Neutral Citation Number: [2011] IEHC 66

THE HIGH COURT

2010 548 JR

BETWEEN

K. I.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 22nd February, 2011

1. This application for leave to apply for judicial review raises once again issues which have troubled the courts for the best part of a decade. The applicant is a Nigerian citizen who arrived here in December, 2008. He is the father of three children, the last of whom is an Irish citizen by virtue of being born here in August, 2004. His wife has permission to remain in the State by virtue of what has come to be known as the Irish Born Child Scheme 05. Ms. I. is presently expecting a child next month which child, if born, will also be an Irish citizen.

2. Mr. I applied for asylum upon his arrival, but this was refused by the Office of Refugee Applications Commissioner in December, 2008. This decision was affirmed by the Refugee Appeals Tribunal in February, 2009. An application for subsidiary protection was refused by the Minister in March, 2010. The Minister subsequently made a deportation order on 1st April, 2010. It is the validity of this order which is under challenge in these proceedings and I am now called upon to consider whether the applicants have established substantial grounds within the meaning of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act") such as would justify the grant of leave to apply for judicial review.

3. Mr. I had previously applied in November, 2006 to our Embassy in Abuja for a visa to travel here to join his wife. This application was refused having regard to the existing policy of not granting a visa to an applicant whose spouse was resident here under the IBC 05 Scheme.

4. Since his arrival in the State, Mr. I appears to have been a dutiful father who has looked after the educational and other needs of his children in an impressive fashion. There are various testimonials from teachers and others to the effect that Mr. I. regularly brings the children to school and assists them with homework. Ms. I. has worked in a variety of capacities during this period - ranging from care worker to a retail assistant - and there is little doubt but that Mr. I.'s presence in the home has facilitated her doing this.

5. There is also little doubt but that Mr. I has abused the asylum system. At his interview with the Office of Refugee Applications Commissioner in December, 2008 he candidly agreed that the only reason he came to Ireland was to be with his wife and children. He added that his wife had been threatening to divorce him and "his children have been asking where I am".

6. All of this points to the fact that Mr. I came to Ireland to pursue a better life than would have been available to him and his family had they remained in Nigeria. For all our present difficulties, the standard of living in Ireland is incomparably higher than that prevailing in Nigeria. Given that S. is an Irish citizen and given further that Ms. I and the other two children were the right to remain here by virtue of the IBC Scheme, it is unsurprising that Ms. I would elect to remain in the State or that both Mr. and Ms. I considered that it was in the best interests of all the children that they would be reared in Ireland, rather than Nigeria. Few would disagree with that assertion. Mr. I further states that Ms. I has a "fear that our daughters will be subjected to female genital mutilation" against their wishes if she returns to Nigeria with them. It is equally understandable that Mr. I. would have sought to come to Ireland to join his family and that his family wanted him in turn to join them in the country in which they had settled.

7. Mr. I. was not, however, entitled to circumvent our asylum and immigration laws for this purpose. As I ventured to suggest in my own judgment in *Robertson v. Governor of the Dochas Centre* [2011] IEHC 24, the principle that legislation should not be interpreted in a fashion as would allow a person to profit from their own wrong is one of general application. If one looked at this issue *simply* from the standpoint of Mr. I. and from that standpoint *alone*, then it is plain that any challenge to the validity of the deportation order would have to fail *in limine* in view of his calculated abuse of the asylum system.

8. If only life were that simple. Irrespective of the fact that Mr. I. did abuse the asylum system, the other relevant consideration here is that the I. family have being living here for well nigh seven years. S. will be seven in August, 2004 and she has lived here all her life. As S. is an Irish citizen she has the right to live here and to grow up as a fully fledged member of the Irish nation. She is, moreover, oblivious to the conduct of her father and, in principle, at any rate, the law should, if possible, seek to shield her from the consequences of her father's manipulation of the immigration system.

9. A further consideration is that it is perfectly obvious from the language of Article 41 and Article 42 of the Constitution that S. has the right to the care and company of her parents, a point which, in any event, is attested by four powerful Supreme Court decisions, *G. v. An Bord Uchtála* [1980] I.R. 32, *Re JH* [1985] I.R. 375, *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 470 and *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795.

10. Of course, it is plain from a series of cases such as *Osheku v. Ireland* [1986] I.R. 733, *AO and DL v. Minister for Justice* [2003] IESC 3, [2003] 1 I.R. 1 and *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595 that these rights are not absolute and must yield in appropriate cases to the State's legitimate interest in controlling its own borders and ensuring the integrity of the asylum system. That system would, of course, be undermined if Mr. I. could profit from his own wrong and effectively circumvent immigration control by acting in the manner which he has.

11. These were all factors which the Minister set out in some detail in the examination of file for the purposes of s. 3 of the Immigration Act 1999 ("the 1999 Act"). The Minister concluded:

> "In the light of the rising level of unemployment in Ireland and its knock-on effect on the welfare system along with the pressure being placed on other state service providers by the economic downturn, consideration is also given to the impact of granting permission to remain [to] Mr. I. on the health and welfare systems in the State and how such a decision may lead to similar decisions on other cases.

> All factors relating to the position and rights of S. I. who is an Irish citizen child have been considered above and these have been considered against the rights of the State. In weighing these rights, it is submitted that if the Minister makes a deportation order in respect of K.I., there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of KI."

12. The Minister also added that at as of that date (March, 2010), S. (who was then 5 years and 7 months) was "of an adaptable age and should, therefore, be able to integrate *easily* into life in Nigeria." (emphasis supplied). While not everyone, perhaps, would be so sanguine about the effects on a young child of moving from the educational system of (what is still) a very affluent country to that which prevails in Nigeria, in some ways this debate is academic, as Mr. and Ms. I. have made it plain that Ms. I. will remain in Ireland with the children, even if Mr. I. is deported. Specifically, Mr. I's averment to this effect at para. 7 of his affidavit of 13th July, 2010, has not been contradicted, nor was it in any way disputed during the course of the hearing.

13. The practical effect of this is likely to be that S. will have little or no direct contact with her father. It seems unlikely that Mr. I. will get the necessary visa to travel to other European countries. It is true that the family could possibly meet in Nigeria, but such trips would surely place a huge financial burden on the family, given that Ms. I.'s income is unlikely ever to exceed the average industrial wage.

14. It is likewise hard to see how a marriage could survive a prolonged absence in these circumstances. In this regard it may be noted that in his s. 11 interview Mr. I. stated (Q. 44) that his wife was threatening divorce if he did not come to Ireland and he repeated this assertion in his affidavit. It must also be borne in mind that the deportation is in principle permanent in its effects, subject only to the power of the Minister to revoke the deportation order pursuant to s. 3(11) of the Immigration Act 1999: see, *e.g.*, my own judgment in *MAU v. Minister for Justice, Equality and Law Reform (No.1)* (Unreported, High Court, 13th December, 2010).

15. It will thus be seen that the Minister is confronted with a difficult and unpalatable choice between making a deportation order which effectively sunders the family ties with S.'s father on the one hand, while on the other permitting the father to stay amounts to rewarding those who choose to circumvent the immigration controls by making abusive asylum applications.

The Supreme Court's Decision in AO and DL

16. The leading authority in this general remains that of the Supreme Court in *AO and DL*. That case concerned two sets of families, one Czech and the other Nigerian, who had arrived here from the United Kingdom within weeks of having been refused applications for asylum in that state. It was manifest that the applicants claim for asylum in this State was governed by the Dublin Convention (as it then was). Shortly after their arrival here the two mothers gave birth and the young infants in question were Irish citizens. Deportation orders were made by the Minister in respect of the non-Irish children and parents and the reasons given for that decision were that, in summary:

- the families had been in the State for a relatively short period of time, in both cases measured in months;

- the need to uphold the integrity of the Dublin Convention system;

- the need to uphold the integrity of the asylum system.

17. A majority of the Supreme Court upheld the validity of the deportation orders. While (as might be expected) there are slight differences of emphasis between the various majority judgments, the essence of the Court's decision is, perhaps, best summed up by the following passages from the judgment of Murray J. He first stated ([2003] 1 I.R. at 91):

> "A child or infant of non-national parents has, *prima facie*, a right to remain in the State. While in the State such a child has the right to the company and parentage of its parents. These rights are not absolute but are qualified. 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 Minister 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 good and sufficient reason in the interests of the common good for deporting the non-national parents the Minister should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the ends sought to be achieved."

18. Murray J. then noted that the Minister had regard to all the relevant facts and constitutional considerations. He continued ([2003] 1 I.R. 1 at 91-92):

> "In deciding to make the deportation order the Minister made specific reference to the period of time for which the applicants for asylum had been in the State. He had regard to two matters which are material to promoting the interests of the common good namely the application of the Dublin Convention and the protection of integrity of the immigration and asylum systems. Each of the families who comprise the appellants in this case were in this State for a relatively short period before the deportation order was made. The grounds upon which they seek to challenge the Minister's deportation order stem from the birth of a child in this State some months after their arrival. It seems to me entirely reasonable to conclude that the circumstances relating to the applicants are not unique but on the contrary that it is a situation that could apply or would apply to a substantial proportion of applicants for asylum. In these circumstances it seems to me entirely reasonable that the Minister would consider whether a refusal to make a deportation in such circumstances could call in question the integrity of the immigration and asylum systems including their effective functioning. That is a matter for him. It has not been contested that the circumstances of each of the families are such that the Minister may require that their applications for asylum be examined in another state pursuant to the Dublin Convention."

19. Murray J. then concluded ([2003] 1 I.R. 1 at 92):

> "In the circumstances of the case I am satisfied that the Minister's decision has been shown to be reasonable and rational in determining that there existed good and sufficient reasons associated with the common good for the making of the deportation order. Non-national immigrants are permitted to remain in the State while their applications for asylum or refugee status are examined and determined. It has been shown that the Minister decided to deport the non-national parents in this case because, *inter alia*, of concerns that this process could be circumvented by reason only of the fact that during the relatively short period during which that process takes place applicants may become the parents of a child

> born in the State. The Minister had a stark choice to make, either to deport or not to deport. There is no halfway house. No circumstances have been disclosed or shown to exist upon which one could consider the Ministers decision to be disproportionate. In my view, it has not been established that the Minister's decision to deport in these cases was unlawful or unconstitutional. Cases may arise which are so wholly exceptional and unique in their circumstances which might require further evidence of the manner in which the integrity of the immigration and asylum systems could be called in question if no deportation order was made but this is clearly not such a case."

20. The judgments in *AO and DL* are generally regarded as authority for the proposition that the non-national parent of a dependent Irish citizen child may be deported on the ground that this is necessary to uphold the integrity of the asylum system. Nevertheless, as Denham J. subsequently noted in *Oguekwe*, while *AO and DL* "is an important precedent and is relevant, it must be considered in light of the facts of that case": [2008] 3 I.R. 795 at 815. A critical factor here, of course, is that in *AO and DL* the Minister had assumed that in each case the parents would bring their citizen child with them and the Supreme Court judgments clearly proceeded on that assumption. As Keane C.J. noted in his judgment ([2003] 1 I.R. 1, 13), the memorandum for the Minister had expressly contemplated that this would happen when it stated that:

> "…it should be presumed that the applicants will preserve the family unit on enforcement of orders by taking [the minor applicant] with them, thereby preserving his right to the care and protection of his family as per Article 41 of the Constitution."

21. This passage from the memorandum was also quoted by other members of the majority: see, *e.g.*, the judgment of Murray J., [2003] 1 I.R. 1, 65.

22. In some respects, Oguekwe may also be regarded as something of a development of the law since *AO and DL*. Here Denham J. stressed that the Minister must specifically "consider the facts relevant" to the constitutional rights of the citizen child. The decision to deport a parent must identify a "substantial reason" requiring the deportation of a foreign national parent of an Irish born child. She further stressed that the Minister is required to make "a reasonable and proportionate decision".

23. In *Oguekwe* the Minister's decision was quashed, precisely because the decision did not identify any substantial ground to justify the deportation. Denham J. also observed ([2008] 3 I.R. 795 at 817-818):

> "I would affirm the decision 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 the consideration of the attachment of the child to the community, and other matters referred to in s. 3 of the [Immigration Act 1999].
>
> The extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the part, if any, he or she has taken in the community. Thus, his or her education, and development within the State, within the context of his or her family circumstances, may be relevant. If the child has been in the State for many years, and in the school system for several years, and taken part in the community, then these and related facts may be very pertinent. However, if the child is an infant then such considerations will not arise.
>
> However, I respectfully disagree with the learned High Court judge, and I believe the High Court erred, in holding that the Minister was required to inquire into and take into account the educational facilities and other conditions available to the Irish born child of a proposed deportee in the country of return, in the event that the child accompany the deportee. I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. 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."

24. At the same time, there are definite differences between the present case and *AO and DL*. First, the family in the present case have been here for much longer periods of time than those in *AO and DL*. Second, the children here are of school-going age, a factor to which Denham J. attributed importance in *Oguekwe*. Third, the Minister has already given permission to Ms. I (and the other non-national children) to reside in the State under the IBC Scheme.

25. A further consideration is that if the deportation order takes effect, then in practice S. will be permanently deprived of meaningful contact with her father for the rest of her childhood, unless the Minister were to revoke that order under s. 3(11) of the 1999 Act or the family's financial position were dramatically to improve such as would allow them to travel to Nigeria. What, then, would be left of her constitutional right to the care and company of her father? Such constitutional rights must, of course, where possible be construed in a way "as to give them life and reality": see *Buckley v. Attorney General* [1950] IR 67 at 81, per O'Byrne J.

26. If the matter were *res integra*, then I should have thought that in these circumstances the applicants would have demonstrated the existence of substantial grounds justifying the grant of leave on the basis that the Supreme Court did not quite have a case of this kind in mind when deciding *AO and DL*. Judged by that standard, one might also contend that different considerations should possibly apply where - as here - the citizen child will inevitably be separated from one parent on whom she is dependent during her minority by reason of the operation of the deportation order in circumstances where the other parent has a permission to remain in the State.

27. However, the matter is not *res integra*, as there are numerous judgments of this Court dealing with cases which present broadly similar facts to the present one and which point firmly in the opposite direction.

The Previous Jurisprudence of this Court

28. I propose to take but three representative examples to illustrate this point. In the first of these cases, *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595, the facts were broadly similar. The citizen children - two twin girls - were born in Ireland in September, 2004 and were more or less at the same stage of the educational system as S. is in the present case. The parents were Nigerian nationals. Ms. Alli had been given permission to stay in the State under the IBC 05 Scheme and she stated that she was not prepared to return to Nigeria with her children, even if her husband was deported.

29. In a comprehensive judgment, Clark J. considered that the issue was essentially determined by *AO and DL*:

> "Such a deportation will be lawful once the Minister has considered all relevant factors and has identified a substantial reason for the deportation. It is not the law that the Minister can only deport the father of a citizen child in exceptional circumstances. The law is that notwithstanding the very important status of citizenship, the Minister can deport such a father in pursuit of an orderly and fair restrictive immigration policy in the common good provided that a full and fair assessment of the particular child and particular family situation has been balanced against the State's interests and the decision is not disproportionate in the circumstances."

30. So far as the proportionality exercise was concerned, the Minister was fully aware of the applicant's representations in relation to Mr. Alli's contributions to family life:

> "If he were to be deported, then the family would be ruptured, the children would have no father to guide them and Mrs Alli would have difficulties with childcare and in bringing up the children as a single parent. As Mrs Alli made it clear that she had considered that her children's best interests lie in their remaining in Ireland, no submissions were made as to the children's life in Nigeria or in the Côte d'Ivoire. It is inconceivable that the Minister was unaware of the consequences of his proposed decision as it was in fact specifically noted that if the mother was to stay in Ireland there would be some disruption to their family life. The Minister also looked at the personal facts pertaining to the citizen children and their family and the consequences of permitting Mr Alli to remain with his family. These consequences were that it Mr Alli was unlikely to obtain employment, the grant of permission for Mr Alli to remain would have an impact on the health and welfare systems of the State and could lead to an expectation of similar decisions in other cases."

31. Clark J. went on to uphold the proportionality of the assessment made by the Minister:

> "In effect, he concluded that the decision to deport Mr Alli would not impact in an excessive way on the personal and family rights of his wife and children as there were no insurmountable obstacles to their going with him to Nigeria and continuing family life there. The Court is satisfied that this was a reasonable conclusion. Quite appropriately, the Minister accorded weight to the relatively short time the family has been in the State; the young age of the twin citizen children; and to Mr Alli's absence from the family for a significant time after his children were born. The Minister had already determined that there is no risk of torture in Nigeria in the event of their return there, and the applicants do not contest that conclusion. The Minister was aware that since his arrival Mr Alli has taken up his parental responsibilities and is loved and needed by his spouse and children, but that on the other hand his wife says that the welfare of their children means she will remain with her children in Ireland even if her husband is deported. He cannot be faulted for assuming that a mother and especially this mother, who had come as a stranger to this country and lived for more than three years without the presence or assistance from her husband during the late stages of her twin pregnancy and their delivery, might be in a good position to consider the best interests of her children and might not be excessively inconvenienced if her husband is returned to Nigeria in accordance with the State's immigration policy."

32. The judgment of Cooke J. in *Ofobuike v. Minister for Justice, Equality and Law Reform* [2010] IEHC 89 is in a similar vein. Here the Irish born child was six years old at the date of the deportation order made in respect of her father. She resided in the State with her mother who had permission to stay here by virtue of the IBC 05 Scheme. The father had flagrantly abused the asylum system here to arrive here in 2007. Unlike the circumstances in *Alli,* "no indication was given by them" as to what their intentions might be as regards the daughter remaining with her mother in the State or leaving for Nigeria if a deportation order was made.

33. Cooke J. nonetheless upheld the validity of the deportation orders:

> "No factor pertinent [to the daughter's] personal or family rights under the Constitution or her right to respect for private and family life under the Convention has been distorted, exaggerated or omitted from consideration in the Court's judgment. Having regard to those circumstances and to the personal history of the family members it cannot tenably maintained that the contested decision is either unreasonable or disproportionate."

34. Finally, in *An.O. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 448, Cooke J. took a similar view of another case where the mother was living in Ireland with a citizen child under the IBC Scheme. The child was then five at the relevant date of the decision and the father had later (illegally) joined them in the State. Cooke J. rejected arguments that the deportation orders would be disproportionate in the circumstances, saying that the Minister was not bound by any choice of residence which the parents might make. The judge continued thus:

> "…..the State will always have a substantial and serious interest in maintaining the integrity of its borders and the effectiveness of its immigration system. But whether that consideration is sufficient to prevail over the private or family rights of particular persons depends on the specific circumstances of the case. In that sense the substantial character of the State's reason for deporting is relative and will alter when assessed against the circumstances of the deportee and his or her family including, obviously, how long they have been in the State, what roots if any they have put down here, whether the minor children are at school and at what stage of schooling they may be and so on.
>
> In this case those factors have been addressed in the analysis made by the Minister when formulating the conclusion reached in favour of making a deportation order. In the court's judgment the reasons outlined are reasons of substance and, as such, cannot be interfered with as being unlawful or invalid."

35. While the facts of all of these cases differ somewhat, in substance they conform to the same basic fact pattern. Broadly speaking, the mothers are residing in the State pursuant to the permission afforded to them by the Minister pursuant to the IBC 05 Scheme with citizen children who, for the most part, are at an early stage of the Irish education system and which children are typically aged between 4 to 8 years of age. The parents have generally decided that it is in the best interests of the child that the mother should remain in Ireland to look after the child should the father be deported. The consequence of this will lead to the break up of the family, but the case-law to date is clear that the Minister cannot be held responsible for this choice.

36. For my part, I consider that the present case is indistinguishable in principle from cases such as *Alli* and *Ofobuike*. While it is true that the decisions of one High Court judge cannot strictly bind another, the established practice of this Court is that, generally speaking, previous decisions should be followed: see, *e.g.,* the comments of Parke J. in *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] I.L.R.M. 50 at 53 and those of Clarke J. in *Re Worldport Ltd*. [2005] IEHC 189 and *PH v. Ireland* [2006] IEHC 40, [2006] 2 I.R. 540. As Clarke J. put it in *Re Worldport Ltd.*:

> "It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. …

> Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."

37. None of the special considerations identified by Clarke J. are present here. Quite the contrary, the decisions which I consider that I am bound to follow are all recent decisions where the issues were fully argued and the authorities fully considered. In these circumstances, I would not be justified in departing from the formidable weight of authority and I consider that I ought to apply the principles so forcefully adumbrated by Clark J. and Cooke J. in these cases.

Conclusions

38. Judged by the standards and principles set out by Clark J. in *Alli*, it seems clear to me that it cannot be said that the Minister did not give full consideration to all relevant facts and circumstances. The Minister further identified a substantial reason for the decision to deport Mr. I. in the manner required by the Supreme Court in *Oguekwe* and, in view of the authorities to which I have referred, it cannot be said that it was disproportionate in the circumstances.

39. Given that I consider myself bound by these authorities, I am therefore constrained to hold that the applicants have not established substantial grounds within the meaning of s. 5(2) of the 2000 Act which would warrant the grant of leave to apply for judicial review.