THE HIGH COURT

2017 No. 570 JR

IN THE MATTER OF SECTION 3 OF THE IMMIGRATION ACT, 1999, THE CONSTITUTION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

Between:

AM, VM & ZM (A MINOR SUING THROUGH HIS MOTHER

AND NEXT FRIEND VM)

APPLICANTS

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 29th January, 2019.

1. The applicants are non-EU nationals. AM and VM are married. ZM is their son. AM and VM arrived illegally in Ireland in 2005. ZM was born here in 2007 and has always lived here. AM has sought international protection and for now has permission to remain. ZM suffers medical conditions requiring ongoing care and a stable environment. He has phonological/development/language difficulties. Before the Minister was a letter from three of ZM's teachers opining professionally that to remove ZM from "*the nurturing environment of school and life in Ireland…would be catastrophic"* for ZM. The applicants challenge the decision to deport VM/ZM, related deportation orders and a recommendation that those orders remain extant.

2. *Did the Minister fail to exercise the discretion recognised by O'Donnell J. in DE v. MJE [2018] IESC 16, para.11?* Despite submissions being made to the Minister, he does not in his reasoning: mention/consider this discretion; recognise that even if the applicants' contentions do not yield relief under the Constitution/ECHR the discretion remains. It is not enough that issues relevant to the discretion feature in the Minister's analysis: viewed differently the same facts can support contrary ends.

3. *Is the Minister's analysis flawed as regards family unity?* The applicants comprise a constitutionally protected family. The Minister's analysis states, *inter alia,* that AM "*cannot be considered for deportation at this time."* This present inability yields for now an insurmountable obstacle to the family living together in VM's/ZM's country of origin (COO). That being so it is difficult to reconcile the Minister's reasoning with Lord Phillips' observation in *R. (Mahmood) v. Home Secretary* [2001] 1 WLR 840, para.55, that *"Removal or exclusion of one family member from a State where other members…are lawfully resident will not necessarily infringe Article 8 provided…there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded".*

4. *Was assessment of VM's/ZM's constitutional/Art.8 ECHR rights flawed because:*

> *(i) consideration of ZM's disability was confined to medical care, without considering the familiar/nurturing environment need? The consideration was not so confined.*
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> *(ii) of (a) failure to consider non-medical aspects of COO conditions (b) (I) failure to consider certain COI relating to COO conditions, and (II) a mistake of fact as to whether such information was submitted, (c) failure to consider relevant information considered by the IPO? There was no such failure/mistake. The reasoning states that all representations and correspondence/documentation on file were considered. There is no evidence establishing that the Minister acted contrary to this statement.*
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> *(iii) an Art.3 ECHR test featured in the Art.8 ECHR analysis? It is true that in his Art.8 assessment of ZM's disabilities the Minister considered whether any adverse impact of deportation on ZM reached the level required to breach ZM's Art.3 rights.*
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> *(iv) of failure to consider Art.8 ECHR matters cumulatively? The Minister brought rounded, comprehensive and legally adequate analysis to bear in this regard.*
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> *(v) the Applicant's substantive rights were breached (which breach must be taken into account by the court)? Such failings as present are identified herein and taken into account.*

5. *Were ZM's best interests considered in a flawed way?* The Minister duly considered ZM's best interests, recognising (correctly) that they need not be determinative.

6. *Did the Minister fail properly to deal with/consider delay?* State delay in the deportation process is relevant to the proportionality of deportation. Such delay was raised by the applicants but not expressly addressed by the Minister.

7. The Minister maintains the applicants do not deserve discretionary judicial relief (because *AM* and *VM*, *inter alia*, entered/worked here illegally). The Minister refers, *inter alia*, to *AGAO v. MJE* [2007] 2 IR 492, *C(R) and M(GG) (Zimbabwe) v. The Refugee Applications Commissioner and anor* [2010] IEHC 490, and *GO and ors v MJELR* [2008] IEHC 190. However, the court also has to weigh into account the failings identified in this judgment, failings which arise vis-à-vis members of a constitutionally protected family confronted with possible sunder and a disabled minor whose removal, several educators have opined, "*would be catastrophic*" for him. All considered, without diminishing AM's/VM's wrongs, it does not seem appropriate for the court to exercise its discretion to refuse the reliefs sought. The court will grant the orders of *certiorari* sought.

8. Two final points: (1) there was a relatively brief period of delay in bringing these proceedings. Throughout that period there was liaison with the Minister in the expectation (accurate as regards AM) that the deportation orders would be withdrawn. Notably too the applicants were liaising with the Minister concerning a case where (see para.3) there was, *inter alia*, failure to consider a particular discretion. That liaison/failure suggests this is a case where there was good and sufficient reason for the delay and the refusal to revoke could not reasonably have been anticipated by the applicants confronted with the situation that presented; (2) the court

declines to allow the amendment sought to the statement of grounds as there is not good and sufficient reason for same: all arguments raised by the applicants were within the scope of the statement of grounds as is.