Neutral Citation Number: [2010] IEHC 282

THE HIGH COURT

JUDICIAL REVIEW

2010 238 JR

BETWEEN

U.T.N., V.N.M., J.L.N.M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND U.T.N.), J.M.N.M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND U.T.N.),

AND C.N.M. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND U.T.N.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 14th day of July, 2010.

1. By a judgment delivered on 25th June, 2010, ("the main judgment",) the Court refused leave to the applicants to seek judicial review of a deportation order made on 19th January, 2010, by the respondent Minister in respect of the second named applicant. The applicants now apply pursuant to s. 5 (3) (a) of the Illegal Immigrants (Trafficking) Act 2000 for leave to appeal to the Supreme Court against that judgment and order of the Court. That provision stipulates that such leave "shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court".

2. The full background circumstances to the making of the deportation order, the reasons given for making it by the Minister and the grounds upon which the Court rejected the challenge to its validity are set out in the main judgment and need not be repeated here. It is sufficient to say that the memorandum entitled "Examination of File under Section 3 of the Immigration Act 1999" ("the File Note",) which was furnished with the deportation order by way of explanation of the Minister's reasons for making the order, was judged by the Court to indicate that the Minister had correctly considered all of the matters required to be considered prior to making such an order including the representations made on behalf of the applicants; and that the conclusions reached were reasonable, proportionate and free from any error of fact or mistake of law on the part of the Minister.

3. Briefly stated the "point of law of exceptional public importance" which is proposed to be raised as the basis for the grant of leave to appeal is directed at the alleged inadequacy of the consideration given by the Minister to the possible impact of a transfer of the Irish citizen children to the Democratic Republic of Congo (DRC) should the family decide to return there together, having regard in particular to the information put before the Minister as to the dire state of that country and the hazards and disadvantages the children would face in their future lives, security, education and personal well-being. In considering the position of the children under the heading of "Proportionality" at para. 4 the Minister's officers had said:

> "The applicants' children … are twins that were born on 30/10/2003 and are accordingly six years of age. Information on file from (the father) dated 22/05/2008 states that the twins attend school in Blanchardstown. There is no more recent information relating to the twins schooling. A personal statement has also been written and submitted by [the father]. It is submitted on behalf of the family that they wish to live in a secure and loving family unit. No further submissions have been received regarding these children's integration into the State. It can be assumed that they have a certain level of attachment to the State. Notwithstanding this fact, due to their young age, they may therefore be considered to be of an adaptable age such that they could be expected to adapt to life in the DRC should their mother choose to return there with them."

4. It is submitted that this reference to the children being of an adaptable age and able to adapt to life in the DRC is wholly inadequate and fails to fulfil the criteria to be applied as identified by the Supreme Court when the Minister is considering the deportation of a non-national parent of Irish citizen children. Thus, the following specific points of law are proposed as the basis for the grant of leave to appeal:

> "(1) In the context of Article 8 of the ECHR and in considering whether there is an insurmountable obstacle (as interpreted in the *Boultif* decision) to relocation for a family to two parents and two children aged six to the country from whence the parents came to Ireland in 2003, is it a sufficient consideration of the obstacles and difficulties that will be faced by the two Irish children (as identified on their behalf by their mother and by country of origin information) for the Minister to hold that the Irish children are of an 'adaptable age' such that they may be expected to adapt' to the situation in that country without addressing in any manner how the Irish citizens were expected to adapt successfully to the actual expected difficulties and anticipated obstacles, such including, for example, the conditions of conflict, widespread human rights abuses, the absence of basic healthcare and the absence of basic educational facilities in that country?
>
> (2) In considering a challenge to such a decision of the Minister by way of an application for leave to seek judicial review, is the High Court correct in law to hold that it could not be said to be in any sense unreasonable for the Minister to have concluded that the Irish children were of an age at which they "might well adapt" to the conditions of conflict, widespread human rights abuses, the absence of basic healthcare and the absence of basic educational facilities in that country, in circumstances where the Minister (and the Court) had absolutely no evidence to support such a suggestion."

5. It will be noted that the issues thus proposed are formulated primarily by reference to the facts of the case rather than as general points of law as such. They are directed at the Minister's assessment of the application of Article 8 ECHR to the specific context of this family and the circumstances of the children, their ages, education and future prospects and by reference to the conditions in one particular country namely the DRC. In explaining the basis for the proposed points of law, counsel for the applicant focussed on the conclusion of the Minister to the effect that the children were "of an adaptable age such that they could be expected to adapt to life in the DRC should their mother choose to return there with them". He submits that this is wholly inadequate as the assessment required to be made of the rights of the children under Article 8. The Minister is required by law to enquire into the conditions the children will face in the DRC and he cannot say they can be expected to adapt if he gives no consideration to and makes no mention of the conditions they will be required to adapt to in the DRC in terms of future education, exposure to disease, lower life expectancy and so forth. It is argued that the Minister's obligation requires him to examine and consider what the lives of the children in the DRC would be like before reaching a conclusion that they can be expected to go there should their parents so decide.

6. In the judgment of the Court questions so formulated cannot be said to involve points of law of exceptional public importance because they are dependent upon the facts peculiar to the applicants and on the manner in which the Minister has made a specific decision. The questions do not as such transcend the facts of the case so as to raise issues of law of exceptional public importance.

7. In its judgment of 26th November, 2009, in *I.R. v. M.J.E.L.R.* at para. 6, this Court endeavoured to summarise the essential criteria which fall to be applied when considering an application under s. 5 (3) (a) of the 2000 Act as the criteria emerge from the case law listed at para. 5 of that judgment. The Court identified them as follows:

- o It is not enough that the case raises a point of law: it must be one of exceptional importance;
- o The jurisdiction to grant a certificate must be exercised sparingly;
- o The area of law involved must be uncertain such that it is in the common good that the uncertainty be resolved for the benefit of future cases;
- o The uncertainty as to the point of law must be genuine and not merely a difficulty in predicting the outcome of the proposed appeal or in appraising the strength of the appellant's arguments;
- o The point of law must arise out of the court's decision and not merely out of some discussion at the hearing;
- o The requirements of exceptional public importance and the desirability of an appeal in the public interest are cumulative requirements.

8. As indicated, the Court does not consider that the questions proposed to be raised for the appeal come within those criteria in this case. This is primarily because the grounds of appeal are effectively directed at the specific assessment made by the Minister in this case rather than raising any issue of law as to the correct interpretation of Article 8 of the Convention or s. 3 (6) of the Immigration Act 1999. Even if the questions could be reformulated so as to identify points of law in the interpretation of those provisions, the Court is satisfied that this is not an area in which the law is so uncertain as to justify their being submitted for appeal in the public interest.

9. The essential point made is that the Minister failed to consider whether the information as to the conditions the children would face in the DRC constituted an "insurmountable obstacle" to their accompanying their father should he be deported. The law in relation to the concept of "insurmountable obstacles" in the context of Article 8 of the Convention has recently been considered in detail by Clark J. in her judgments in the cases of *Alli v. M.J.E.L.R.* [2009] No. 193 JR and *Asibor v. M.J.E.L.R.* [2009] No. 200 J.R. (see in particular paras. 45-59 of the latter).

10. Strictly speaking, the term "insurmountable obstacles" is not actually used by the Strasbourg Court in its judgment in the *Boultif* case mentioned in Question 1 above, (*Boultif v. Switzerland* [2001] 33 EHRR 1179) although as Clark J. has pointed out it is used in other judgments both earlier and later. The phrase appears to have gained prominence in this jurisdiction from its use in the judgment of the English Court of Appeal in R. *(Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840 where it occurs in the passage at para. 55 of the judgment of Lord Phillips of Worth Matravers MR in which he identifies 6 conclusions drawn from the case law of the Strasbourg court as to the approach to Article 8 of the Convention. (The paragraph is quoted in full at para. [47] of the judgment of Denham J. in the *Oguekwe* case (see para. 13 below). It is notable, however, that in a case somewhat analogous to *Boultif* considered by Lord Phillips, that of *Beldjoudi v. France* [1992] EHRR 801, a different expression is used. That case concerned the deportation to Algeria of a man who had been born in France, who had lived all his life there, married a French woman and who had lost French nationality through a failure to comply with a French nationality law. In para. [78] of the judgment the court refers to the impact of the deportation on the wife: "To be uprooted like this could cause her great difficulty in adapting and there might be real practical or even legal obstacles, as was indeed acknowledged by the Government Commissioners before the Conseil d'Etat." The French government had argued (para. 73,) that the difficulties faced by the spouse were not "insurmountable" but without accepting that argument the court concluded that they were of a level of difficulty which might imperil the future of the marriage.

11. In the *Boultif* case the European Court pointed out that it had, up to that point, (2nd August, 2001) dealt only with a limited number of cases where "the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together" and proceeded to establish "guiding principles" for the purpose of examining whether an expulsion was "necessary in a democratic society" in accordance with Article 8.2 of the Convention. In para. 48 of that judgment the court then listed some of the relevant criteria which it would consider. These included:

- o The nationalities of the various persons concerned;
- o The applicant's family situation such as the length of the marriage;
- o Whether the couple led a real and genuine family life;
- o Whether the spouse knew about the offence at the time when her or she entered into a family relationship;
- o Whether there are children of the marriage and if so their age;
- o Not least, "the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere facts that a person might face certain difficulties in accompanying

her or his spouse cannot in itself preclude expulsion".

12. In para. 53 of the judgment the Court then concluded that the Swiss spouse in that case did face difficulties relocating to Algeria: "The Court has considered, first, whether the applicant and his wife could live together in Algeria. The applicant's wife is a Swiss national. It is true that she can speak French and has had contact by telephone with her mother-in-law in Algeria. However, the applicant's wife has never lived in Algeria, she has no other ties with that country, and indeed does not speak Arabic. In these circumstances she cannot, in the Court's opinion, be expected to follow her husband, the applicant, to Algeria". It does not say the difficulties were insurmountable: she could presumably have learned Arabic.

13. Thus, the assessment to be made for the purpose of Article 8 does not depend or depend only upon the existence or non-existence of "insurmountable obstacles" or "real practical or even legal obstacles" in the sense used in the *Beldjoudi* case. As this Court endeavoured to point out in the main judgment (see paras. 21 and 22,) if there are clear impediments which make it legally or physically impossible for family members to relocate with the deportee then there may well, for that reason alone, be an unlawful interference with the rights protected by Article 8 at least unless there are such compelling reasons based on one or more of the interests listed in Article 8.2 and relied upon by the deporting state which can override the interests of the family members without violating the principle of proportionality. The *Boultif* case is, however, authority for the proposition that even in the absence of such outright impediments to actual relocation, other factors may exist in the particular circumstances of a couple or family which mean that it is unreasonable to expect the spouse or family members to relocate although, as the Strasbourg court said, mere difficulties in the relocation may not be enough to render the interests relied upon by the deporting state disproportionate. In other words, the assessment of the lawfulness of an interference with family life by the removal or exclusion of a family member from a contracting state will vary depending upon whether the difficulties for other members in relocating are actually incapable of being surmounted: or merely involve some acceptable degree of hardship; or something in between which may, or may not, be such that it would be unreasonable to expect them to relocate. The Strasbourg case law also shows that the assessment may be influenced in an important way by the nature, history and permanence of the connection between the spouse or family members concerned and the deporting state: in *Boultif* and *Beldjoudi* the spouses were respectively Swiss and French nationals rather than persons who had themselves taken up residence there in adult life.

14. This Court is therefore satisfied that there is no uncertainty about the law either as to the criteria of Article 8 or as to the correct approach which the Minister must adopt in applying them. The position was made clear by the Supreme Court in, for example, the case of *Oguekwe v. M.J.E.L.R.* [2008] 3 I.R. 795. At para 71 of her judgment in that case, Denham J. quoted from the judgment of Finlay Geoghegan J. which was under appeal, the questions which it was said fell to be addressed by the Minister when determining whether or not to make a deportation order under s. 3 of the Act of 1999 by reference to rights protected under Article 8 of the Convention:

> "(1) Whether or not the proposed decision will constitute an interference with the exercise of the applicant's or other family members' rights to respect for his or her private and family life.
>
> (2) Unless a conclusion is reached that the proposed decision will not constitute an interference, as that term has been construed by the European Court of Human Rights, then:
>
> (i) Is the proposed decision taken in accordance with law? and
>
> (ii) Does the proposed interference pursue a legitimate aim, *i.e.*, one of the matters specified in Article 8.2?
>
> (iii) Is the proposed interference necessary in a democratic society, *i.e.*, is it in pursuit of a pressing social need and proportionate to the legitimate aim being pursued?"

(It will be noted that this approach is identical to the analysis made in the *Boultif* case by the European Court at paras. 41 – 55 of its judgment.)

15. At para. 72 of her judgment, Denham J. affirmed the general approach proposed by the High Court but added:

> "However, the issues and questions are interrelated and need not be addressed in such a micro-specific format, as long as the general principles are applied in the circumstances of the case. In the exercise of his discretion the Minister is required to consider the constitutional and convention rights of the parents and children and to refer specifically to factors he has considered relating to the position of any citizen children. The circumstances and factors will vary from case to case. The formal approach with specific questions as required by the High Court is not necessary. Each case will depend on its own relevant facts."

16. At paras. 80 – 84, Denham J. quotes from the analysis made by Finlay Geoghegan J. of the manner in which the file note had dealt with the consideration of Article 8 of the Convention in that case. This included:

> "The consideration given in the examination on file contains no substantive consideration of the questions which are required to be addressed, in accordance with Article 8 of the Convention as set out above. While the decision contains a reference to Article 8 it is only in the context of an analysis of what is perceived by the clerical officer as having been determined by the Supreme Court in relation to the application of that Article in the decision in *A.O. and D.L. v. Minister for Justice*."

17. On that basis Finlay Geoghegan J. had concluded that the absence of any substantive consideration of the Article 8 factors meant that the applicants had discharged the onus of establishing that the Minister had failed to consider and determine the questions set out earlier in the judgment. Denham J. also quoted the following passage from the High Court judgment:

> "I have separately analysed the respondents obligations having regard to the constitutional rights of the citizen child and those guaranteed by Article 8 of the Convention by reason of the submissions made. However I do not wish to be taken as deciding that in practice that those separate obligations necessarily require separate and distinct consideration by the respondent. There is considerable overlap between the matters which are required to be considered and determined under each set of obligations such that the respondent and his officials could devise a decision-making approach which would comply with both sets of requirements."

At para 84 of her judgment Denham J. then states:

> "I would affirm the decision of the High Court as to the order for deportation. However, my reasons are, in part, as referred to herein different to those of the High Court judge."

Denham J. then set out a non exhaustive list of matters relating to the position of an Irish born child whose parents may be considered for deportation. At paras 6 and 7 of that list appear the following matters:

> "(6) The Minister should consider expressly the constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:
>
> (a) Reside in the State,
>
> (b) Be reared and educated with due regard to his welfare,
>
> (c) The society, care and company of his parents, and
>
> (d) The protection of the family pursuant to Article 41. The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.
>
> (7) The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the constitutional rights."

18. As explained in the main judgment (see in particular para. 27) the Court was satisfied that the Minister had "complied thoroughly and carefully" with the approach required on these issues by the judgments of the High Court and Supreme Court in the *Oguekwe* case. The guidelines listed by Denham J. do not require the Minister to conduct a spontaneous inquiry into general living conditions in the country of deportation. What is required is a consideration of the likely impact of the deportation of the non-national parent on the rights of the Irish citizen children protected under Articles 40.3 and 43 of the Constitution and on the interest of the family members to the extent that those interests are entitled to respect under Article 8 of the Convention. This consideration is to be carried out by reference to the actual circumstances of the children and family as known by or made known to the Minister at the time of making the order. He is not required to engage in any speculative exercise as to what might happen to the family in the future.

19. If it is evident to the Minister or made clear to him in representations that the Irish children and a parent entitled to do so, intend to remain in the State, the consideration will necessarily be confined to the impact of their being separated from the deported parent while growing up, including the factors identified by Denham J. at paragraph [68] of her judgment subject to the limitation expressed in paragraph [69]. That consideration would be done by reference to the circumstances of the remaining family members in Ireland. It may well be that if in representations it was made clear to the Minister that it would be impossible for the family to remain and inevitable that the Irish children must relocate, the Minister's assessment would require to take account of the same factors in the context of the destination country. Even in that case, however, the Minister's inquiry obligation is limited in the manner described by Denham J. at paragraph [69]:

> "… I believe the High Court erred in holding that the Minister was required to inquire into and to take into account the educational facilities and other conditions available to the Irish born child of a proposed deportee in the country of return, in the event that the child should accompany the deportee. I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. This general approach does not exclude a more detailed analysis in an exceptional case. The decision of the Minister is required to be proportionate and reasonable on the application as a whole, and not on the specific factor of comparative educational systems."

What is said there about educational facilities applies equally to factors such as health facilities, employment prospects and so forth.

20. There is in this regard one final reason in the Court's judgment why it could not be said that it is desirable in the public interest that an appeal on these issues be taken in this case. Whatever may have been the position known to the Minister when making this order, the first named applicant has made it clear that she has no intention of taking the children to the DRC. (See the main judgment at paras. 24 & 25.) Thus even if the outcome of an appeal was to quash the present decision of the Minister, any reconsideration of the matter would necessarily take place on the basis of the mother and children exercising their declared entitlement to remain here such that conditions in the DRC would be irrelevant.

21. In effect, therefore, the questions proposed to be raised seek to invite the Supreme Court to reconsider the contents of the Minister's File Note and do not, in the Court's judgment, raise any point of law of exceptional public importance. Accordingly, as the Court also considers that the law in relation to these issues is devoid of uncertainty there is no basis upon which it could be said to be desirable in the public interest that an appeal on these issues be taken to the Supreme Court.

22. The application for leave to appeal is therefore refused.