Neutral Citation No. [2005] IEHC 104

HIGH COURT

Judicial Review
2004 No. 351 JR

Between:
Corina Eugenia Spartariu (nee Ioja) and Ioan Spartariu

Applicants

And

The Minister for Justice, Equality and Law Reform

Respondent

Judgment of Mr Justice Michael Peart delivered the 7th day of April 2005:

This is an application for leave to seek relief by way of Judicial Review an Order of Certiorari quashing the decision of the respondent refusing to revoke a deportation order in respect of the first named applicant which was communicated to the said applicant by letter dated the 13th November 2003, as well as an order of Mandamus directing the respondent to quash the said order.

The applicants also seek certain declaratory reliefs based on family and private rights, recognised in the Constitution and the European Convention on Human Rights.

In addition, certain declarations are sought, based on an alleged medical condition affecting the first named applicant, that to enforce the deportation order against her would breach her personal right to bodily integrity, her right to life and her right to be treated in a humane manner, as protected by the Constitution and the Convention. The grounding affidavit of the second named applicant refers to this medical condition as chronic anaemia, though the medical evidence fails to specify the particular ailment. Connected to this aspect of the application is an application for a declaration that that in the light of certain representations made to her by the respondent that she would not be deported until her medical condition stabilised, a legitimate expectation arises such as would be breached if the deportation order is enforced.

There is also relief sought by way of declaration that the deportation order itself is by now spent and is not enforceable against the first named applicant.

This application does not come within the ambit of s.5(2) of the Illegal Immigrants (Trafficking) Act, 2000, and accordingly the applicants must for the purpose of this application satisfy the Court that there are arguable grounds for seeking the reliefs set forth in the Statement of Grounds.

Factual Background:

The applicants are Romanian nationals. The first named applicant arrived in the State on the 1st August 2001 at Rosslare and applied for asylum on the 14th August 2001. She had a Romanian passport which contained a C-Schengan visa issued by Germany and valid for the period from 20th July 2001 until 18th August 2001.

She married the second named applicant in this State on the 13th November 2001. However this marriage was not notified to the respondent prior to the making of the deportation order in this case in respect of the first named applicant on the 23rd November 2001. The second named applicant was at that time lawfully residing and working in the State for about eight years.

Her application was treated as coming with the terms of the Dublin Convention, and therefore one more appropriately dealt with by the German authorities, and on that basis a deportation order was made. The decision to so treat the application was the subject of judicial review proceedings which were determined in October 2002. The said applicant also wrote to the respondent seeking to have the deportation order revoked on the basis that her marriage to the second named applicant, and applied for leave to remain here with him. This application was refused by letter dated 13th November 2003. This notification was almost two years subsequent to her application for revocation made at the end of November 2001.

Since December 2003 the first named applicant has been certified as unfit to travel as already referred to. Since the making of the deportation order she has been required to present herself in the usual way to the Garda National Immigration Bureau and has complied with these requests, but she states that in April 2004 when attending at GNIB pursuant to a letter requesting that she do so, she was first of all told that she would be asked to return again after her next medical

appointment, that she was asked to wait until somebody could deal with her, and that having waited for several hours she was advised that she was being arrested and would be deported the following morning. An application was made to the High Court successfully on her behalf for an injunction restraining her deportation, pending determination of these proceedings.

Applicants' grounds for applying for the reliefs sought:

• ***Breach of private and family rights:***

It is argued on behalf of both applicants that the respondent's decision to refuse to revoke the deportation order once he was notified of the applicants' marriage breaches their rights, both Constitution and Convention to reside in this State as a family unit. It is also argued that the respondent has failed to put forward any replying affidavit in which he might seek to justify the decision to refuse, and thereby satisfy the requirement to justify on some grounds considered proportionate what the applicants say is a breach of a fundamental right. In this regard the applicants submit that the reason set forth in the letter of notification to them dated 13th November 2003, namely "the interest of upholding the Immigration and Asylum laws in the State", is not a sufficient justification for the breach, and that the respondent's decision is therefore disproportionate.

Ms. Barrington on behalf of the respondent has submitted that while undoubtedly there are constitutionally recognised and protected family rights, this protection does not prevent the respondent where he chooses so to do, to deport one spouse in circumstances where the other spouse is permitted to remain. She has submitted that the respondent is entitled to enforce the immigration laws of the state even in circumstances where to do so results in the break up of the family unit. The Court has been referred to the judgments in **Osheku v. Ireland [1986] I.R. 733**, and **Pok Shun Sun v. Ireland [1986] I.L.R.M. 593**, both of which have been referred to by Ryan J. in his judgment in **Fitzpatrick v. The Minister for Justice, Equality and Law Reform, unreported, High Court, 26th January 2005** in which the learned judge has helpfully drawn attention to the clear distinction to be drawn between rights which may avail an Irish born child of non-national parents, who has rights as a citizen, and rights which are enjoyed by spouses who are non-national. In the latter case, as pointed out by Ryan J. in Fitzpatrick, there is no balancing of rights to be undertaken in the way there is in the case of the Irish born child of non-national parents. This distinguishes the present case from cases such as Fajujono and also Amadasun dealing with children's rights.

Ms. Barrington has submitted that the first named applicant cannot be regarded as having a right to reside here simply arising simply from the fact that she married a man who has been allowed reside and work here, and that it is also of relevance that when they got married they must be taken to have been aware that there was a risk that she may be deported. In this regard, Ms Barrington has referred to the remarks of Lord Phillips in **Mahmood v. Home Secretary [2001] 1 WLR. 840,** being referred to also by Ryan J. in Fitzpatrick as follows:

> *"(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.*

(5) Knowledge on the part of one spouse, at the time of marriage, that rights of residence of the other were precarious, militates against a finding that an order excluding the latter spouse violates article 8."

In the face of this line of argument, Ms. Phelan has stated that the applicants are not arguing that they have a right to reside together in this State, but rather that the respondent's decision is a breach of a fundamental right, being a family right, and that there has been no justification of the decision which could demonstrate that it is a proportionate measure. It is submitted on their behalf that there has been no attempt to justify the interference as being necessary in a free and democratic society, and outweighing the rights of the applicants. Ms. Phelan has referred to the cases of **Boultif v. Switzerland 33 EHRR 1179**, and **Yildiz v. Austria 36 EHRR 553**, and submits that the Court now must have regard to the case-law of the European Court of Human Rights as mandated by s.2 and s.4 of the European Convention on Human Rights Act, 2003. In Boultif the applicant complained under Article 8 of the Convention that the Swiss authorities had not renewed his residence permit and thereby separated him from his wife, a Swiss citizen who could not be expected to follow him to Algeria from where he hailed, because while she could speak French she would not be able to work there and would have no money. Mr Boultif had arrived in Switzerland on a tourist visa in December 1992, and had married his wife some three months later. But two years later he was convicted of unlawful possession of weapons. The Swiss authorities refused to renew his permit in the interests of public order and security. The ECHR reiterated that no right to enter or reside in a particular country is as such guaranteed by Article 8 of the Convention, but that the removal of a person from a country where close family members are residing may amount to an infringement of the right to respect for family life as guaranteed by that Article. The Court went on to state that *"such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8",* and that it was therefore "*necessary to determine whether it was in accordance with law, "motivated by one or more of the legitimate aims set forth in that paragraph and necessary in a democratic society."*

In the case of Mr Boultif the Court noted that the expulsion of the applicant was in accordance with a Swiss statutory provision and therefore was "in accordance with law". The Court was also satisfied that the measure was for the prevention

of disorder and crime – a legitimate aim. However, the Court went on to consider whether in the case of the applicant the measure was *"necessary in a democratic society."* The Court stated that while a State is entitled to maintain public order, if necessary by controlling the entry and residence of aliens, and that to that end they may deport aliens convicted of criminal offences. But the Court went on to state that even these decisions must be *"justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."*

The Court considered whether the refusal to renew Mr Boultif's permit struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life on the one hand, and the prevention of disorder and crime, on the other. The Court remarked that it had only a limited number of decided cases where the main obstacle to expulsion is the difficulties for the spouses to stay together and in particular for a spouse and/or children to live in the other's country of origin, and went on to set out certain principles appropriate to a case where the reason for expulsion was the commission of a criminal offence. That of course is not the context of the case before this Court but it is useful to look at those principles in order to appreciate the nature of the exercise to be undertaken when deciding whether a measure is proportionate to the objective to be achieved. The principles can be summarised as follows:

- Nature and seriousness of the offence
- The length of the applicant's stay in the country
- The time elapsed from the date of the offence and the applicant's conduct in the intervening period
- The nationalities of the various persons concerned
- The applicant's family circumstances i.e. the length of the marriage, children
- Whether the spouse knew about the offence at the time she entered the relationship
- The seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.

In the case of Mr Boultif the Court noted that the offence committed was serious, but that in the six years which had elapsed since the offence he had committed no further offences, and had undergone training as a waiter and had worked as a painter. His prison conduct had also been without blemish. The Court decided that while the offence gave rise to some fear that for the future he would pose a risk, that risk was mitigated by the particular circumstances of the case. The Court also considered that Mr Boultif's Swiss wife had never worked in Algeria, had no ties there and could not speak Arabic. It was not therefore reasonable that she should be expected to follow her to Algeria.

Over a year later, the ECHR came to similar conclusions in the case of Yildiz. There is no need to set out the terms of that judgment here.

Having considered the case-law of the ECHR to which I have been referred and bearing in mind the requirement to have regard to same, I am of the view that for the purpose of this leave application it is at least arguable firstly that the decision of the respondent infringes a right or rights protected by the Constitution and/or the Convention, and that while the respondent has stated that the deportation "will proceed in the interests of upholding Immigration and Asylum laws of the State", there has not been carried out the exercise of considering and balancing the competing interests and factors, as appears to have been required by the ECHR as shown above, in order to satisfy that the measure is necessary in a democratic society, and therefore proportionate to the objective to be achieved. While there are certain distinguishing features in the present case, it is in my view arguable that the respondent's decision is defective in that regard. I note that no replying affidavit has been filed on the present application.

I express no view for the purpose of this application on the submission that the more heightened 'anxious scrutiny' test should be applied to the decision in this case.

- ***Breach of Personal Rights of Bodily Integrity and right to Life:***

The background to this submission is already set forth. It appears that the first named applicant was certified as unfit to travel and was undergoing some tests for an ailment which is for some reason not disclosed in the medical certificates, but which is stated by the second named applicant's affidavit as "chronic anaemia". In my view there has been no adequate factual basis put forward for this ground to reach the required threshold of arguability. I, for one, would require far more in the way of medical evidence before I would be satisfied that it is even arguable that to enforce a deportation order in respect of a person suffering from and being treated for anaemia is in breach of any right to life or right to bodily integrity, or right to be treated in a humane manner, as protected by the Constitution and/or the Convention.

- ***Legitimate Expectation re: medical condition:***

It is submitted by the first named applicant that after he had received the medical evidence submitted on her behalf, the respondent had deferred the enforcement of the deportation order pending further medical review, and that when the first named applicant was arrested on the 20th April 2004 for the purpose of deportation the following day, there was a breach of a legitimate expectation that she would not be deported pending further medical review. In his grounding affidavit, sworn also on behalf of the first named applicant, the second named applicant avers as follows:

"10. In or about November 2003 the first named applicant's health took a serious turn for the worse. She suffers from chronic anaemia. As a result of this condition she is receiving treatment and attends regularly with doctors and at the Mater Hospital. She has been certified as unfit to travel. The first named applicant advised the GNIB of this fact and furnished medical evidence to them. As a consequence the practice has developed since December 2003 of the GNIB indicating periodically when the first named applicant attends with them that they will give her an appointment after her next medical appointment so that her condition can be reviewed at that stage……..

11. By letter dated the 12th March 2004 the solicitor for the first named applicant wrote to the GNIB advising that the first named applicant was scheduled for her next medical appointment on the 10th May 2004 and requested that she be asked to return for her next appointment with the GNIB after this appointment……..When the first named applicant attended for her regular appointment with the GNIB on the 20th April (Tuesday last) she tells me that she informed them that her next medical appointment was the 10th May 2004. She tells me that it was conformed to her that she need not return until after that date but she was requested to wait until someone was in a position to deal with her. She duly waited but when she was attended to several hours later at in or about 5.00pm. she was advised that she was being arrested and detained and would be deported the next day to Germany……"

Ms. Phelan has referred to the judgment of O'Hanlon J. in **Fakih v. The Minister for Justice [1993] 2 I.R. 406**, as well as that of Smyth J. in **Crossan v. The Council of the Kings Inns, unreported, High Court, 15th January 1999** which consider the question of legitimate expectation. In addition she has referred to a reference by Keane J. (as he then was) in **Pesca Valentia v. The Minister for Fisheries and others [1990] 2 I.R. 305** where the learned judge makes reference to some remarks by Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374** and then states at p.321:

"Lord Diplock there emphasises that the essence of the doctrine – in England at all events – is the right of the person affected to be given some rational ground for alterations in a regime to which he has become accustomed and an opportunity to be heard in relation to them before they are implemented..."

The learned judge went on to say that *"the doctrine of legitimate expectation in short gives relief by way of judicial review in England to the person affected because of the manner in which a decision is made by a public authority"*. It therefore is relevant to the question of the fairness of the manner of the making of the decision. In the present case it is suggested that there is a manifest unfairness in the manner in which the first named applicant was dealt with, and it is put on the basis that having been accustomed to being asked to return to the GNIB from time to time after they were notified of the medical condition and so that her tests could be carried out, she ought not, without notice of an intention so to do, on the 20th April 2004 have been arrested for deportation the next day, especially given that they had been told that she had another medical appointment for the 10th May 2004. In other words, that the course of dealing which had taken place between the first named applicant and the GNIB was such as to give rise to a legitimate expectation on her part that she would not suddenly and without notice be dealt with as she was on the 20th April 2004. In my view it is at least arguable to the required level that such action by the GNIB was unfair in the sense referred to by Lord Diplock.

It is a matter for another day to consider what exactly the expectation, if it existed, extended to. Was it for example a legitimate expectation to be allowed to remain indefinitely until such time as she recovered completely? Was it an expectation that she would not be deported suddenly and without reasonable notice being given of an intention so to do, given the course of dealing which had taken place? These are matters for further argument at a substantive hearing, and I propose allowing leave in that regard.

- ***Deportation Order Spent:***

The submission under this head is that because of the passage of time since the making of the Deportation Order it is spent and cannot now be enforced. The basis on which it is contended that it is no longer of any force is that under the terms of the Dublin Convention, Article 11.5 it is provided that:

"Transfer of the applicant for asylum from the Member State where application was lodged to the Member responsible must take place not later than one month after acceptance of the request to take charge or one month after the conclusion

of any proceedings initiated by the alien challenging the transfer decision if the proceedings are suspensory."

The period of one month has long since expired. It is submitted that under the Convention the deportation of the first named applicant is dependent on the consent of the German Government. It is contended that by now the consent already given by the German Government will have lapsed and that the deportation cannot now take place. Ms. Barrington for the respondent has pointed to the fact that when the Dublin Convention was transposed into Irish law by S.I. 343 of 2000 the time limit of one month was not included in the statutory instrument. She has also referred to a note which was attached to the German acceptance of the first named applicant and which is referred to in the judgment of Smyth J. in this case dated 4th October 2002 (dealing with the challenge to the case being dealt with under the Dublin Convention) and which is included as an exhibit in this present application. This note states as follows:

"Should the transfer of an alien not be possible within three months, a later transfer to Germany can only be accepted if there are no circumstantial evidences of a change in the responsibility (sic) – i.e. in form of leaving the territory of the Convention."

This passage has suffered from some less than ideal translation in my view and there is some ambiguity as to exactly this means, but it seems to suggest that in certain circumstances Germany will accept an alien after a three month period has elapsed.
Ms. Barrington also makes the point, and it is well made in my view, that in effect this point is a challenge to the deportation order itself and comes under s. 5 of the 2000 Act and therefore within the requirement that not merely arguable grounds be shown before leave be granted, but 'substantial grounds'. However, I am satisfied that this point does not even reach the point of arguability – the lower test. Any time difficulties are in my view a matter for resolution between the two sovereign governments. In the event that Germany refuses to accept the first named applicant because of the lapse of time, that is a matter which the respondent will have to deal with. It may be that a further deportation order would have to be made in the appropriate way on an altered basis. But that is not a matter upon which the first named applicant can rely at the moment. I will refuse leave on that ground.

No submissions have been made in relation to any claim for damages as sought in the Statement of Grounds.

I therefore grant leave to seek the reliefs set forth in the Statement of Grounds at paragraph (d), subparagraphs I, II, IV, V, VI, VII, IX, XI, on the grounds set forth therein at paragraph (e), subparagraphs 1, 2, 3, 4, 5, 6, 7, 8, and 11.