which is to the effect that the issues and questions need not be addressed in a micro-specific format as long as the general principles are applied to the circumstances of the case and a formal approach is not necessary.

Ugbelase v. Minister for Justice

- 14. The applicants refer to this judgment for the purposes of establishing a type of decision which involves a correct analysis of the rights to be considered and the manner in which the various rights of each of the parties might be balanced. Paras. 19 22 of the judgment set out the portion of the Minister's decision as related to the balancing of rights and the constitutional rights of the parties. The Minister stated that he had considered the best interests of the Irish citizen child and of the age of the child. The paragraph goes on to set out various general matters such as the state of the economy at the time and the fact that there is no general obligation on a state to respect the choice by married couples of the country of their residence.
- 15. The constitutional rights of the Irish citizen child were specifically acknowledged, including a right to the society, care and company of their parents and the decision goes on to state that these rights are not absolute. Thereafter the Minister went on to indicate that an individual assessment had been given and due process was respected. The recommendation of the Minister was to the effect that nothing warranted revocation of the deportation order. Clark J. concluded by finding that the applicants had not established that the Minister's refusal to revoke the deportation order should be quashed and therefore the application was refused.
- 16. The respondent refers to the case of Shadiat Bot a further judgment of Clark J. delivered on 20th May, 2010 where she stated, at para. 36:-

"The applicants did not address or indeed accept that there were any deficiencies in their representations but relied on the argument that once representations were made the Minister must, by the terms of s. 3, consider and engage with those representations... It seems axiomatic that, unless the representations are of real substance and raise the probability that such deportation would be unnecessarily harsh or disproportionate, no in depth or extensive analysis of those representations will be necessary and the rationale underpinning his decision that no humanitarian considerations of relevance arise will be sufficient. The extent of the Minister's obligation to examine and assess the representations made will, in all cases, be commensurate with the nature and gravity of the risks asserted by the applicant."

E.B.

- 17. The applicant refers to para. 61 of this judgment to the effect that the relevant principles as set out in *Oguekwe* are applicable to an application to have a deportation order revoked. The applicants also referred to para. 82 of the judgment to the effect that the best interests of the children are effectively a significant part of the decision maker's remit and that the child's best interest is material and ranks highly.
- 18. On the other hand the respondent refers to para. 59 of the judgment where it is accepted that the constitutional rights present a compelling argument for minor applicants to have the care and company of their father however their rights are not absolute and the Court makes reference to the case of A.O. and D.L. v. Minister for Justice Equality & Law Reform [2003] 1 I.R. 1 (the Supreme Court). In this regard the respondent lays significant emphasis on the quote from the Supreme Court judgment as follows:-

"While in the State such a child has the right to the company and parentage of its parents."

The respondent also refers to para. 107 of the judgment to the effect that the relevant factual matrix or circumstances which fell to be considered were those as made known to the respondent through the representations made on behalf of the applicants or otherwise known the respondent.

## **Discussion**

## A - Constitutional Rights

- 19. The relevant decision which is dated 16th December, 2015 and dispatched initially under cover letter to the applicants bearing date 28th January, 2016, is a document of some 14 pages.
- 20. Both parties accept that the second letter tendered by the applicants from Tusla and undated does not feature in any portion of the decision. In this regard the applicant contends that this is a significant lapse whereas the respondent contends because there is minimal difference between the two Tusla letters, no significance attaches to the lack of reference to the second letter dispatched.
- 21. The first 8 and a half pages of the decision relate to whether or not the return of the first named applicant to Algeria would be contrary to s. 4 of the Criminal Justice Act, 2000. The following 5 and a half pages relate to the private or family life of the applicant or applicants. This consideration commenced with a brief background and the fact that the first named applicant's Article 8 rights were considered prior to the making of the deportation order and thereafter under the heading of "family life" the background of the letter from the second named applicant and the letter from Tusla of 1st September, 2015 is referred to. The decision notes that it was submitted on behalf of the first named applicant that his daughter had constitutional and Article 8 rights. It was noted that the third named applicant was an Irish national and had rights under the Constitution although these were not absolute and may be restricted. There then follows extracts from various case law as to the effective unsuitability of drip feeding the respondent. In this regard the applicant suggests that there is a factual error in this regard as the discussion appears to suggest that the first named applicant did not advise the respondent of the second named applicant's pregnancy with the third named applicant until after the deportation order which was information capable of being presented at an earlier date. In fact, it is accepted that this information could not have been provided prior to the deportation order as the second named applicant became pregnant in or about October, 2014 and the respondent was advised in December, 2014. Remaining under the heading of "Family Life" there is a discussion on the first named applicant's relationship with the second named applicant and the fact that he must have known upon entering this relationship that his status within the State was precarious and thereafter the discussion refers to the UK case of Isiko & Anor. v. Secretary of State [2000] 1 F.L.R. 930 to the effect that the knowledge on the part of the one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8. There was a quote from the case of Ugbelase, aforesaid, to the effect that the choice the wife faced was whether to remain in Ireland and raise their son or relocate to raise their son together.
- 22. There follows a quote from the Zambrano judgment and in the next para. it states that the infant and the second named applicant are currently residing in Ireland and can continue to reside there and the first named applicant's child is:-

"currently not dependant solely on him in the State and would therefore not be deprived of the genuine enjoyment of the substance of the rights attached to the status of European Union citizens if Mr. D. were to be removed from the State."

The only other reference to the infant applicant is that in weighing the rights of the applicants and the State the deportation order was not disproportionate and, further, in weighing the rights of the applicants and the State, if the deportation order was affirmed there would be no less restrictive a process available.

- 23. The respondent acknowledges that the rights of a citizen child must be acknowledged and the decision does albeit briefly, acknowledge such constitutional and Convention rights which it is argued is sufficient because of the want of representations advanced by and on behalf of the child as to how her constitutional rights would be affected. In this regard it is asserted that playing a parental role does not in fact represent how the third named applicant's rights might be affected and this was an obligation on the part of the applicants. It is asserted that reference to the case of *Ugbelase* in fact incorporates reference to the sundering of a family. It is stated that the fact that the Minister set out the content of the initial Tusla letter was sufficient to identify that same was considered in the round and the reasons for the weight apportioned between the parties' respective interests is clear from all the analysis and discussion contained in the document.
- 24. By way of contrast, the applicant states that there was no consideration of constitutional rights, save the recitation that constitutional rights were available to the infant applicant and further asserts that by merely stating that constitutional rights were vested in the infant applicant is not a consideration of those rights and in this regard the applicant refers to the Supreme Court judgment in *Oguekwe* where rather minimal representations were made and yet the Supreme Court identified a non-exhaustive list of matters to be considered by the Minister when making a decision to deport a parent of an infant citizen child.

# **Consideration of Constitutional Rights of the Infant Applicant**

- 25. As mentioned above the applicant argues that the consideration afforded to the infant applicant in the case before Clark J. of *Ugbelase* is an example of a correct approach for the Minister to adopt. The respondent counters that although the approach may not be ideal and acknowledges that reference is brief nevertheless sufficient references included in all other circumstances.
- 26. It is abundantly clear from the case law relied upon by both parties that the mere fact of being a parent of an Irish citizen child will not render a deportation order of a non-national invalid in the *Ugbelase* case before Clark J. the non-national parent was deported and in the Supreme Court case of *Oguekwe* set out the factors to be considered by the Minister when contemplating the deportation of a non-national parent of an Irish citizen child. This latter mentioned case also provides that it is not necessary for the Minister to be micro specific, a formal approach is not necessary, each case will depend on its own relevant facts and the approach will be satisfactory provided the general principles are applied. Furthermore the non-exhaustive list identified provides that the Minister should consider expressly the constitutional rights including the personal rights of the Irish born child and should also consider the Convention rights of the Irish born child which rights are acknowledged to overlap to some extent and maybe considered together with the constitutional rights.
- 27. In the *Ugbelase* decision the Minister afforded a section of the decision to the constitutional rights of the Irish citizen child and stated that the infant was an Irish citizen and had personal rights under Articles 40, 41 and 42 of the Constitution. These rights were enumerated and a statement was incorporated to the effect that factors relating to the individual position of the Irish citizen child have been expressly considered above. Thereafter it was noted that such constitutional rights of the child were not absolute which is followed by a further repeat enumeration of the rights of the child. Later in the decision there was a section of "balancing of rights" and it was stated that:

28. In the current impugned decision the following incorporates the totality of the reference to the third named applicant child:-

"Ms. Hutson is currently pregnant ... this child, Ms. ... was born on the 18th July, 2015 and Mr. Djerbi is named as the father on the child's birth certificate ... he has been seen to have a parenting role with the two children ... his daughter have (sic) constitutional and Article 8 rights. Ms. I.D. is an Irish national and has rights under the Constitution, however, constitutional rights are not absolute and may be restricted ... she claims to have been pregnant in December 2014 with Mr. D.'s child, this child being born in July 2015 ... Mr. D. in failing to inform the Minister of his relationship with Ms. Hutson as well as her second pregnancy ... Mr. D. can continue to reside in Ireland, Mr. D.'s child is currently not dependent solely on him in the State and would therefore not be deprived of the genuine enjoyment of the substance of the rights attached to the status of the European Union citizen ... having weighted and considered all of the factors outlined above relating to the status of Mr. D., Ms. Hutson and her two daughters ..."

- 29. Accordingly therefore insofar as reference to the constitutional rights of the third named applicant is concerned the impugned decision does recognise that the third named applicant has constitutional rights and Article 8 rights however it is noted that her constitutional rights are not absolute and might be restricted. Later on it is noted that the third named applicant continued to reside in Ireland and is not currently solely dependent on the first named applicant. Finally, in the conclusion it is stated that the decision maker weighted and considered all of the factors outlined above in relation to the two daughters such circumstances outlined above being, in effect, that the third named applicant was an Irish citizen child with constitutional and Article 8 rights which are not absolute and may be restricted and she is not solely dependent on the first named applicant.
- 30. The State acknowledges that references to the infant citizen child's constitutional rights are particularly brief but this has to be reviewed in the context of the minimal submissions tendered on behalf of the applicant.
- 31. I am of the view that the minimal reference to the constitutional rights of the third named applicant in the impugned decision, on its own would not vitiate an otherwise lawful decision.

## **B** - The Undated Tusla Letter

- 32. The applicant contends that the content of the final Tusla letter submitted included a qualitative difference over the prior letter of the 1st September, 2015 and to the first named applicant's role as a parent. In the letter of the 1st September, 2015 it is said that the first applicant had been seen to have a "parenting role with the two children within the home" whereas the undated letter stated that the first applicant "is currently living with ... plays a very important role in caring for both children and has been seen to take an active role in parenting."
- 33. The applicant contends that failure to refer to the undated letter in conjunction with the failure to recognise the quantitative difference between the two letters demonstrates the respondent's failure to consider the effect of deportation on the personal rights of the infant applicant. In this regard the applicant acknowledges that lack of specific reference to one letter in the ordinary course would not necessary vitiate an otherwise lawful decision.
- 34. The respondent argues that the two letters are effectively identical and no great difference can be identified between the two letters and hence the lack of reference to this undated letter is not material.
- 35. It appears to me that reading the decision as a whole the Minister did not question or express any doubt that all three applicants were living in the one home.
- 36. The difference therefore in the two letters is that the undated Tusla letter expresses the view that the first named applicant plays a very important role and takes an active role in parenting. The letter of 1st September, 2015 confirmed that the first named applicant has a parenting role with the two children within the home. It appears to me that such a role is important and by definition is active.
- 37. In the events I do not accept that failure to refer to the undated Tusla letter on its own would vitiate an otherwise lawful decision.

## Conclusion

- 38. Only two documents were tendered dealing with the rights and position of the 3rd named applicant, one of which was not referenced in the decision. Furthermore, the express consideration of constitutional rights relating to the 3rd named applicant are extremely minimal she is not solely dependant on the 1st named applicant.
- 39. Although neither the failure to refer to the undated Tulsa letter on its own nor the minimal reference to the constitutional rights of the third named applicant might, individually, vitiate the decision, nevertheless the combination of these two factors is such that in my view the respondent's decision is unsatisfactory and should be quashed.