THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 727 J.R.]

BETWEEN

EDUARDO DIAS FERREIRA

VERONICA RAMOS DA SILVA FERREIRA

EDUARDO DIAS

MARIA EDUARDO DIAS FERREIRA (A MINOR SUING BY HER FATHER AND NEXT FRIEND EDUARDO DIAS FERRIERA)

GUILHEREME EDUARDO DIAS FERREIRA (A MINOR SUING BY HIS FATHER AND NEXT FRIEND EDUARDO DIAS FERREIRA)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

[2017 No. 777 J.R.]

BETWEEN

JONAS FERNANDES

ELUI FERNANDES

GUYLHERME FERNANDES (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JONAS FERNANDES)

ARTHUR FERNANDES (A MINOR SUING BY HIS FATHER AND NEXT FRIEND JONAS FERNANDES)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of January, 2018

Facts - Ferreira

1. The applicants in *Ferreira* are a family from Brazil. The first and second named applicants are a married couple and the fifth named applicant is their son, a child born in Ireland in 2008. The parents arrived in Ireland on 20th June, 2005 on visitor permissions. The permissions expired in 2005 and the applicants have been illegally present in the State ever since. The first and second named applicants have worked unlawfully in the State without the permission of the Minister. None of the applicants have made a protection application. Representations seeking regularisation of the applicants' status were made on 8th February, 2012, but nothing happened on foot of those representations. The applicants were subsequently informed on 25th June, 2013 that the Minister proposed to make deportation orders. Those deportation orders were made on 30th September, 2016. Subsequently, an application was made seeking revocation of the deportation orders by a letter dated 13th March, 2017 and the Minister then decided, pursuant to s. 3(11) of the Immigration Act 1999, to affirm the deportation orders on 4th September, 2017. It is the latter decision that is now challenged. I have received submissions from Mr. Garry O'Halloran B.L. (with Mr. Mark de Blacam S.C.) for the applicants, and from Ms. Sara Moorhead S.C. (with Mr. Anthony McBride B.L.) for the respondents.

Application to cross-examine James Boyle

2. The first issue is an application to cross-examine the State's deponent, Mr. James Boyle. Mr. O'Halloran submits that he should be entitled to cross-examine Mr. Boyle on whether an alleged scheme to give effect to the Report of the Working Group on Improvements to the Protection Process (the McMahon report) exists, when it began and the terms of the scheme. It seems to me that in determining whether such cross-examination should be allowed, one has to contrast the somewhat speculative musings by Ms. Sarah Ryan, solicitor for the applicant, with the very clear position set out subsequently by Mr. Boyle on behalf of the respondents, in a series of detailed averments which have not been adequately contradicted. It seems to me that there is no appropriate contest of fact here which would warrant cross-examination. It is clear that the Department of Justice and Equality has granted a number of permissions to various individual applicants having regard to the McMahon report and based on criteria set out in that report. Nothing concrete has been pointed to as to what conflict of fact exists that would require cross-examination. Mr. O'Halloran launched into a lengthy list of matters that he would have liked to have asked Mr. Boyle but that very much had the air of a fishing expedition. A judicial review applicant who wants to cross-examine must set that up appropriately with a focused conflict of admissible evidence, and that was not done here. The main stumbling block for the applicants is that they are not protection applicants, so the McMahon report does not apply and therefore they are not eligible for consideration under this heading. Mr. O'Halloran has not introduced any evidence averring to the proposition that non-protection applicants have benefited from the alleged scheme so it seems to me that the alleged conflict warranting cross-examination does not exist.

The fact that we are now at the s. 3(11) stage is a fundamental difficulty for the applicants

3. An applicant cannot circumvent the procedure under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 simply by coming up with the idea of making a s. 3(11) application. The scheme point, or indeed any point that the applicant wanted to raise, does not arise simply because the applicant has had the subsequent idea of making a revocation application (see the decision of the Supreme Court

in *L.C. v. Minister for Justice and Equality* [2007] 2 I.R. 133 [2006] IESC 44, *per* McCracken J., and the other jurisprudence referred to in my decision in *C.O. (Nigeria) v. Minister for Justice and Equality* [2017] IEHC 725 [2017] 11 JIC 2406). Such a point was there originally and the applicant cannot obtain relief now by making a revocation application, having failed to challenge the original order within the time limited by s. 5 or at all.

The alleged entitlement under the alleged scheme giving effect to the McMahon report does not exist
4. Even if, contrary to the foregoing, the applicants are entitled to make this point, they never made any submissions under s. 3 of the 1999 Act that the working group report should be applied to them. That seems to me to be fatal to this argument. As stated in my decision in *C.O.,* I do not consider that there is an obligation to set out criteria for deportation but even if there is, it was satisfied in the McMahon report. It is clear that the Minister has a wide discretion at deportation stage (see *F.P. v. Minister for Justice* [2002] 1 I.R. 164 *per* Hardiman J. at 173 to 174, *A.B. v. Minister for Justice and Equality* [2016] IECA 48 *per* Ryan P. at para. 48, *P.O. v. Minister for Justice and Equality* [2015] 3 I.R. 164 *per* Charleton J. at para. 80). Therefore, there is no illegality under this heading. More fundamentally, these applicants were not protection applicants so could never have qualified. (See my decision in *Bertan v. Minister for Justice and Equality* (12th January, 2018)).

Discretion
5. Even if I was minded to find any illegality in the process, which I am not, I would refuse relief on a discretionary basis having regard to the flagrant abuse of the immigration system by the adult applicants over a twelve year period by living and working in the State (see *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102). It seems to me that it is not unjust to the fifth named applicant to exercise a discretion negatively given that his position is derivative; as otherwise a person who flagrantly abused the law of the State could avoid the consequences of such abuse merely by the expedience of having a child. See *P.O. v. Minister for Justice and Equality* where Charleton J. at para. 87, speaking in the context of art. 8 rights, said that "*The often claimed separate rights of children are, save for extraordinary circumstances, dependent upon the approach of the parent who claims on their behalf and on their own behalf through that child. That emerges clearly from the decision of Feeney J.* in Agbonlahor v. Minister for Justice *[2007] IEHC 166 [2007] 4 I.R. 309*." Irvine J. in *K.R.A. v. Minister for Justice and Equality,* at para. 54, said "*what emerges from the decision in* P.O. *is that whilst MacMenamin and Charleton JJ. both make reference to the decision in* Butt v. Norway *[Application no. 47017/09, European Court of Human Rights, 4 December 2012], neither do so in the context of an application for a stay or injunction restraining deportation. They do so only in the context of the substantive rights of the parties*." She went on to hold that such an identification was not one the court was minded to make in the context of a stay consideration. However, here we are at the substantive stage, so my reading of *P.O.* and *K.R.A.* is that it is permissible and appropriate to identify children with their parents, at least in circumstances (such as those here) where the child's position is genuinely derivative rather than substantially different on an independent basis.

Order - Ferriera
6. For the foregoing reasons the order will be,

(i) that the third and fourth named applicants be struck out at the request of those applicants;

(ii) that the application be dismissed as against the first, second and fifth named applicants;

(iii) that the injunction be terminated.

7. In terms of the injunction, I am applying the Supreme Court decision in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49. Firstly, I must give all appropriate weight to the orderly implementation of valid deportation orders, and due weight to the public interest in the orderly operation of the immigration system. I also have regard to the fact that there is no protection issue, so the consequences for the applicants of the measure in question being implemented pending resolution of any (at this stage purely hypothetical) appeal are limited to ones of convenience rather than protection. Finally, I have regard to the question of the strengths or weaknesses of the applicants' case and for the reasons outlined in the decision, given that, apart from anything else, these are points that arose in relation to the deportation orders originally and thus cannot properly be pursued as a ground for relief by way of judicial review merely because a s. 3(11) application was made, it seems to me the applicants' case is distinctly fragile.

Order - Fernandes
8. Mr. Garry O'Halloran B.L. for the applicants in *Fernandes* accepts that this matter is essentially governed by the submissions he made in *Ferreira*, and has no further submissions to make.

9. With due regard to the factual difference, being that in *Fernandes* a deportation order is challenged rather than a s. 3(11) decision, and subject to that qualification, the ruling in *Ferreira* will apply to this case as well, so the order will be that the proceedings be dismissed.

10. In relation to the injunction, the infirmity of the applicants' case in *Ferreira* on the point that it was a s. 3(11) application does not apply but the other considerations do apply, and having regard to those considerations in accordance with *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 I will order that the injunction be discharged.