[2019] IEHC 932

THE HIGH COURT

[2019 No. 628 JR]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, AS AMENDED

BETWEEN

SHAEED ADEOLA ISHOLA, ABISOLA NIMOTALAI ISHOLA AND BASIT ISHOLA (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND SAHEED ADEOLA ISHOLA)

APPLICANTS

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered 14th November, 2019.

1. Mr Ishola came to Ireland without any legally established right to remain, travelled to the United Kingdom on a passport that was not his own, was convicted there of fraud and thereafter deported to Ireland, became involved in a plan to import over €1.4million worth of cocaine into Ireland, was sentenced to ten years' imprisonment (with three years suspended) following conviction under s.15A of the Misuse of Drugs Act 1977 ("Act of 1977"), was released early from prison in 2016, has been living without incident in the community since then, had a deportation order made against him in August 2019, and comes now to court, with his wife and minor son, seeking to challenge that deportation order. The grounds upon which relief is sought are stated as follows in the statement of grounds:

> *"A. The impugned decision of the Respondent was made in contravention of the Applicants' rights under Article 41 of the Constitution as the Respondent failed to afford prominence to and sufficient protection to the marital family of the first and second Applicants, and applied an incorrect test in considering the rights of the second Applicant, an Irish citizen, to have her spouse live with her in Ireland. The Respondent has erroneously conflated the legal position regarding the deportation of the spouses as non-Irish citizens with that regarding the deportation of spouses of Irish citizens.*
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> *B. The impugned decision of the Respondent was disproportionate in light of the strong Article 41 constitutional family rights of the Applicants and/or the Article 8 ECHR family rights engaged. The first applicant came to Ireland in 2003, was granted residence permission in 2005 and again in 2011, is married to an Irish citizen and has four Irish citizen children aged 14, 17, 19 and 22.*
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> *C. Further or in the alternative the Respondent failed to identify, consider, protect or vindicate the constitutional family rights of the Applicants and/or to respect the Article 8 ECHR family rights of the Applicants.*
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> *D. The decision of the Respondent to make a deportation order in respect of the first Applicant is disproportionate, irrational and unreasonable in circumstances where the Respondent, in allowing the first Applicant to participate in the Community Return Scheme, and in granting the Applicant enhanced remission from his prison*

sentence, accepted that the Applicant was at a low risk of re-offending. However, in the Respondent's 'Examination of File under Section 3 of the Immigration Act, 1999, as amended', upon which the decision to make a deportation order is based, the Respondent finds that his [Mr Ishola's] 2012 conviction for sale and supply of cocaine (in 2011) gives rise to a compelling public interest in his deportation in 2019 such as to outweigh all of the family and private life rights engaged. Further or in the alternative, the Respondent failed to consider the long period of time that had passed since the offence (eight years) and/or since the application for leave to remain (seven years) and/or since the first Applicant's release from prison (three years) during which time his presence in the State had been tolerated and he had not committed any other crimes."

2. Arising from the foregoing, the applicants contend that the following legal issues present for adjudication:

   (1) Was the impugned decision of the Minister made in contravention of the applicants' rights under Art.41 of the Constitution by reason of the application of an incorrect test?

   (2) Was the impugned decision of the applicants' rights to respect for family life under Art.41 of the Constitution and/or Art.8 of the European Convention on Human Rights ("ECHR")?

   (3) Can the Minister rely on the prevention of disorder and crime as the primary basis for a deportation decision in respect of a person such as Mr Ishola who has strong connections to the State, in circumstances where the Minister delays as long as he did in this case in processing the deportation order and no crimes have been committed during the timeframe in which the said process transpires?

3. Considerable reliance has been placed by the applicants on the decision of the Court of Appeal in *Gorrv v. Minister for Justice and Equality* [2017] IECA 282 ("*Gorry*"), including:

   (a) the following observations of Finlay Geoghegan J., at paras. 78 and 90-93 of her judgment:

      "78. Mr. and Mrs. Gorry, as a lawfully married couple and a family within the meaning of Article 41, and Mr. Gorry as an Irish citizen, have constitutionally protected rights to have the Minister consider and decide their application with due regard to:

         (i) the guarantee given by the State in Article 41.1.2 to protect the family in its constitution and authority;
         (ii) a recognition that Mr. and Mrs. Gorry are a family, a fundamental unit group of our society possessing inalienable and imprescriptible rights which rights include a right to cohabit which is also an individual right

of the citizen spouse which the State must, as far as practicable, defend and vindicate (Article 41.1 and Article 40.3.1)

(iii) a recognition that the decision that the family should live in Ireland is a decision which they have a right to take and which the State has guaranteed in Article 41.1 to protect; and

(iv) a recognition of the right of the Irish citizen to live at all times in Ireland as part of what Article 2 refers to as his 'birth right . . . to be part of the Irish Nation' and the absence of any right of the State (absent international obligations which do not apply) to limit that right."

…

90. Article 8 ECHR does not distinguish between a family based on marriage and one that is not based on marriage. The distinction in the obligations of the Minister relevant to this appeal only arise where the family is one based on marriage, and therefore a family within the meaning of Article 41 of the Constitution. They also exist by reason of the fact that one spouse is a citizen of Ireland.

91. The obligation imposed on the State pursuant to Article 8 ECHR in relation to family life is a restraint on interference with an individual's right to respect for his family life. Even taking into account the fact that the wording of Article 41.1.1 of the Constitution, in its recognition of the family as a 'moral institution' possessing 'inalienable and imprescriptible rights, antecedent and superior to all positive law' may not be intended to be taken absolutely literally, nevertheless, it appears to me to be a stronger recognition of a family based on marriage as a unit than the right of respect for family life included in Article 8 ECHR. Further, the wording of Article 41.2 cannot be overlooked in its more straightforward wording of a guarantee to protect the family 'in its constitution and authority, as the necessary basis of social order and as indispensible to the welfare of the Nation and the State'. That appears to me to be a stronger pledge by the State than the obligation undertaken pursuant to Article 8 ECHR in which it agrees not to interfere with the right to respect for family life, save as permitted under Article 8.2. Protection connotes more than respect.

92. The practical effect of this in relation to the required approach to an application to the Minister to permit a non-national married spouse of a citizen reside in the State, or to revoke a deportation order, or not to expel a non-national, is that under Article 41, the starting point of the Minister must be in accordance with the principles set out above; the recognition to be given to the rights of the family based on marriage; the guarantee to protect the family in its constitution and authority, including its right to take a decision that the family live in Ireland, and the constitutionally protected rights of the Irish citizen to live in Ireland and to cohabit with his spouse. Those rights impose obligations on the State inter alia to respect and protect

the right of the couple to decide that their family live in Ireland. That does not mean of course that the Minister is obliged to permit this happen by issuing the relevant visa or other permission. However, it is the starting point of the Minister's consideration and must be weighed in the balance.

93. By contrast, in accordance with the judgments of ECtHR, the starting point under Article 8 is that it does not impose any general obligation on a Contracting State to respect the choice of residence of married couples. Further, if family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of family life within the host state would from the outset be precarious, then it is only in 'exceptional circumstances' that the removal of the non-national family member will constitute a violation of Article 8, see Jeunesse v. The Netherlands…[2014] ECHR 1036…paras. 107 and 108",

and (b), the following observations of Hogan J., at para. 29 of his judgment:

"It is against that general background that the Minister's decision falls to be considered. It is incorrect to say that the couple are entitled to insist as a matter of constitutional entitlement that their choice of residence must always be accepted by the State. But it is equally incorrect to say – as the Minister in effect did - that the couple's choice need not be respected unless it is shown that there would be 'insurmountable obstacles' to the Irish citizen moving to the country of the third country national, which is essentially the test applied by the European Court of Human Rights in a line of Article 8 ECHR cases ranging from Boultif v. Switzerland [2001] ECHR 497, (2001) 33 EHRR 50 to Jeunesse v. Netherlands [2014] ECHR 1036, (2015) 60 EHRR 17. For all the reasons I have just stated, Article 41 of the Constitution goes further than Article 8 ECHR in this regard."

4. What emerges from the above, *inter alia*, is that when it comes to an analysis under Art.41 of the Constitution (as opposed to the balancing test that arises to be done under Art.8 ECHR) *"the starting-point of the Minister must be in accordance", inter alia*, with the *"right to cohabit"* and *"the right of the Irish citizen to live at all times in Ireland*". Of course this does not (it could not) change the position at law identified by the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795, para. 72, viz. that "*the issues and questions* [arising under the Constitution and the Convention] *are interrelated*" and, in truth, this is all that one sees at play in the impugned decision, *i.e*. a thorough consideration of all the issues presenting and then conclusions reached.

5. Specifically, when it comes to Art.41, the Minister:

(i) Recognises the extent of the right of Mr Ishola's family to reside in the State and for his children to have the company and care of their father.

(ii) Has regard to the possible consequences for the family if a deportation order were made (considering both the position if the rest of Mr Ishola's family remain/leave Ireland following his deportation).

(iii) At no point requires the family to take a particular action but recognises that what the family members do if and when Mr Ishola is deported is a matter for them.

(iv) Expressly references the constitutional and Convention rights of the second and third applicants (and the status of Mrs Ishola and her children as Irish citizens).

(v) Expressly considers the rights of the family as one of proportionality, balancing any decision by Mr Ishola's family to reside in the State with "*the rights inherent in the State in relation to the control of entry to the State by non-nationals*" (*Gorry*, Finlay Geoghegan J., para. 86).

6. There is no assimilation of the assessment of constitutional and Convention rights, but there is a perhaps inevitable overlap between the two, with the Minister proceeding in this regard in a manner consistent with, e.g., the approach of the Supreme Court in *AO and DL v. Minister for Justice* [2003] 1 IR 1, a decision that remains binding on this Court.

7. Regrettably, when it comes to pp. 21-23 of the impugned decision, including the reference to *Boultif v. Switzerland* (Application No. 54273/00), the Minister, in a manner inconsistent with the above-quoted observations of Hogan J., appears to apply the insurmountable obstacles test to his Art.8 ECHR analysis and also to his Art.41 analysis. However, perfection in decision-making has never been a requirement of administrative law. What the court needs to consider is whether any error as presents is of such consequence as to yield the conclusion that the court, in the application of its discretion, should not allow an impugned decision to stand. Here that conclusion does not follow. Given the extensive consideration of Mr Ishola's Art.41 rights, the court does not see that it can credibly be contended that the Minister relied on the 'insurmountable obstacles' test as the sole basis for the impugned decision; there is no indication that in his Art.41 assessment the Minister considered/did not consider something that he ought not to have/should have considered.

8. As to the question of proportionality, the court notes from the impugned decision that, *inter alia*:

(i) thanks to a period of marital breakdown and his later lengthy imprisonment, Mr Ishola spent the best part of ten years away from his family;

(ii) throughout this time the family were dependent on Mrs Ishola as, in effect, a sole parent (a matter on which the Minister placed no little weight);

(iii) while the Minister acknowledges that deportation would yield hardship, this is not a case where Mr Ishola's children are all in their infancy; and

(iv) apart from being a long-absent and since-returned father, and without wishing in any way to diminish the important role of fathers *vis-à-vis* their children (their mere presence typically has a considerable value, a point accepted by the Minister), Mr Ishola did not, in his submissions, present with any exceptional specifics as to his role/integration (apart from certain school-letters expressly referenced in the impugned decision),

and that the Minister considered all the information placed before him when weighing up whether or not to decide to deport Mr Ishola.

9. As to Mr Ishola's conviction and imprisonment pursuant to s.15A of the Act of 1977, the court notes that the Minister, in the impugned decision, does not rely on the fact of conviction alone as a ground for deportation. He has regard to the seriousness of the offence on which the conviction was predicated (and it was very serious), to Mr Ishola's apparent disregard of his quite precarious position in the State when the offence was committed, and to Mr Ishola's history of criminality in the United Kingdom. Nor does the court accept the proposition that because a decision is taken to grant enhanced remission under the Prison Rules, this yields a negation of the risks associated with the beneficiary of such decision as a lawfully convicted person (and clearly this was not accepted by the Minister either).

10. As to the State's supposed 'tolerance' of Mr Ishola's presence in Ireland post-release, a factor to which the European Court of Human Rights has regard in *Jeunesse* (see paras. 103 and 116), the court does not accept that Mr Ishola's post-release presence in Ireland can be said to have been 'tolerated' in the full sense when (a) there was an ongoing deportation process in train against him and (b) throughout the entire post-imprisonment period, he had no settled legal right to be here. Moreover, to the extent that life went on and ties were built during the post-imprisonment period, those ties have been considered by the Minister in his Art.8 analysis.

11. Insofar as it is claimed that the Minister did not, contrary to, *e.g.,* the observations of the European Court of Human Rights in *Üner v. The Netherlands* (Application No. 46410/99), *Nunez v. Norway* (Application No. 55597/09), and *Jeunesse*, on the best interests of the minor applicant, this is not accepted by the court. The Minister states himself to have considered all the information before him and thus has considered all the available evidence in respect of the best interests of the third applicant. While complaint is made that the Minister does not delve into the contents of the school letters received, he does expressly mention them and thus has clearly given them particular attention.

12. Turning to the questions posed by the applicants in the within case:

(1) Was the impugned decision of the Minister made in contravention of the applicants' rights under Art.41 of the Constitution by reason of the application of an incorrect test?

Court Response: No, for the reasons offered in this judgment.

(2) Was the impugned decision of the applicants' rights to respect for family life under Art.41 of the Constitution and/or Art.8 of the European Convention on Human Rights?

Court Response: No, for the reasons offered in this judgment.

(3) Can the Minister rely on the prevention of disorder and crime as the primary basis for a deportation decision in respect of a person such as Mr Ishola who has strong connections to the State, in circumstances where the Minister delays as long as he did in this case in processing the deportation order and no crimes have been committed during the timeframe in which the said process transpires?

Court Response: The court does not see that this was the primary basis for the decision to deport Mr Ishola and, for the reasons stated, sees no unlawfulness to present in the Minister's decision to deport.

13. For the reasons stated above, the court respectfully declines to grant any of the reliefs sought.