THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 334 J.R.]

BETWEEN

B.S.S. (AN INFANT SUING

BY HIS FATHER AND NEXT FRIEND A.S.)

AND

A.S.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 17th day of July, 2017

1. This is an application for leave to apply for judicial review which is made on notice to the respondent.

2. Prior to the processing the within leave application an application for an injunction was processed before me and on 26th April, 2017 when I refused an injunction. That order was appealed to the Court of Appeal and I have been advised that the Court of Appeal had made an injunction pending the leave application. Accordingly the only issue now before this Court is as to whether or not to grant leave to the applicant as the issue of the injunction is not before me.

3. In the statement of grounds of 21st April, 2017 the relief sought is a declaration that the implementation of the deportation order issued in respect of the second named applicant at this juncture would be unlawful together with injunctive relief. Within the grounds it is complained that the execution of the deportation order prior to a decision being made in respect of the application to revoke the deportation order would be unlawful. In turn the application to revoke was processed by way of a solicitor's letter of 13th April, 2017. In that communication the solicitor indicated that the second named applicant was the parent of a Polish citizen child, the first named applicant born on 30th September, 2016. This, it is alleged, constitutes a material change in circumstance since the making of deportation order. Thereafter the letter makes reference to the European Court of Justice decision in *Zhu and Chen* (C-200/02). In that case the mother secured a right of residence as otherwise it would deprive her young child of her right to reside in the UK. It is asserted on behalf of the second named applicant that a similar provision prevails and his removal to his country of origin would be such as to constitute an identical infringements of the rights of his EU national child. On this basis it is requested that the Minister reconsider his decision to deport the second named applicant.

4. The respondent is resisting the granting of leave to the applicant on the basis that the purpose of the application is strike down the deportation order, that in fact there has been no material change in circumstances or any event since the making of the deportation order. It is argued that in substance the proceedings comprise a collateral attack on the deportation order and therefore are captured by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 as amended. The respondent further argues that there is no application before this Court to extend time and no explanation as to why time should be extended. In this regard it might be noted that at the hearing of the injunction application before me on 26th April, 2017 the respondent did in fact raise the s. 5 issue and notwithstanding this although further submissions have been filed and an additional affidavit has been filed on behalf of the applicants, the respondent is correct is asserting that no application to extend time or grounds by which time might be extended have been furnished.

5. Unfortunately at the hearing of the leave application the applicant conflated the application for leave with an application for an injunction in that the applicant relied on several decisions where an injunction was afforded however in those decisions an injunction was considered entirely independently of the leave application (see *PBN v. NJU* [2014] IESC 9, *A.O. v Minister for Justice, Equality and Law Reform* (No. 3) [2012] IEHC 104, *C & Ors. v. MJE & Ors.* [2015] IECA 167, *IRM & Ano. v. MJE & Ors.* [2015] IEHC 873 (No. 1)).

6. The applicant has relied on the matter *Q.L. & Ano. v. Minister Justice Equality and Law Reform* [2010] IEHC 223 being a judgment of Cooke J. of 15th June, 2010 however significantly in my view in that matter at para. 19 thereof it was indicated that:

> "in principle the Court considers that there is no legal impediment to the grant of relief by way of judicial review notwithstanding the existence of an unquestionably valid deportation order provided that the relief sought does not have as its purpose the striking down of the deportation order but is brought about by a material change in circumstances or by new events or the coming to light of previously unknown facts or information and is related to some other objective such as the revocation of valid order" (sic).

7. The applicant also relies on the judgment of Humphreys J. in *I.R.M. & Ors. v. the Minister for Justice & Ors.* [2016] IEHC 478. A significant difference in that case over the present circumstances is in my view the fact that the relevant deportation order was made on 30th October, 2008 and sent to the first named applicant on 6th November, 2008. The third named applicant was born on 21st August, 2015, some seven years later. The application under s. 3 (11) of the 1999 Act was made on 21st May, 2015 some three months prior to the birth of the third named applicant and the court expressed the view that the prospective birth of the third named applicant was a matter which should be taken into account by the Minister under s. 3 (11) application.

8. It is not disputed that the first named applicant in the current proceedings is currently in the care control and custody of the mother and the second named applicant has limited contact with him since in or about April, 2017. The fact of this limited contact was also aired during the currency of the injunction application and nevertheless the only matter advanced by the applicants since

then is the production of D.N.A. evidence to establish that the first applicant is the son of the second applicant but no attempt was made to advise this Court as to the extent of the access between father and son or precisely how the removal of the second named applicant to his country of origin would be such as to constitute an infringement of the rights of the first named EU national child.

9. The Supreme Court judgment in *Nawaz v. the Minister for Justice, Equality and Law Reform & Ors.* [2012] IESC 58 is instructive. During the course of his judgment Clarke J. stated at para. 27 thereof that the real question which arises is as to whether in the circumstances of the case a challenge to the validity of s. 3 is a challenge in which Mr. Nawaz can be said to question the validity of either or both of a notification or deportation order so as to engage s. 5."

10. Clarke J. at para. 44 of his judgment stated that whether the provisions contained in s. 5 of the 2000 Act is engaged is one to be looked as a matter of substance rather than as a matter of form. The question to be asked is whether, if the relief is granted, it will amount to a determination to the effect that a particular type measure specified in the section is invalid or, to use the words of s.5 itself, has had its validity successfully questioned. In para. 46 of the judgment it is indicated that the very fact that an injunction to restrain deportation was brought in proceedings sought only to question the validity of the underlying relevant legislation, confirms that the only practical purpose for seeking a declaration was to render invalid any order which the Minister might make for deportation. At para. 53 the Court made two conclusions including that the substance of the challenge in the proceedings involved a questioning, albeit indirectly, of the validity of measures which come within the list within s. 5 of the 2000 Act.

11. In the subsequent case of Mac Eochaidh J. in *F.O. v. the Minister for Justice, Equality and Law Reform* [2013] IEHC 206 Mac Eochaidh J. struck out plenary proceedings comprising a collateral attack on a deportation order on the basis that the proceedings had the object or affect of questioning the validity of the deportation order. In the course of his judgment Mac Eochaidh J. indicated that the timing of the proceedings indicated their true purpose and found that the purpose of the institution of the proceedings was to prevent the deportation order from having effect – the plaintiff had been arrested and detained on 27th April, 2013 and the following day the proceedings were commenced. The Court also held at para. 37 of his judgment that as a s. 3 (11) application will assert that the deportation order has lost his validity then this will be caught by s. 5 of 2000 Act.

12. The applicants argue that the decision in *F.O.* was wrongly decided and/or has since been overturned although in this regard the applicant has not identified any particular express provision of any decision which overturned the *F.O.* decision and it does appear to me that same followed the prior Supreme Court decision in *Nawaz*.

13. Even excluding *F.O.* from consideration Clarke J. in *Nawaz* did indicate that the fact that an injunction to restrain the deportation was brought in proceedings confirmed that the practical purpose of the plenary challenge was to render invalid the Minister's deportation order. In the instant case a similar injunction application was processed.

14. I cannot see how the within leave application involves anything other than a suggestion that because of a material change in circumstances the deportation order has lost its effectiveness and therefore the challenge, although indirect, is a challenge to the substance of the validity of the deportation order and is captured by s. 5. The relevant deportation order was notify to the second named applicant's last known address in October, 2016 and as contended for by the respondent there is no application for an extension of time or no grounds submitted to support the securing of an extension of time. I am further satisfied that the respondent is correct in relying on the case of *Smith & Ors. v. the Minister for Justice, Equality and Law Reform* [2013] IESC 4 insofar as Clarke J. in that case condemned the practice of a proposed deportee storing up points (notwithstanding that the *Smith* case involved repeated applications for revocation of a deportation order).

15. Finally, even if I am incorrect in finding that the application is covered by s. 5 and therefore must fail because of the failure to apply within the statutory 28 day limit, the applicant must necessarily fail in the leave application having regard to the judgment of Humphreys J. in *O.O.A. & Ors. v. the Minister for Justice, Equality and Law Reform* [2016] IEHC 468. At para. 27 of the judgment the court indicated that whilst there was modest evidence of dependency it seemed to fall well short of the level of dependency that would, in practice, have the effect of impairing the EU law rights of the second named applicant and the Court was satisfied that such rights were not threatened because the second named applicant remains in the custody of his mother, who obviously had an entitlement to remain in the State. There is nothing to suggest that any rights of the second named applicant under the EU treaties will in fact be jeopardized by the deportation of the first named applicant. These are very similar facts indeed to those arising in the instant circumstances.

16. At para. 30 of his judgment Humphreys J. noted that to contend that a child must continue to enjoy the society of a father even on a limited basis irrespective of the father's legal status is logically equivalent to conferring an immunity from deportation on a person who manages to produce a child who is entitled to reside in the State and no national immigration system could survive such a rule.

17. In the instant matter at the time of making the deportation order (October, 2016) the first named applicant had already been born on 30th September, 2016 and therefore his birth is not a new fact or matter which arose subsequent to the making of the deportation order so as to trigger a consideration under s. 3 (11) of the 1999 Act. To consider otherwise would be to afford second named applicant an entitlement to rely on being in breach and failing to engage in the immigration rules in order to trump a valid deportation order. Further the s. 3 (11) letter of 13th April, 2017 makes a bald unsubstantiated assertion that the removal of the second named applicant to his country of origin would be such as constitute an infringement of the rights of the first named EU national child. No attempt is made to explain how this infringement might actually arise and no facts of any description have been put forward to support such a bald assertion notwithstanding that since the hearing of the injunction matter the second named applicant has been aware that such detail is outstanding.

18. In conclusion therefore I am satisfied that the substance of the within judicial review proceedings is to effectively indirectly challenge the deportation order as is clear from the fact that an injunction to restrain the deportation order was brought and therefore s. 5 of the 2000 Act does apply.

19. Even if s. 5 does not apply the birth of the first named applicant occurred prior to the making of the deportation order which was not advised to the Minister because the second named applicant did not engage with the process.

20. In any event the s. 3 (11) application is made on a bald unsubstantiated assertion that the deportation of the second named applicant would create an infringement of the right of the EU National first named applicant. The second named applicant has not seen fit to explain how this infringement would arise in the instant circumstances.

21. The application for leave is therefore refused.