Neutral Citation: [2015] IEHC 873

THE HIGH COURT

JUDICIAL REVIEW

[2015/436 J.R.]

BETWEEN

I. R. M. & S. J. R. (No 1)

APPLICANTS

AND

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

RESPONDENTS

Ex Tempore Judgment of Mr. Justice Colm Mac Eochaidh delivered on the 1st day of August 2015.

Introduction:
1. This is an application for an interlocutory injunction to restrain the deportation on foot of an order which is of some vintage.

Background:
2. The first named applicant is thirty-two years of age and has been in a relationship with the second named applicant, who is twenty-five years of age, for approximately twelve months. The second named applicant is pregnant and is due to give birth on the 29th August, in approximately four weeks time. The first named applicant is the father of the child. They live together in Dublin and they plan to marry. The second named applicant says she is of limited means. Her mother lives in Scotland with her husband and her father lives in Cork with his wife and children. In evidence which was not contradicted she describes her poor psychological history having suffered from depression and having engaged in some acts of self harm in the past. The narrative of the absence of family support and psychological fragility suggests a high degree of dependence on the first named applicant at this late stage of her pregnancy. She says that she will not travel to Nigeria if the first named applicant is deported there, partly because of the difficult security situation which currently exists in Nigeria and, she notes, in that regard, that the Irish government has issued a travel warning for Nigeria.

3. It would appear that the first named applicant has been in Ireland for many years and, to put it mildly, has a poor immigration history. He has been classified as an evader and it would appear that since 2008 he has only reported on one occasion to the Garda National Immigration Bureau and that was recently on the 20th July, 2015.

4. In May of this year an application was made for revocation of the deportation order. It is based upon a change in the first named applicant's circumstances, namely his relationship with the second named applicant and the fact that she is expecting their baby. No decision has issued yet on the application for revocation pursuant to s. 3 (11) of the Immigration Act 1999.

5. On the 18th June, solicitors for the first named applicant requested an undertaking that he not be deported prior to the decision on the revocation application. The reply received was a direction that he present himself to the G.N.I.B. and his solicitors understood that to be a refusal by the G.N.I.B. to give an undertaking not to deport.

6. The first named applicant duly reported to the G.N.I.B. on the 20th July when he was asked to present himself five days from now on the 6th August, 2015 and in the absence of an undertaking not to deport, his solicitors have sought the temporary protection of an injunction pending the outcome of the revocation application.

Submissions:
7. The first named respondent, in reply today, has said that the deportation is not imminent but counsel was careful to express this in neutral terms. There was certainly no indication that the first named applicant would not be deported in five days time on the 6th August. I accept that it is a real possibility that this may happen. A valid deportation order exists and the State is entitled to deport the first named applicant at any moment, including at any moment prior to the 6th August, 2015.

8. An interim injunction was granted by this Court on Monday of last week and the Court directed that an application for leave and an application for interlocutory relief be returned for hearing in the course of that week and the application was commenced yesterday, on Friday the 31st July and continued today on Saturday the 1st August. The application for leave to seek judicial review seeks:-

> "a) A Declaration that the implementation of the Deportation Order issued in respect of the first Applicant prior to a determination being made in respect of his application to revoke the deportation order made in respect of him would be unlawful"

And further seeks:-

> "b) A Declaration that the practice or policy of the first named Respondent of deporting persons the subject of deportation orders without providing them with a reasonable period of notice of the actual proposed date of deportation is unconstitutional and/or in breach of European Law and/or unlawful."

9. Two matters are before the Court today: an application for leave to seek judicial review and an application for an interlocutory injunction. The Court has decided to accede to an application by counsel for the applicant to adjourn the application for leave and this judgment, therefore, will deal only with the application for a pre-leave interlocutory injunction. The reason I have done this is that I do not reagrd the leave application as urgent. Self evidently, the application for the injunction is urgent and requires immediate determination.

The application for leave:
10. In respect of the application for leave, I direct that it be adjourned to be heard on notice on the first motion day of the new term with liberty to the respondents to seek to have the matter heard at any time during the vacation. I direct that the respondents not be required to seek further permission from a vacation court if it is desired to bring the matter for hearing during the vacation. I am accepting that it is urgent and suitable for a vacation hearing if that is what the respondents request.

The interlocutory injunction:
11. In respect of the application for an interlocutory injunction to restrain deportation, the principles which govern these applications were set out by the Supreme Court in its decision in *Okunade v. The Minister for Justice, Equality and Law Reform* [2012] I.E.S.C. 49. The judgment of Clarke J. deals extensively with the principles which apply in cases such as this.

12. A neat summary of the correct approach was recently expressed by Hogan J. in the decision in *Chigaru v Minister for Justice, Equality and Law Reform* [2015] I.E.C.A. 167 delivered in the Court of Appeal on the 27th July, 2015. Hogan J. says:-

> "5. The criteria regarding the grant of interlocutory relief in immigration cases of this kind was fully explored by the Supreme Court in *Okunade v. Minister for Justice and Equality* [2012] IESC 49, [2012] 3 I.R. 152. It is clear from that judgment that, absent special or particular features, the courts should not generally grant a stay restraining the enforcement of a deportation order. As Clarke J. pointed out in his judgment in that case, any decision regarding the circumstances in which a foreign national should be permitted to remain in the State is, in principle, an executive decision for the purposes of Article 28.2 of the Constitution. As with any decision of this kind, there is a presumption that any such decision is regular and valid.
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> 6. In order, therefore, for an applicant in a case of this kind to obtain a stay on a deportation order, it would be necessary to show, first, that he or she had established a fair or arguable case and, second, that the balance of convenience favoured the granting of such relief. While the issue of the adequacy of damages as a remedy is of considerable importance in many applications for interlocutory injunction, it is, as Clarke J. recognised in Okunade, of somewhat lesser importance is a case of this kind *(sic)".*

13. The approach adopted by Hogan J. was to examine, first, whether there was a fair, arguable case to be tried and, second, where the balance of convenience might lie. In that case Hogan J. granted an interlocutory injunction to restrain deportation notwithstanding the extremely poor immigration history of the parents in the case. He did so on the basis of the interests of the children, who were seven and eight years of age and knew no country except Ireland, and, therefore, whose rights would be negatively effected in a dramatic way if the parents were to be deported as it would require the departure of the children from the State too.

14. It is interesting to note that in *Chigaru*, (which originally involved challenges to both a subsidiary protection decision and a deportation order) the High Court order refusing to quash the deportation order was not appealed to the Court of Appeal or, in any event, was not part of the decision of the Court of Appeal delivered by Hogan J.. The only matter considered by the Court of Appeal was whether there was an arguable case that the subsidiary protection decision in question was unlawful and it was decided that such argument was made out by reference to the uncertainty which surrounds the legality of the former subsidiary protection regime, having regard to the decision of the Court of Justice in Case C-277/11 *M.M. v Minister for Justice and Equality* [2012] E.C.R. I-000 and the fact that the matter has been referred back a second time to the Court of Justice by the Supreme Court.

15. But what is clear is that an interlocutory injunction restraining deportation was given in a case where there was a valid and unchallenged deportation order in being.

16. A similar pattern can be discerned in the Supreme Court's decision in *P.B.N. [D.R. Congo] v. The Minister for Justice and Equality* [2014] I.E.S.C. 9 given by Laffoy J. on the 21st February, 2014. It would appear that the decisions under challenge in those proceedings (and related proceedings) were a decision refusing to permit the applicant to re-enter the asylum system and a decision refusing revocation of a deportation order. An interlocutory injunction was granted restraining deportation notwithstanding the absence of a challenge to a deportation order. In both of those cases injunctions were granted by an appellate court restraining deportation and what I detect is that it was thought proper to prevent the implementation of a deportation order, which itself was unchallenged, in order to await the outcome of a process, which if successful, would make it impossible for the State to deport the persons concerned. A successful subsidiary protection decision, if achieved, would require the Minister of her own motion to revoke an existing deportation order and similarly a successful application for re-admittance to the asylum system would require the Minister of her own motion to revoke a deportation order.

17. In that sense, those decisions to which I have just referred bear some parallel to the current case because there is no challenge to the deportation order in this case. The argument that is made is that illegality would attach to the implementation of the deportation order because it would be disproportionate to deport the first named applicant in circumstances where he is awaiting the outcome of a revocation application based upon his relationship with the second named applicant and based upon the fact that they are expecting their first child.

18. The essence of the illegality said to be arguably established is that deporting the first named applicant would infringe the rights of the second named applicant and would infringe the rights of the unborn child. In order to proceed with this application, I have to decide whether those arguments are made out from a standard of arguability - whether a fair issue to be tried has been raised in these proceedings.

Findings:
19. Dealing first of all with the impact of the deportation on the second named applicant the Court recognises that pregnant women, though not suffering from any illness merely because of pregnancy, are in a condition of physical and often psychological vulnerability. It is an obvious and natural phenomenon in society that pregnant women receive special respect and care, whether that be in society generally where, for example, people will offer a pregnant woman a seat on a bus, assist her with carrying shopping or be of other physical assistance to her; or whether it is in her family where it is accepted that the pregnancy creates circumstances which require care, comfort and support which would not otherwise be needed.

20. It seems to me that on an arguable grounds basis a constitutional right (pursuant to Article 40.3 of the Constitution) might be said to exist whereby a pregnant woman is entitled to have the support, care and the comfort of the person she has relied upon in the pregnancy and there should be no interference with this right by the State save by proportionate state action. This right could never be absolute and there are many circumstances where its violation may be justified. It may be necessary, for example, to imprison the father of an unborn child. But courts have granted bail to convicted men to permit them to be at home in the days leading to the birth, thereby balancing state rights and the personal rights of the mother, father and child. In this case, it is the biological father who has afforded the second named applicant the care and comfort which is undoubtedly needed by her. I accept that it is established to the standard necessary for an interlocutory application that the first named applicant is the carer of the second named applicant in her pregnancy.

21. I accept that there is an argument that the very special circumstances of pregnancy require protection and might oblige the

State not to intervene or interfere with the support which is being provided. As pregnancy progresses the needs become more pressing and I have no doubt that a woman in the last few weeks of pregnancy is in a particularly vulnerable position and, therefore, the right that may exist under the Constitution to have the support of the person who has been providing care and comfort becomes more acute. It hardly needs to be emphasised that these comments about the rights of dependant pregnant women not having a supporting partner removed during pregnancy are made on an interlocutory application and may not survive more detailed judicial consideration.

22. With respect to the position of the unborn child, I have no doubt but that when the child is born, he or she will have a constitutional right to the care and comfort of his or her father, and I note the dicta of Hogan J. in a decision called *E.A. & P.A. v. The Minister for Justice and Equality* [2012] I.E.H.C. 371 where he refers to the conflicting judgments which exist with respect to the nature of the constitutional right of an Irish citizen child to the care and comfort of a parent. He noted notwithstanding many decisions from the High and Supreme Court dealing with these issues that:-

> "39. Given these cross-currents of judicial opinion, it seems to me that the applicant can readily meet the *Campus Oil* standards of arguability. While readily acknowledging the desirability of maintaining judicial consistency, on further reflection I have come to the conclusion that the issue is so fundamental that faced with a choice between decisions such as *Alli* and *U*. on the one hand and *S, XA* and the *AO* decisions on the other, I would respectfully opt for the latter decisions, at least in those cases where the effect of the deportation order would be to split up the family and to deprive the children of the essence of their constitutional rights to the care and company of their parents by condemning them to a childhood without one of their parents.. Moreover, it must be recalled that while Article 8 ECHR simply guarantees the right 'to respect' for family life, some weight must be given to the even more emphatic description of family rights contained in Article 41 –'inalienable and imprescriptible'– even if those rights are not, of course, to be regarded as absolute."

At para. 40 of that judgment the learned Judge says:-

> "40. In summary, therefore, I would conclude as follows:
>
> i. The applicant has manipulated the asylum system and has engaged in egregiously wrongful conduct. He has no personal merits which would entitle him to administrative or judicial protection.
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> ii. The applicant is not entitled to rely on the decision of the Court of Justice in *Zambrano*. Given that the mother has refugee status in this State, she cannot realistically be expected to return to or even visit Nigeria and there is almost no prospect that the effect of the deportation order would be to result in the child leaving Ireland or the territory of the Union.
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> iii. The court must, however, approach this application not from the perspective of the father, but rather from that of the child. It must accordingly seek to ensure, where possible, that the substance of the constitutional right of the child as guaranteed by Article 42.1 to the care and company of his parents is protected.
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> iv. In the present case, were Mr. A. to be deported, the likelihood is that the child would have no further personal contact with him during his minority, thus depriving the child of the essence of that constitutional right.
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> v. It is reason that I consider that Mr. A. has satisfied the *Campus Oil* criteria and I will therefore grant an interlocutory injunction restraining his deportation. I will discuss with counsel the form of that order and will give further directions for the early hearing of this application. (sic)"

There are obvious similarities between that case and the current case.

23. A further question arises with respect to arguability of the rights of the unborn child in this case. There are two decisions dealing with the circumstances which are relevant to the present case. The first is *O.E. & A.H.E. v. The Minster for Justice and Equality* [2008] I.E.H.C. 68, [2008] 3 I.R. 760. In that case the father was the subject of a deportation order and subsequent to the making of the order he developed a relationship with an Irish citizen and they became pregnant. The respondent refused to revoke the deportation order made in respect of him and the second named applicant sought to quash that refusal to revoke the deportation order on the grounds that the respondent failed to take the constitutional rights of the applicant into account. Irvine J. held that the constitutional right to be born enjoyed under Article 40.3.3 of the Constitution was not the only right enjoyed by the applicant at the time of the respondent's refusal to revoke the father's deportation order and that the applicant enjoyed the same rights as he would have enjoyed had he been born prior to the making of the decision, by reason of Article 40.1 and 40.3 of the Constitution. She also held that the Minister was obliged, on an application to revoke a deportation order, pursuant to s. 3(11) of the Immigration Act 1999 to consider the constitutional rights of the applicant and, in particular, the right to enjoy the care, company and support of his father and to consider the effect of the deportation on those rights.

24. The opposite result was achieved in *Ugbelase v. The Minister for Justice and Equality* [2009] I.E.H.C. 598, [2010] 4 I.R. 233, where the learned Cooke J. said that on an application to revoke a deportation order the Minister was not required to consider the constitutional rights of an unborn child because the unborn child had only a right to be born and no other rights. Those decisions seem to me to be in conflict, one with the other, although Cooke J. very carefully distinguishes the decision of Irvine J. in *O.E.*.

25. My view is that there is a conflict between the decisions. That conflict has interesting implications for this case because the Minister will find herself faced with the dilemma as to whether she is required to consider the interests of the unborn child on the application for the revocation, that is, if she decides to take the decision on that application before the child is born, sometime in the next four weeks. If she follows what Irvine J. says, she will be in conflict with what Cooke J. says and if she follows what Cooke J. says, she will be in conflict with what Irvine J. says. This is not the place, on an interlocutory injunction application, to resolve such a conflict or even attempt to. I simply note that the conflict exists.

26. The first named respondent has urged on me that I cannot consider the rights of the unborn child at this stage because no rights exist, save the right to be born.

27. My view is that the Court has a well established jurisdiction to grant an order to prevent an anticipated breach of rights. In this case, the applicants argue that if the first named applicant is deported before the birth of the unborn child, the child at the moment of his or her birth will be prevented from enjoying the constitutional right to the care and comfort of his or her father. I believe that I have jurisdiction to grant such an order provided it is made out that there is an arguable case that the unborn child, at the date of

his or her birth, will enjoy such a right and that the pre-birth deportation of the father will interfere with that right. I was not persuaded that this argument was unavailable to the applicants merely because the unborn child was not a party to the proceedings. In any event, had I decided otherwise I would have heard an application to join the unborn child.

28. I have decided in this case that the applicant has made out an arguable case that implementation of the deportation order now will have an unlawful impact on the rights of the second named applicant. I have also decided that the applicants have made out an argument that implementation of the deportation order at this stage will possibly interfere with the rights of the unborn child when acquired at birth.

29. Therefore, in respect of the first relief which the applicants seek, that is a declaration that implementation of the deportation order would be disproportionate and unlawful; I find that an arguable ground has been made out.

30. In respect of the second relief sought, that is a declaration that the practice or policy of deporting persons without notice is unlawful, I reject any suggestion that this practice is unlawful as the applicant is in court and is seeking the protection of the Court and has not not been impeded in his access to court by the absence of a definitve notified deportation date. The applicant has had a copy of the deportation order since 2008 and has not encountered any difficulties seeking legal assistance. The illegality contended for is of such a purely hypothetical and theoretical nature that it is, in my view, unstateable. It may be that a person deported could establish actionable harm caused by the absence of a definitive notified deportation date but the facts of this case do no connect inury to the parties caused by that alleged deficiency.

31. I do not believe that any illegality attaches to the regime which exists in Ireland whereby the State does not give notice to the addressee of a deportation order as to precisely when they will be deported. In any event, addressees of deportation orders are expressly directed to present at the G.N.I.B. on a particular date and it is plainly indicated that they may be deported on that date. If they are not deported a new reporting date is given and such persons are told they may be deported on any of the subsequent reporting days or, indeed, at any time. It is, therefore, not true to say that deportees are not told anything of their proposed deportation date. Each such person is on notice of the posibility of deportation at any moment or at least on the day they are required to report to the G.N.I.B.. Such form of notice permits pre-deportation access to lawyers and courts as may be necessary. No arguable case has been made out that implementation of the deportation order would be unlawful because of an absence of a definitive deportation date notified in advance to the first named applicant.

32. Therefore, I reject that part of the applicant's claim which relates to the second relief sought. It remains open to the applicant to seek leave in relation to that matter and a different standard of review for the leave stage will be employed by the judge dealing with the matter then.

33. The next part of the process involves asking the question as to whether and how to apply the last part of the decision of the Supreme Court in *Okunade*. Having analysed the correct approach Clarke J. said at para. 10.4 of that judgment:-

> "However, in the absence of any additional factors on either side, it seems to me that, if faced simply with an assertion on the part of the Minister that it is desired that a deportation order be enforced unless and until it be found invalid and an assertion on the part of an applicant that the applicant in question does not wish to run the risk of being deported only to be readmitted if the relevant proceedings are sufficiently successful, the position of the Minister would win out."

The well known default position is described at paragraph 10.5:-

> "The default position is, therefore, that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side."

The Judge also notes:-

> "There may, as already noted and as the trial judge recognised, be some cases where the presence of the applicant for the hearing of the judicial review proceedings is necessary."

34. That of course is not entirely dissimilar to the type of argument being pursued in this case. In essence, the applicants are arguing that the presence of the first named applicant in the State is necessary not for the purposes of participating in proceedings, and not for the purpose of participating in a parallel administrative decision making process, but for the purpose of supporting the mother of his unborn child in the last weeks of her pregnancy and for the purpose of being present in the State when that child is born, so that the child's right to the care and comfort of his father can be vindicated.

35. Clarke J., at para. 10.8 of his judgment, says as follows:-

> "It also seems to me that, in the context of deciding what is to happen on a temporary basis pending trial or a leave application, a disruption of family life which has been established in Ireland for a significant period of time is a material consideration."

And he goes onto say:-

> "All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of both the judicial review proceedings and any other process which might follow on, the children concerned might be allowed to remain in or return to Ireland."

36. Of course, this is not a family life situation which is of long duration but is undoubtedly a situation where the Court is asked to consider the disruption that will happen to the family life and where the second named applicant is in the late stages of pregnancy, saying that she relies heavily on her partner for support at this time.

37. Clarke J. also says at para. 10.10:-

> "….it seems to me that the situation which pertains at an interlocutory stage is different. At an interlocutory stage the court is not considering whether a relevant infant has the right to remain in Ireland as such, but rather the court has to decide where the least risk of injustice lies in formulating a temporary measure to cover the situation which is to prevail until the substantive legal rights of the infant concerned are established."

38. It seems to me that I am also asked in this case to grant an injunction until a time when the substantive legal rights of this unborn child are established and weighed, a process which will happen in the revocation application provided the Minister follows the course advised by Irvine J. in *O.E.* that she is not only entitled, but is obliged, to consider the rights of the unborn child in that case. The Court acknowledges that the Minister may decide that the alternative judgment of Cooke J. in *Ugbelase* is the proper course, in which case there is an inevitability of further litigation to establish the infant's rights and to establish at what point in time they should be considered.

39. Clarke J. makes a claim that the Court, although urged to follow a default position of respecting an extant deportation order, may have regard to what he refers to at para. 11.1 of the judgment as "whether there [are] sufficient countervailing factor[s] to alter the default position."

40. I have come to the view that the vulnerable position of the second named applicant in this case and the extent to which she relies upon the first named applicant is one of those special countervailing factors. It seems to me that it would be harsh to deport the first named applicant in the days prior to his partner giving birth to their first child. The first named applicant may have no merits, may have played ducks and drakes with the immigration system, but none of that is the fault of the second named applicant nor is it the fault of the unborn child, though I acknowledge the submission of the first named respondent as correct that the conception in this case happened when the parties were aware that there was a deportation order in existence. Notwithstanding, the special protection that is required for persons about to give birth seems to me to require the intervention of the Court at this stage and I express mild surprise, no more than that, that an undertaking was not given in this case, given the particular circumstances of the second named applicant.

41. In those circumstances I have decided to grant an interlocutory injunction restraining deportation until further order of the Court.

Addendum:
42. The Court refused an application for the applicants' costs of the interlocutory application because leave to seek judicial review has not yet been granted and it is possible that leave might be refused. If this were to occur, the costs of the interlocutory application might be seen in a different light.