THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 779 J.R.]

BETWEEN

CHIBUIKE ONYEMAECHI

MARY CYNTHIA MATHEW

FAVOUR ONYEMAECHI

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND MARY CYNTHIA MATHEW)

DANIEL ONYEMAECHI

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND MARY CYNTHIA MATHEW)

JOSH ONYEMAECHI

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND MARY CYNTHIA MATHEW)

CHIMEZIRIM ONYEMAECHI

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND MARY CYNTHIA MATHEW)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

THE ATTORNEY GENERAL

IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of October, 2017

1. The father in this case is a national of Nigeria and met the mother in Nigeria in mid-2006. A deportation order was made against the father in the State on 27th February, 2006, which does not appear to have been challenged. He was due to present on 10th March, 2006, but evaded for a nine-year period from then until he presented on the 13th March, 2015. Apparently he left Ireland in 2006. The mother avers that he returned in November, 2008. The mother was pregnant when she travelled to Ireland in March, 2008, and the first child was born here in November, 2008. Three further children were born in 2009, 2011 and 2013. The first named applicant presented on 9th June, 2015 and then evaded for in excess of another further year.

2. In 2015 he applied by way of a first s. 3(11) application to revoke the deportation order. The analysis, which recommended refusal, dated 10th July, 2015, noted that he had failed to provide birth certificates for the children. He subsequently presented in August and October, 2016. On the 7th November, 2016, it was noted in the context of a second s. 3(11) application that four birth certificates were provided but they did not identify the first named applicant as the father, so that application was also refused. He then presented on the 22nd November, 2016, and in January, 2017. On the 9th January, 2017, the births where re-registered with the first named applicant's name. He failed to present in February, 2017, and then presented between March and September 2017. He was due to present again on the 4th October, 2017, but failed to do so and a decision was made to arrest him. He was arrested on the 7th October, 2017, and is currently detained in Cloverhill Prison.

3. On the 9th October, 2017, the re-registered birth certificates were sent to the Minister - 9 months after the re-registration. On the 12th October, 2017, a third s. 3(11) application was made. Such an application was made at the eleventh hour, and particularly when an applicant is already in custody, is *prima facie* abusive.

4. I heard oral evidence from D/Garda Michael Byrne who was cross-examined on his affidavit and having seen and heard him in the witness box, I accept his evidence. Exceptionally, I permitted oral evidence from the applicant's brother, given that the hearing is being conducted at short notice. He gave a somewhat strange story about Gardaí calling to the house about an alleged paedophile on 6th October, 2017. His evidence, unlikely as it is, appears to be quite peripheral to any issue I have to decide in that respect. He gave an account of an interaction with D/Garda Byrne that I reject having heard and seen them both.

5. I have heard helpful submissions from Mr. Gary O'Halloran B.L. for the applicant and Ms. Sinead McGrath B.L. for the respondent.

Relief sought

6. The only substantive relief being pursued is an injunction restraining the deportation of the first named applicant. That is sought as a substantive relief and not as interlocutory relief. An order of *mandamus* compelling the Minister to determine the revocation application was sought in the papers as issued but it is agreed that that is not necessary because the Minister is stating that that application will in due course be determined.

Grounds of the application

7. The first ground is that the Minister is acting contrary to fair procedures as he has yet to consider the impact of the deportation on the first named applicant and others and has yet to consider whether to grant the applicant permission to remain in the State in like circumstances to similarly situated persons.

8. It is well established that there is no obligation to refuse to deport someone merely because there is a revocation application, subject of course to the *caveat* that the Minister has to be satisfied at any given time that he is acting lawfully.

9. It was alleged by Mr. Gary O'Halloran B.L., in the course of an able submission, that there is a policy that applies to "*hundreds of other people*" (i.e., the alleged policy arising from the McMahon report), but even if there is such a policy is it not a basis for benefitting this or any other applicant. In my view, the argument based on a scheme or policy is without any substance whatsoever. The Minister has publicly stated (e.g., as referred to in *D.E. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 650 (under appeal) and *(No. 2)* [2017] IEHC 276) that he is attempting to identify individual cases to which the McMahon Report might be applied. But the McMahon Report is not the policy and any individual applicant does not have an entitlement to have it applied to him or her.

10. I would therefore uphold the plea in the statement of opposition at para. 4 that a s. 3(11) application does not preclude deportation, nor is the Minister required to determine such an application prior to deportation (see *Toidze (orse Arabuli) v. Minister for Justice and Equality* [2011] IEHC 395). The Minister must of course be satisfied that deportation in any particular case is lawful. D/Garda Byrne indicates that the Garda Síochána Evader Tracking Unit checks in with the Department of Justice and Equality via the Arrangements Unit prior to making an arrest and is informed essentially that there is an all-clear. That constitutes confirmation by the Minister that there is no legal obstacle from the Minister's point of view, which satisfies any requirements in that regard; unless that decision can be shown to be unlawful - which is certainly not the case here.

11. The second ground is that the Minister is obliged by law to consider and determine the revocation application. That is true but it is not a basis for an injunction restraining deportation.

12. The third ground is that the balance of convenience favours the maintenance of the *status quo*. However, that is irrelevant. The balance of justice arises at the interlocutory stage, not in relation to substantive relief. One cannot bring an action (whether by way of judicial review or otherwise) seeking purely interlocutory relief (see in a different context *Caudron v. Air Zaire* [1985] I.R. 716).

13. The Supreme Court decision in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 [2012] 3 I.R. 152 applies to interlocutory injunctions and not to injunctions by way of substantive relief (see for example, para. 11.4). A rational immigration system is not possible if parties could seek an injunction as a substantive relief and then seek to apply interlocutory principles in order to obtain that relief. So in my view there is no basis for an injunction here. Even if I am wrong about that, I should clarify that *Okunade* does not apply as we are dealing not with a deportation order but with an application to revoke a deportation order, so exceptional circumstances are required for an injunction; but even if *Okunade* does apply, the balance of justice leans against relief.

14. I accept the averment of James Boyle that the applicant has sought to undermine the operation of the immigration process in the State by evading deportation and by providing materially false and misleading information. He claimed to be in the State for ten years (see for example, his submission dated 15th June, 2015), but it is clear that he returned to Nigeria in 2006 to 2008. He evaded the deportation order for a nine-year period. There was an extraordinary laconic approach to furnishing the birth certificates. A quite deliberate decision was made by the applicant not to register himself as the father. There was then a nine-month delay in furnishing the birth certificates even having obtained them.

15. He failed to notify the Garda National Immigration Bureau of his correct address, having given at all material times a registered address as that of the mother. But it is clear from the evidence that he lived at times elsewhere and gave the address in Drogheda of his brother as his address in a 2016 lost property application. Even his brother accepted that the applicant moved around addresses. I accept D/Garda Byrne's evidence that the first named applicant claimed he could not present because of a hip problem and yet carried his own bags when arrested.

16. There seems to be quite limited evidence of anything approaching an intensive involvement of the father in the lives of the family. The mother's averment in this regard is quite laconic and unparticularised (see *M.I. v. Minister for Justice and Equality* [2017] IEHC 174 para. 16, *per* O'Regan J.) There are no apparent obstacles to the return of the family as a unit in Nigeria in any event. Furthermore, if the Minister allows the applicant's application in due course he can always be brought back.

17. The fact that he is on his third s. 3(11) application does not assist. The immigration system should not be a form of endless legal merry-go-round. It has been repeatedly noted that the role of the court in the s. 3(11) process is much more restrictive; see for example, *Akujobi v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603, [2007] IEHC 19 *per* MacMenamin J., *O(G)* and *Ors. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190 *per* Birmingham J. and *Mamyko v. Minister for Justice, Equality and Law Reform* [2003] IEHC 75 where Peart J. referred to a drip feeding of grounds which would have the result that "*the entire fabric and integrity of the asylum process would be thrown into chaos*".

18. The Minister is entitled to stand on the entitlement of the State to deport a person who has acted in flagrant breach of immigration law, notwithstanding that it has adverse effects on third parties including children. Children are not a shield against deportation. At most the interests of children are one factor to be weighed in the balance amongst other factors at the interlocutory stage, even acknowledging that children are not associated with parental wrongdoing. Even with such a concession, those interests can be outweighed by other factors. And even if, which I do not accept, the weighting of factors appropriate for the interlocutory stage has any relevance to substantive relief as sought is here, insofar as the Minister is adopting the approach that affirming deportation under s. 3(11) of the Immigration Act 1999 is the appropriate step, that is a lawful and permissible position. I should therefore add that that decision should therefore not be enjoined - especially not by some sort of strange, free-standing injunction as a boot-strapping substantive relief, designed to thwart an immigration decision which has not been challenged in the manner permitted by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

Order

19. Therefore I will order that the proceedings be dismissed.