THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 4 J.R.]

BETWEEN

MARS CHIDERA PETERS IGBOSONU (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND MICHAEL IGBOSONU) AND MICHAEL IGBOSONU

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND

THE ATTORNEY GENERAL

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 5th day of December, 2017

1. In *Igbosonu v. Minister for Justice and Equality (No. 1)* [2017] IEHC 681, I rejected the applicants' application for *certiorari* of a s. 3(11) decision refusing to revoke a deportation order against the second named applicant. Mr. Conor Power S.C. (with Mr. Paul O'Shea B.L.) for the applicants now applies for leave to appeal that decision, and I have heard submissions from him and from Mr. David Conlan Smyth S.C. (with Mr. Timothy O'Connor B.L.) for the respondents. I have considered the case law on leave to appeal as set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 and related cases, and as summarised in my decision in *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185, [2017] 3 JIC 2405 at para. 72.

The first question

2. The first proposed question is formulated somewhat widely in the written submissions but as presented orally, it was essentially whether the child could challenge a s. 3(11) decision on the basis of a factor which was there at the time of the original deportation order but which predated the birth of that child. In this case the deportation order was made on 27th May, 2016, when the child was in *utero*. On 1st August, 2016, a s. 3(11) application was made effectively on behalf of the unborn child as well as the father, including points made regarding the position of the child. On 15th November, 2016, the child was born. On 3rd January, 2017, leave for the present proceedings was granted. Mr. Power accepts that the applicant cannot make points related to challenging the s. 3(11) decision on the basis of the conviction because that matter was there at the time of the original deportation order, but he says the position is different because the first named applicant has been born since the original deportation order. That argument rests on a number of fallacies, a first being that the child could not have challenged the deportation order as an unborn child applicant. That unfortunately is a false assumption. It is well established that the unborn child has the right to litigate. I set out the case law on this subject in *I.R.M. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 478, [2016] 7 JIC 2932, paras. 71 to 76, citing multiple examples where such a right has been recognised, including *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] IESC 44, [2003] 1 I.L.R.M. 241, [2002] 2 I.R. 169, s. 19(3) of the Registration and Title Act 1964, the practice in every state of the United States as noted in Paul Benjamin Linton, "The Legal Status of the Unborn Child under State Law", (2011) 6 *St. Thomas Journal of Law & Public Policy* 141 at 154, *P.P. v. Health Service Executive* [2015] 1 I.L.R.M. 324, [2014] IEHC 622 (Unreported, High Court, 26th December, 2014) (Kearns P. (Costello and Baker JJ. concurring)), and *O.E. and A.H.E. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 68, [2008] 3 I.R. 760 *per* Irvine J. at p. 774 onwards. The second named applicant could have instituted proceedings challenging the deportation order and joined the unborn child as an applicant suing through his father as next friend, but instead no proceedings at all were brought.

3. The second fallacy in the argument made relates to the broader issue as to whether a s. 3(11) decision, or indeed any immigration decision, or perhaps even more widely whether any administrative decision can be challenged by a third party, such as a child, at all. In my view it is necessary that the challenge has to be made by someone to whom the decision is addressed, save in exceptional circumstances which do not arise here. It seems to me that the idea that a child can wander along later and challenge an immigration decision against a parent is fundamentally flawed. Merely being affected by a decision does not give you a legal entitlement to bring *certiorari* proceedings where the person to whom it is addressed has such an entitlement and fails to exercise it. Otherwise, for example by analogy, a child could intervene in any civil or criminal proceedings against a parent on the grounds that the child would also be affected. The issue is not so much one of asserting *locus standi* on the grounds of being affected. One can assume for the sake of argument that a child, or any family member, is affected (indirectly, in the sense of not being the primary addressee of the measure in question) by a range of decisions that can be made in relation to an applicant. It is a question of whether a person thus indirectly affected is entitled to quash a decision where the primary addressee does not seek to quash that decision. If a parent fails to challenge a decision in a timely manner it would be absurd if they could vicariously resuscitate an entitlement to challenge it by having a child at a later stage. Mr. Power accepts that what he calls the *"legal logic"* of the submission is that five, ten or twenty years later, all issues on a deportation order could be re-litigated by an applicant having a child who could then make a s. 3(11) application. That would make a nonsense of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. In my view the appropriate applicant to challenge an immigration decision is the person to whom it is addressed. Other family members can be joined as and where appropriate but if the primary applicant fails or refuses to challenge the decision, those other family members do not have any independent right to do so. Nor do they have an independent right to challenge it subsequently if they are born at a later stage or at such a later stage cease to be under a disability. In any event, even if I am wrong on all of the foregoing, this is not a decisive point as I said that even if I was incorrect about the status of a s. 3(11) application I would reject the proceedings on the merits (see para. 4 of the No. 1 judgment).

The second question

4. The second proposed question of alleged exceptional public importance is whether the Minister's proportionality assessment enjoys a margin of appreciation so that that it must be demonstrated to be clearly wrong, such that the Minister could not reasonably have come to that view. This question does not involve any new point of law. In para. 8 of the No. 1 judgment I simply sought to apply the well-established case law on this issue as set out by Clarke J. in *A.M.S. v. Minister for Justice and Equality* [2014] IESC 65, [2015] I.L.R.M. 170 at para. 7.15, and noted the comments of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701, p. 723, to the same effect. Whether my application of the well-established case law was right or wrong is classically a completely fact-specific question, but the legal issues involved are covered by that well-established case law.

The applicant cannot dispute that the State has a margin of appreciation or that the applicants have a burden of proof to demonstrate that the decision was unlawful. More fundamentally, the point does not arise because we are now at the s. 3(11) stage. Well-established case law is clear that this is a much more restrictive process: see *Sivsivadze v. Minister for Justice, Equality and Law Reform* [2012] IEHC 244, *K.R.A. and B.M.A v. Minister for Justice and Equality* [2017] IECA 284 *per* Ryan P. at paras. 38 to 40 (relying on *P.O.*, and on *Smith v. Minister for Justice and Equality* [2013] IESC 4), Clarke J. in *Kouaype v. Minister for Justice and Equality* [2005] IEHC 380, [2011] 2 I.R. 1, *Dada v. Minister for Justice Equality and Law Reform* [2006] IEHC 166 (Unreported, MacMenamin J., 31st January, 2006), C*.R.A. v. Minister for Justice Equality and Law Reform* [2007] 3 I.R. 603, [2007] IEHC 19, *per* MacMenamin J., and *L.C. v. Minister for Justice and Equality* [2007] 2 I.R. 133, [2006] IESC 44, *per* McCracken J., a point I made in the recent decision in *C.O. (Nigeria) v. Minister for Justice and Equality* [2017] IEHC 725 (Unreported, High Court, 24th November, 2017), para. 8(iii).

The third question

5. The third proposed question is whether the Minister was obligated in law to assess and consider the second named applicant's risk of reoffending in the State. Mr. Power concedes that this point "*was not specifically pleaded*" in the statement of grounds and in my view it is not impliedly pleaded either. This question is a *post-hoc* creation of a point that the applicant now attempts to salvage from the wreckage of the proceedings after receiving a substantive judgment. It involves, in any event, a fundamental misunderstanding of the facts because the personal situation of the applicant was considered, including his lack of remorse, his lack of understanding of the impact on the victim, and the lack of evidence of rehabilitation. Mr. Power suggests that these are matters separate from a risk of reoffending but it is well established that matters of this nature including remorse, understanding and rehabilitation are by their very nature intimately linked to the question of a future risk. In any event, it was never put to the Minister in the s. 3(11) application that there was such a non-consideration at the deportation order stage. It is a form of gaslighting of the Minister to seek to challenge the s. 3(11) decision, or any decision, on the basis of failure to consider a point that was not put. In any event, independently of the foregoing, the point seems to me to be of no substance. It would bring the law in to well-deserved disrepute if a serious offender could resist deportation on the grounds that his propensity for reoffending had not been expressly considered. Leaving aside EU law considerations which do not arise here, I held that no such consideration is necessary and the Minister is entitled to deport a criminal to mark past offending, to deter future offending or *pour encourager les autres*. But even if I am wrong about that, that point could have been made at the time of the deportation order. The second named applicant having decided not to even challenge that order, cannot now seek to do so through the guise of these proceedings merely because he later came up with the idea of making a revocation application.

The fourth question

6. The final question is whether the Minister was required to set out the manner in which the best interests of the child were considered. The argument that the decision is invalid because the Minister failed to do so was not pleaded. Again this arises from an *esprit d'escalier* that occurred to the applicants in the course of the substantive hearing, so the point does not arise at this stage. In any event, it is well-established that an immigration decision is not a micro-granular approach or a dialogue with an applicant. Nor does a decision-maker have to give reasons for his or her reasons. Again, this is a point I made in *C.O.*, at para. 8(ii), in relation to the discretionary nature of the process. Multiple authorities, including Supreme Court authority, establishes that deportation (apart from *refoulement* and art. 3 of the ECHR) is very much a discretionary process (see the decision of the Supreme Court in *P.O. v. Minister for Justice* [2015] 3 I.R. 164, [2015] IESC 64, Kearns P. in *Sivsivadze v. Minister for Justice Equality and Law Reform* [2012] IEHC 244 (cited with approval by Charleton J. in the Supreme Court in *P.O.* at para. 29), Hardiman J. in *F.P. v. Minister for Justice Equality and Law Reform* [2002] 1 I.R. 164, Charleton J. in the Supreme Court in *O.O. v. Minister for Justice and Equality* [2015] IESC 26 at para. 27, *A.B. v. Minister for Justice and Equality* [2016] IECA 48 *per* Ryan P.).

7. Mr. Power submitted that this particular heading was not discretionary because it was "*about fundamental rights*" and contended that the Minister's decision is unlawful having regard to the administrative law right to reasons, arising from the European Convention on Human Rights Act 2003, as applied to the obligation to consider the best interest of the child in making a deportation decision, an obligation that arises under Strasbourg jurisprudence on best interests in the context of art. 8. Unfortunately, all three legs of the stool on which this argument rests are absent from the pleadings. The applicants did not plead the right to reasons, nor did they plead the 2003 Act, nor did they refer to the Strasbourg art. 8 jurisprudence on best interests. Mr. Power suggested in argument that these matters were "*generally pleaded*" and that the "*child's rights were mentioned*" but that is obviously totally inadequate (see O. 84 r. 20(3) and practice direction HC69 on asylum and immigration). In any event, the right to reasons depends on context. In the context of the executive power of the State and generally discretionary nature of the deportation process, the right to reasons, including reasons regarding why the rights of applicants or other parties are outweighed by the public interest, is by its nature satisfied by reasons of a more general nature than in other contexts. Overall, the approach adopted on behalf of the applicants illustrates the problem with dragnet pleadings. If one throws enough material into the mix, the hope is that there will be enough flotsam after the proceedings are shipwrecked in order to knock together a makeshift vessel for an onward voyage to an appellate court. As noted above, such an approach is inconsistent with O. 84 r. 20(3) and should not be humoured by the court system. In any event, on the facts, the decision clearly sets out elements of the consideration regarding the child's rights and is much more than a bare assertion of a conclusion.

Conclusion and Order

8. If we are to have a credible legal system, the process has to stop somewhere. The Supreme Court has already pronounced on the law relating to the s. 3(11) process and the deportation order process on multiple occasions. Those decisions constitute a fundamental roadblock to the application. If those pronouncements, which must be regarded as well-established case law, are to have any meaning or purpose they must be applied to preclude this matter going any further. The applicant has already had the benefit of an extensive process:

> (1) He applied for and obtained a stamp 4 permission which expired on 7th February, 2014. He could have applied to renew it at that time but did not do so for over a year.
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> (2) On 28th May, 2015, he made an application to remain under *Zambrano* (C-34/09). That was refused on 2nd February, 2016.
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> (3) He sought leave to quash that refusal by way of judicial review. That was refused by Faherty J. in *Doyle v. Minister for Justice and Equality* [2017] IEHC 374.
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> (4) He had the opportunity to seek leave to appeal from Faherty J. but did not do so.
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> (5) He had the opportunity to make s. 3 submissions. He did so and those were rejected and a deportation order was issued on 27th May, 2016.

(6) He had the opportunity to seek judicial review of the deportation order but did not do so.

(7) He had the facility of making a s. 3(11) application, which was duly considered and rejected.

(8) He sought leave to challenge that decision, was granted leave and had his application considered and rejected on the merits in the No. 1 judgment.

9. We are now at the ninth opportunity for the applicant by way of his attempt to seek leave to appeal the latter decision. Having regard to the matters referred to above, the order will be that leave to appeal be refused. The process has to end somewhere and in my view, for the reasons stated, it should end here.