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THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 852 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999, AND IN THE MATTER OF THE CONSTITUTION, AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

S.L, A.L., P.L, R.L., O.L, O.L.L. (A MINOR SUING BY HER FATHER AND NEXT FRIEND A.L.), D.L. (A MINOR SUING BY HER FATHER AND NEXT FRIEND A.L.), A.D.L. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND A.L.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of January, 2014

1. The first named applicant is a Nigerian national born on 15th November, 1985. His natural mother was killed in a motor accident on 4th May, 2001, in Nigeria. He and his sister, R.L., who was born on 10th March, 1987, resided and were raised by an uncle. The applicant's natural father, the second named applicant, A.L., does not appear to have had any contact or engagement with him during the course of his childhood. His father married the third named applicant, P.L., with whom he had four children who are the fifth to eighth named applicants. R.L., the first applicant's sister, is the fourth named applicant.

2. The fifth and sixth named applicants were born in Nigeria on 19th July, 1994 and 29th October, 1997, respectively and arrived in Ireland in 1998 with their parents. The seventh and eighth named applicants were born in Ireland on 1st December, 1998, and 1st December, 2001 respectively. Though the court is informed that some form of application for family reunification was made in February, 2002 to reunite the two children with their father by the second and third named applicants on the basis that they were not being properly cared for, no further details are available in respect of this application or in respect of the contact between the children and their father and extended family.

3. The fourth named applicant, the first named applicant's sister, arrived in the state and was granted refugee status in January, 2007.

4. The first named applicant arrived in Ireland on a two month visitor's visa on 12th October, 2008. He was entitled to remain lawfully within the state until 10th December, 2008. He applied for an extension of his visa on 15th August, 2008, which was refused on 22nd December, 2008. He was informed that he could apply for a further visa at a later stage. He then chose to remain in the state because he wished to be with his family. At that time he was 23 years old. At that stage all of the other members of the family were lawfully resident in the state and in time each would obtain citizenship.

5. Unsurprisingly, the first named respondent informed the first named applicant that it was proposed to consider his deportation on 26th January, 2009. Representations were made on his behalf pursuant to s. 3 of the Immigration Act 1999, for leave to remain. On 8th June, 2010, the applicant was notified that a deportation order had been made in his case on 3rd June, 2010. The letter contained a copy of the deportation order and the examination of file note prepared for and submitted to the Minister in the course of that process. The deportation order has not been the subject of a challenge by way of judicial review.

6. On 23rd June, 2010, some fifteen days after notification of the order, the first named applicant sought its revocation. It is instructive to outline the contents of the examination of file before examining the s. 3(11) application. The examination considered each of the matters which are required to be taken into account under s. 3(6) of the Immigration Act 1999. It was noted that though he had entered the state on foot of a travel visa ostensibly to visit his father and extended family members who were lawfully resident in the state, he now sought leave to remain on the basis that he wished to be with his family members who were now domiciled here. He was illegally in the state. No detail of past employment in Nigeria was produced by his solicitors, though he had a national diploma in Business Studies together with a letter from the Lagos State Polytechnic. No explanation was furnished by the applicant as to why he failed to comply with the conditions of his entry visa. It was also noted that on 15th December, 2008, a request had been made for a stamp for residency which appears to have been refused. A request to be allowed leave to remain temporarily in the state on the basis of "exceptional circumstances" was submitted by his solicitors. At that time the first named applicant's father and step-mother had temporary permission to remain in the state and both had applied for "naturalisation". Clearly no issue arose in respect of s. 5 of the Refugee Act 1996, and s. 4 of the Criminal Justice (UN Convention against Torture) Act 2000.

7. It was accepted that the deportation of the first named applicant would engage his rights with respect for private and family life under Article 8(1) of the European Convention on Human Rights. It was stated that full consideration had been given to the relationship between the first named applicant and the other applicants, and it was not accepted that the decision to deport him constituted an interference with his right to respect for family life under Article 8. In particular, the examination of file relied upon the case law of the European Court of Human Rights to the effect that relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties. Of course, family life existed between father and son and the first named applicant and the other members of the family. However, it was not accepted that an extensive relationship between the family members had been established by the first named applicant because he had only lived in the state since late 2008. He had lived all his life in Nigeria. It is clear that other relevant factors, including the identification of the first named applicant's relations, the nature and extent of their relationships, the age of the applicant, where and with whom he has resided in the past, and the forms of contact he has maintained with members of the family with whom he claims to have a

family life were all considered. It was not accepted that the first named applicant's circumstances suggested anything more than the existence of "normal emotional ties".

8. It is clear that the Minister was furnished with all of the information relating to the family circumstances of the applicant before reaching his decision. There is ample provision under s. 18 of the Refugee Act 1996 (as amended), to enable applications for family reunification to be made within the terms of the Act. It was at all times open to the second named applicant in particular to seek family reunification with his two children in Nigeria at any stage. Though there is some suggestion that an attempt was made in February, 2002, the court has not been furnished with any details as to whether this application was pressed or whether a review of any refusal was sought. Furthermore, it was open to the first named applicant, an adult, to comply with the lawful terms of the visa upon which he entered the state and return to Nigeria from which a further application for permission to visit could have been lawfully made. Instead, the first named applicant decided that he wished to remain in Ireland permanently and has decided also that the best way of doing that was to breach the conditions of his visa and remain in Ireland illegally.

9. On 14th June, 2010, the second named applicant wrote on behalf of his son to the Department of Justice, Equality and Law Reform seeking to "appeal" the decision. This was followed on 23rd June, 2010, with a formal application under s. 3(11) of the Immigration Act for the revocation of the order. This application, once again, set out the family and domestic circumstances and the background to the first named applicant's arrival in the state. Submissions were made concerning the further integration of the applicant into Irish society during the course of his stay and s. 5 of the Refugee Act 1996, based on country of origin information said to indicate a low level of human rights protection in Nigeria. The court notes that there is nothing new advanced of any relevance to the particular circumstances of the applicant in these submissions. The applicant was legally advised when making the application under s. 3(11) and the application under s. 3 for leave to remain. It is unsurprising, having regard to the short period between the s. 3(11) application and the making of the deportation order, that nothing new was advanced of any substance. However, further materials were submitted, including letters from the applicant's siblings and testimonials, over the subsequent two year period. During that time the other applicants became Irish citizens and at the time of the preparation of the consideration under s. 3(11) this factor and other documents and submissions made were considered in detail.

10. In a letter of 23rd August, 2012, Trayers & Co. Solicitors emphasised that each of the other applicants had now become an Irish citizen, but no particular submission was made as to how the first named applicant's deportation might infringe any asserted right under Article 41 of the Constitution. The submissions concentrated on the case law of the European Court of Human Rights which had already been considered in the examination of file prior to the deportation order. No complaint was made of any alleged inadequacy in the consideration of Article 41 rights and in respect of any failure to mention Article 41 specifically in the examination of file.

The Challenge

11. The grounds upon which an order of *certiorari* of the affirmation of the deportation order is sought are:-

> "1. In failing to consider whether the affirmation of the deportation order in respect of the first named applicant infringed the citizen applicants' rights under Article 41 of the Constitution, the respondent failed to protect and vindicate the citizen applicants' rights under Article 41.
>
> 2. The affirmation decision is a disproportionate interference with the applicants' rights under Article 41 of the Constitution.
>
> 3. There was an inadequate consideration given to a proportionate balancing of the interests of the state in maintaining the integrity of the immigration laws as against the entitlement of the remaining applicants, all citizens, to invoke the protection of their family interests under Article 41 of the Constitution.
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> 4. The affirmation decision is a disproportionate interference with the applicants' rights under Article 8 and 14 of the European Convention on Human Rights.
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> 5. The affirmation decision is a disproportionate interference with the applicants' rights under Article 7 of the Charter of Fundamental Rights of the European Union.
>
> 6. The respondent failed when affirming deportation order in respect of the first named applicant to express in clear and unambiguous language that he had sufficient consideration of the relevant criteria, namely the Constitution and Article 8 and Charter rights of the whole family in this jurisdiction."

Article 41 of the Constitution

12. The relevant provisions of Article 41 relied upon by the applicants' are:-

> "1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

There is no doubt that the first named applicant and the other applicants form a family for the purposes of Article 41 of the Constitution. It is clear that at the time the decision in respect of s. 3(11) was made, the first named respondent was fully aware of the family circumstances and of the development that each of the other applicants was now an Irish citizen. The first named applicant was not entitled to choose Ireland as his residence simply because his family members who are now Irish citizens reside here. He enjoyed no family life with these applicants prior to his arrival in the state. He is an adult and there is no evidence that he was in any way dependent financially upon the second or third applicants or his sister whilst in Nigeria. It is accepted by the second named applicant that in respect of the first and fourth named applicants he was not "there for them as a father" and did not provide them with any paternal care during the early stages of their lives. The family relationship between the first named applicant and the other applicants only developed following his arrival in 2008. Thereafter, he should have returned to Nigeria after two months but now seeks, having remained in Ireland illegally, to build a case on the relationships which he now says have been formed during the period of his illegal presence in the state.

13. The court notes that when considering to make a deportation order under s. 3(6) of the Immigration Act, the Minister was required to "have regard" to a number of matters including the age of the first named applicant, the duration of his residence in the

state, the family and domestic circumstances of the first named applicant, the nature of his connection with the state, if any, his employment record, humanitarian considerations and any representations duly made by or on his behalf, and the common good. It is clear that at all stages of this process the nature and extent of the first named applicant's relationship with the other applicants was considered in great detail in the examination of file and in the consideration prior to the affirmation of the deportation order. I am not satisfied that simply because there is no reference to Article 41 of the Constitution in the consideration, that the decision is thereby vitiated.

14. In *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] ILRM 593, Costello J. held that the state was not precluded from deporting a foreign national simply because they are married to or related to an Irish citizen. He held that the decision of the Minister was not flawed simply because he and his staff "did not take down the Constitution and consider the constitutional provisions relating to the family before reaching a decision or making a recommendation". In that case, as in this case, the Minister was well aware of the family circumstances of the applicant and it was clear from the evidence that the Minister had a full understanding and briefing in respect of the likely affect on the removal of the first named applicant from the state on the other applicants and their relationship with him as it had developed since his arrival. In *P.F. v. Minister for Justice* [2005] IEHC 9, a decision not to revoke a deportation order was challenged. It was submitted that the Minister was under an obligation to address the constitutional rights of the Irish husband. Ryan J. rejected the contention on the basis that as a matter of fact the issue of marriage was considered by the respondent, together with the impact of a deportation order upon the parties and their relationship. It was not necessary to have a specific recitation that the impact had been considered. (See also *B.I.S. & Anor v. Minister for Justice, Equality and Law Reform* [2007] IEHC 398). As Gannon J. said in *Osheku v. Ireland* [1986] I.R. 733:-

> "…it seems to me to follow that the personal rights guaranteed under the Constitution are not so absolute as to be capable of being considered entirely independently of the overall provisions of the Constitution. The personal liberty of the citizen is probably the greatest of the fundamental freedoms. It must be in the interests of social order and the common good from time to time in individual cases to restrict the freedom of movement of a citizen within the state as, for instance, by imprisonment or hospitalisation. This necessity may prevail over the related constitutional rights of members of the family of the individual concerned notwithstanding the recognition in the Constitution of the family as "the natural, primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law…" and "as the necessary basis of social order and as indispensable to the welfare of the Nation and the State"…
>
> The right to reside in a particular place of the individual's choice is not a fundamental or constitutional right of a citizen whether he be married or single."

15. In *T.C. v. Minister for Justice* [2005] 4 I.R. 109 and *A.O. & D.L. v. Minister for Justice* [2003] I.R. 1, the Supreme Court acknowledged the fact that parentage of an Irish born child did not confer a right on the parents of that child to remain in the state and that family rights under Article 41 were not to be viewed as absolute. Thus, membership of a family by marrying an Irish citizen did not confer on the applicant in *Osheku* a status or immunity from the sanctions of the law in respect of his continued disobedience of the law or his deportation.

16. I am satisfied having considered all of the papers furnished in the course of the s. 3(11) application and the previous unchallenged decision made to deport the applicant and the very extensive consideration given to the family circumstances of all of the applicants, and their relationship in particular to the first named applicant, that it is unrealistic and artificial to contend that the applicant's rights as a member of a family unit under the Constitution were not considered in this case. It is equally unrealistic to challenge the affirmation of the order as disproportionate interference with the applicant's rights under Article 41, when the nature and extent of the relationship and its disruption of the family unit were fully considered in both decisions. The extensive letters of support written by his siblings were fully considered by the first named respondent in the s. 3(11) application. Indeed, there is nothing in this argument beyond the assertion of disproportionality offered to demonstrate why it must be viewed as disproportionate.

17. The authorities clearly indicate that the Minister has a wide discretion under s. 3(11) and that it is incumbent upon the first named applicant to advance something new to give the first named respondent a basis upon which to withdraw the order. In *Smith & Smith v. the Minister for Justice and Equality & Ors* [2013] IESC 4, Clarke J. stated:-

> "5.4 …there can be little doubt but that permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances would contribute to such delays and have an adverse affect on the orderly implementation of the Irish immigration system. It seems to me to follow that it is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decisions not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances."

The application of s. 3 clearly requires the Minister to take into account the family circumstances of the first named applicant in a fair, reasonable and proportionate manner. There is nothing in the examination of file or the consideration in the s. 3(11) application to indicate that this was not done. Furthermore, the court is not satisfied that any new material of any significance was advanced as part of the revocation application.

Article 8 of the European Convention on Human Rights

18. Most of the argument in this case was directed towards the alleged inadequacies of the consideration of the applicants' private and family life rights under Article 8 of the Convention. It was submitted that the first named respondent failed to consider what was said to be a material change in the applicable law resulting from the decision of the European Court of Human Rights in *A.A. v. United Kingdom* [2011] European Convention on Human Rights 1345, to which reference was made in the applicants' letter of 23rd August, 2012. It was submitted that where a material change in the applicable law occurs which may warrant reconsideration of a deportation order, the Minister was obliged to reconsider it. This position has been accepted by the Supreme Court in *Smith v. the Minister for Justice and Equality* as referred to above and in *Okunade v. Minister for Justice and Equality* [2012] IESC 49.

19. The principles relied upon and set out in the letter of 23rd August, were based upon the decisions in *Bouchelkia v. France* [1997]

ECHR1, *Boujlifa v. France* [1997] ECHR 1, *Maslov v. Austria* [2008] ECHR 546 and *Bousarra v. France* [2012] EHCR1999. I am not satisfied that the *A.A.* case gives rise to a substantive change relevant to the first named applicant's case. The European Court of Human Rights in that case determined the matter on the basis of private life rights under Article 8 of the Convention, though it was acknowledged by the court that the case law "would tend to suggest that the applicant, a young adult of 24 years, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"".

20. It should be noted that a significant number of the cases cited concern the deportation of persons who had been convicted of criminal offences but who had lawfully resided within the respondent states for many years and, in most instances, since childhood. Each of these applicants, unlike this case, had been educated and worked for most of their lives within the respondent states and had little or no connection with their country of origin.

21. In *B.I.S.* (cited above) the applicant, a Nigerian, failed in an application for asylum. He and his two siblings were born in Ireland and resided here with their parents and challenged the deportation order made against him in August, 2006, the applicant having arrived in Ireland in April, 2006. The first named applicant's parents had come to Ireland from Nigeria in 2001. He had one older sister who still resided in Nigeria. He and the older sister lived with his grandmother after the parents left Nigeria for Ireland. His parents visited him in Nigeria in 2003. It was claimed that the Minister in that case failed to consider the impact upon his Irish born siblings of the first named applicant's deportation, and that there was a disproportionate breach of the applicant's rights to private and family life under Article 8 of the Convention and the Constitution. It was also submitted that the deportation order did not strike the appropriate balance between the aim of removing the applicant from the state on the one hand and the rights of the applicants' under Article 8 and the provisions of Article 41 of the Constitution in that the requirement that the applicant remain outside the state was not the most limited necessary restriction on the applicant's Article 8 rights and, therefore, not proportionate and was a disproportionate restriction on his siblings constitutional rights. Similar arguments have been advanced in this case. These submissions were rejected by the court and Dunne J. concluded that it was impossible to argue that the applicant had established such a relationship with his siblings within the short period available sufficient to constitute family life within the meaning of Article 8. The applicants had not enjoyed any family life together outside the state prior to the arrival of the first named applicant. The court was also satisfied that if the relationship had been sufficient to establish family life under Article 8, deportation would be proportionate in such a case in all save a small minority of exceptional cases.

22. The period for which the first named applicant was lawfully in the state was two months. His contact with his natural father and extended family in Ireland was minimal prior to his arrival. He was not financially dependent upon his family and arrived in Ireland as a young adult who had spent all of his life in Nigeria residing with other members of his family. His sister, R.L., resided with him in Nigeria until she came to Ireland. He did not form part of a family unit comprising his father, step-mother and step-siblings prior to his arrival. At the time the deportation order was made on 3rd June, 2010, there was very little to suggest that more than "normal emotional ties" existed between them. Furthermore, it is appropriate to have regard to the lawfulness and length of stay of the first named applicant as significant factors when seeking to identify the exceptional case which might prevent the state from exercising its entitlement to impose immigration control. As in the *B.I.S.* case, I am satisfied that the first named applicant is, in effect, asserting a choice that he would like to reside in Ireland with his extended family. I do not consider that affirmation of the deportation order in any way interferes with his right to respect for family life under Article 8.

23. In *K.A. v. Refugee Appeals Tribunal* [2012] IEHC 109, Cooke J. reviewed the jurisprudence of the European Court of Human Rights on this matter and concluded as follows:-

> "15. To constitute "family life" for the purpose of Article 8, mere residence, even over a prolonged period and even when legal, is not sufficient. There must be evidence of some more substantial existence lived with close relatives in which the individual concerned can be shown to have established personal roots in the contracting state through personal relationships, parenthood, education, employment or other indicators that the contracting state has become the real centre of the individual's settled way of life. Whether or not the expulsion of an individual from a contracting state can be shown to be an unlawful interference with such a "family life" will depend upon a variety of factors which can be expressed as a series of questions which is not, of course, exhaustive:
>
> - Who are the other members of the family in question and what is their degree of relationship to the individual concerned?
>
> - Are they immediate relatives in the direct line, such as parents, children, siblings or spouse?
>
> - In what circumstances does the family life in question come to be established within the contracting state?
>
> - Most importantly, for how long has it been established as the household situation in which the individual concerned has been living?
>
> - Has the individual's presence in the state been lawful?
>
> - Has the presence of the individual concerned in the contracting state been brought about by some circumstance or purpose such as the making of a claim for asylum in which the family life in question is incidental or consequential?
>
> - What ties have been established in the course of that family life by way of education, employment and the other normal incidents of personal existence lived in a settled location?
>
> 16. The wide variety of these and other possible permutations can be seen readily illustrated in the judgments opened to the court, and those referred to above and to be found elsewhere in the case law. As has been seen, in many the subject of the proposed expulsion was a member of a family of settled migrants lawfully present in the state. In many instances the individuals concerned had arrived in the contracting state at a very young age with the family involved and had there grown up, been educated and pursued employment before, for example, facing expulsion as a result of committing a crime."

24. I am satisfied that the decision of the first named respondent in respect of the s. 3(11) application could not be said to be wrong in law or irrational in that it is supported by the available information concerning the first named applicant's history, his family circumstances and the history of the other applicants. In essence, the first named applicant came to Ireland for the purpose of residing with his extended family having obtained a tourist visa to secure his entry. There is no suggestion or allegation that he has been in any way unfairly treated in this application for a visa to visit his family. Though evidence was advanced to suggest that an application for family reunification had at one stage been made in or about 2002 by the first named applicant's father and step-

mother, no further information has been furnished on that matter and no challenge was made at any stage to the lawfulness of the deportation order made in this case. The first named applicant, his father, step-mother and sister must have been aware that the first named applicant was unlawfully in the state once the visa expired. This is clear from the application made to extend the visa which was refused. All of the facts relevant to any of the issues said to arise under Article 41 of the Constitution and Article 8 of the Convention canvassed in the s. 3(11) application were considered appropriately.

25. I am satisfied that the applicants' have failed to establish that the decision to affirm the deportation order was fundamentally flawed on any of the grounds advanced. The application is dismissed.