Neutral Citation Number: [2010] IEHC 250

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

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 25th day of June 2010

1. This is an application for leave to seek judicial review of a deportation order made on 19th January, 2010 by the respondent Minister in respect of the second named applicant. If leave is granted it is proposed to apply for an order of *certiorari* to quash that deportation order. The present application also seeks an interlocutory injunction restraining the deportation of the second named applicant pending the outcome of the proceeding.

2. The first and second named applicants are husband and wife and are nationals of the Democratic Republic of Congo who arrived in the State on 19th October, 2003. The minor applicants are their children. The third and fourth named applicants are twins who were born in the State on 30th October, 2003. The fifth named applicant was born on 3rd October, 2009. The three minors are Irish citizens. As their mother, the first named applicant currently has permission to remain in the State which is valid until 8th December, 2010.

3. Upon arrival in the State in October, 2003 the first and second named applicants applied for asylum. The claim of the second named applicant was subsequently rejected, essentially upon the ground that the account given by him of having worked as a chauffeur for a journalist and to have been arrested and detained because of that association and the political beliefs attributed to the journalist, was found to be lacking in credibility. Following the rejection of an appeal against the negative recommendation of the Refugee Applications Commissioner, the second named applicant was notified by letter dated 28th January, 2010 of the making of the deportation order. By a separate decision signed off on 7th January, 2010, the Minister rejected an application which had been made by the second named applicant for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006. As is the usual practice, the letter of 28th January, 2010 signed by Mr. Bennett of the Repatriation Unit of the Department was accompanied by the formal deportation order of 19th January, 2010 signed by the Minister together with the memorandum of analysis of the second named applicant's case entitled "Examination of file under s. 3 of the Immigration Act 1999," which constitutes, in effect, the detailed statement of the Minister's reasons for deciding to make the deportation order as well as the assessment of the matters which the Minister is required to have regard to under s. 3 (6) of the Act of 1999 and his consideration of the representations made to him by the applicants.

4. In the Statement of Grounds for judicial review the challenge proposed to be raised to the legality of the deportation order is based upon a total of 18 grounds. Some of the grounds thus canvassed are of a general nature and lack particularity in identifying specific flaws or illegalities in the decision and could not therefore form the subject of a grant of leave. For the most part those grounds were not specifically argued upon the application. The Court considers that it is unnecessary, accordingly, to deal with the grounds alleging broadly that the deportation order was *ultra vires* or unreasonable contrary to natural justice; that the Minister failed to give reasons for his decision or gave no substantial reasons. The memorandum gives several reasons.

5. Those grounds which appear to be directed at specific aspects of the assessment made and the reasons given in the memorandum are as follows:

> (ii) The first named respondent erred in law and erred in fact in determining that there was not a risk of serious harm in the Democratic Republic of the Congo to the second named applicant's life or person by reason of indiscriminate violence in the international and internal armed conflict taking place in the country and wider region.
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> (iii) The first named respondent failed to consider whether there were any obstacles, special reasons or insurmountable obstacles to the applicants establishing their home in the Democratic Republic of the Congo.
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> (iv) In particular the first named respondent failed to consider whether the armed conflict taking place in the Congo (which was described in some detail in the country of origin information on file) might not constitute such obstacle, special reason or insurmountable obstacle.
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> (v) The first named respondent failed or neglected to consider the welfare of the third and fourth named applicants, and in particular whether it would be appropriate for the second named applicant to bring them to the Democratic Republic of the Congo in circumstances where the country is suffering from serious international and internal armed conflict and instability.

(vi) The first named respondent erred in law and erred in fact in determining that the third and fourth named applicants were of adaptable age and would therefore be able to adapt to the conditions in the country.

(vii) The first named respondent failed to consider, or have any regard to the seriousness of the difficulties which the first third and fourth named applicants were likely to fact in the Democratic Republic of the Congo.

(x) The first named respondent erred in law and erred in fact in determining that the deportation of the second named applicant would not constitute an interference with the right to respect for the second named applicant's family and private life under Article 8 of the European Convention, in circumstances where the second named applicant's wife and children could not be expected to join him in the war torn Democratic Republic of Congo.

(xv) Without prejudice to the foregoing the second named applicant was a person who had been convicted of certain road traffic offences and related mattes, and would not have been considered by reasonable employers as an "ex offender".

6. The central thrust of these grounds can be said to be based upon the assertion that the conditions of violence and armed conflict in the DRC are such that the second named applicant would face a risk of serious harm and that it would be unreasonable and disproportionate to expect the family as a unit and particularly the minor citizen children to return there. The assessment of these factors made by the Minister in the memorandum is said to be clearly unreasonable and disproportionate and that there is a failure to recognise that the conditions which would be faced by the family in the DRC constitute an insurmountable obstacle to their remaining together as a family should the second named applicant be deported. The decision is thus said to have the consequence of violating the rights of the applicants under Article 8 of the European Convention of Human Rights and Article 41 of the Constitution.

7. The Court cannot grant leave for such an application for judicial review of the deportation order unless, in accordance with the requirements of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 it is satisfied that the matters thus relied upon constitute "substantial grounds" for contending that the Minister's decision is invalid or ought to be quashed.

8. A further subsidiary issue arises in that the initiation of the present application occurred outside the period of fourteen days limited by s. 5 (2) (a) of that Act such that the Court would require to be satisfied that there is "good and sufficient reason" for extending that period in order to enable the application to be made. As indicated, the deportation order was notified to the second named applicant by letter of 28th January, 2010. The present proceeding was initiated on 3rd March so that an extension in the region of fourteen days would be required. It is appropriate to deal first, however, with the issue as to whether the matters thus proposed to be advanced constitute substantial grounds.

9. It is necessary therefore to consider the basis upon which the Minister's decision was made as set out in the detailed analysis in the file examination memorandum. This document extends over 33 pages and can be seen as falling into three main sections.

10. The first section comprises the consideration of the matters to which the Minister is required to have regard for this purpose under s. 3 (6) of the Act of 1999. Each of the headings (a) – (k) is addressed and analyses of varying lengths are made. Thus, for example, in respect of the heading "Employment Prospects" of para. (f), various sources are looked to for information as to the current economic condition of the country and it is concluded that the second named applicant's prospects of obtaining employment in the current climate are poor particularly in view of the fact that he has accumulated a number of criminal convictions.

11. The second part of the analysis comprises the assessments made for the purposes of s. 5 of the Refugee Act 1996 (Prohibition of Refoulement) and s. 4 of the Criminal Justice (U.N. Convention against Torture) Act 2000. In respect of the former, the memorandum devotes some 19 pages to consultation of various sources of information about prevailing social and political conditions in the DRC in the light of the applicant's claim to have been arrested and detained as a result of his political opinions and his association with the journalist. The analysis looks in detail at background information in relation to the activities of the DRC Security Forces; to the reputation and effectiveness of the police, military and judiciary; at reports of corruption and the protection available to victims of injustice and violations of human rights. Particular attention is paid to the treatment of failed asylum seekers on return to the DRC. The officers making the analysis conclude:

> "The above information shows that while there is still instability in many areas of the DRC the area the applicant claims to come from, Kinshasa, lies outside any of the regions where civilians are being displaced by militants. Having considered all the facts of this case, I am of the opinion that repatriating (the second named applicant) to the DRC is not contrary to s. 5 of the Refugee Act 1996 as amended in this instance."

12. The third and most important part of the memorandum for the purpose of the grounds proposed to be advanced, consists of the assessment made by reference to the rights of the applicants and particularly of the minors under Article 8 of the European Convention on Human Rights and the Constitution. This analysis extends over slightly more than eight pages of the memorandum. The analysis is made by reference to a series of headings as follows:

- The private life of the second named applicant;
- The family life of the applicants;
- The issue of proportionality as regards the deportation of one parent;
- The balancing of the rights of the citizen children to remain in the State as against the rights of the State to ensure economic wellbeing, to prevent disorder and crime and to maintain control of its borders and operate a regulated system for control, processing and monitoring of non-national persons in the State;
- The constitutional rights of the Irish citizen children and the balancing of those rights as against the rights of the State.

13. By reference to the heading "Character and conduct of the person both within and outside the State" at para. (g) of s. 3 (6) of the Act, the memorandum notes that, contrary to the assertion made on the applicant's behalf that he had never come to the adverse attention of the authorities since his arrival in the State, the second named applicant had in fact accumulated a series of convictions. The offences noted occurred in the District Courts in Dublin, Kildare and Portlaoise in 2004 and 2005. Eight matters in total are recorded and include convictions for driving a motor vehicle without road tax, failing to produce an insurance certificate, failing to produce a driving licence and dangerous driving.

14. The observations made or conclusions reached under each of the above headings can be summarised as follows:

> **Private Life**:
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> It is accepted that deportation would constitute an interference with the second named applicant's right to respect for his private life for the purposes of Article 8 but it is concluded that such interference would not have consequences of such gravity as to amount to a violation of Article 8.
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> **Family Life**:
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> Here the position of the family is described and it is accepted that if the second named applicant is deported this will interfere with the right to respect for family life under Article 8 as the family has resided together as a family unit in the State since 2003. However it is concluded that the deportation would nevertheless be in accordance with Irish law; would pursue a pressing social need and a legitimate aim as specified in Article 8 (2) and that it is necessary because there is no less restrictive process available which would achieve the pressing social need and legitimate aim of the State to prevent disorder and crime, to ensure economic wellbeing and to maintain control of borders and operate a regulated system of control of non-nationals within the State.

15. Under the heading "Proportionality" the officers referred to the decision of the United Kingdom Court of Appeal in *R. (Mahmood) v. Home Secretary* [2001] 1 WLR 840 to the effect that the removal of one member of a family by deportation does not necessarily infringe Article 8 "provided that there are no insurmountable obstacles to the family living together in the country of origin" even if a degree of hardship for some or all of the members of the family is thereby caused. Reference is made to the meaning of "insurmountable obstacles" set out in the ECHR case of *Boultif v. Switzerland* (5427/00). It is pointed out that as the first named applicant is also a citizen of the DRC it would be open to her to relocate there with her husband should she so decide. The children would also be entitled to citizenship of the DRC should it be decided that they should all relocate there. The officers point out:

> "As Irish citizens, the applicants' children will always have the right to return to Ireland. Indeed, these children could return to the State at any point, or at a later date to pursue education or employment, etc. It is also an option for them to remain in the State with their mother Ms. N. if she decides to remain in the State for as long as her temporary permission allows her to do so."

16. The position of the minor twins is then described and considered including the fact that they are at school in Blanchardstown. It is pointed out that "due to their young age, they may therefore be considered to be of adaptable age such that they could be expected to adapt to life in the DRC should their mother choose to return there with them". The history of the family is then set out in further detail and the criminal convictions accumulated by the second named applicant are listed. The second named applicant's chances of obtaining employment are again looked at.

17. Under the heading "Balancing Rights" consideration is given to the entitlement of the minors to reside in the State and it is acknowledged that the best interest of the citizen children undoubtedly involves having the care and company of both parents. The conclusion is reached:

> "Having considered the overall facts of this case, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the individual family. In weighing the right of the applicant and her family against these rights of the State it is submitted that the deportation of the applicant is not disproportionate as the State is obligated to ensure the economic wellbeing of the State and to prevent disorder in crime and to maintain control of its borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This is a substantial reason associated with the common good which requires the deportation of [the second named applicant]."

18. Finally, under the heading "Constitutional Rights of the Irish born child" the rights of the twins under Article 40 of the Constitution are considered and balanced against the rights of the State in relation to the possible deportation of their father. It is acknowledged that as Irish citizen they have the right to reside in the State and to be reared and educated with due regard to their welfare and to have the society, care and company of their parents. Reference is made to the judgment of the Supreme Court in *Lobe and Osayande* [2003] IESC 3 to the effect that "it does not flow from these rights of the child that the family or parents and siblings of Irish children have a right to reside in Ireland". It is pointed out that the Minister may deport an immigrant family notwithstanding the effect of removal of an Irish citizen child without violating that child's rights. "While there is an obligation on the Minister to consider each case on its individual merits, he is entitled to take into account the consequences of allowing a particular applicant to remain in the State where that would inevitably lead to similar decisions in other cases." Note is taken of the assertion that the second named applicant wishes to stay in the State with his family and to find employment or study and to provide for the family. It is pointed out, however, that in the current economic downturn with high unemployment his prospects of fulfilling that ambition are extremely poor. Account is taken of the fact that granting him permission to remain would impact upon the health and welfare systems of the State and the fact that such a decision might lead to similar decisions in other cases. The overall conclusion is then stated as follows:

> "It is submitted that having considered the overall facts of the case, the factors relating to the rights of the State are weightier than those factors relating to the rights of the individual family. In weighing the right of the applicant and his family against these rights of the State, it is submitted that the deportation of the applicant is not disproportionate as the State has the right to prevent disorder and crime and to ensure the economic wellbeing of the State and to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of V.N.M.."

19. It will be immediately apparent from this summary of an extensive memorandum that, contrary to the suggestion which is implicit in the grounds sought to be advanced in this case, the Minister has given detailed and careful consideration to all of the factors relevant to the position of the second named applicant and the members of his family and has spelled out reasons which he characterises as substantial for concluding that the deportation is necessary and justified.

20. It is clear that the High Court could not issue an order of *certiorari* to quash this deportation decision unless it was satisfied that the Minister had acted unlawfully in deciding to make it. This is not a case in which it is argued that the decision is vitiated by any material error of fact which goes to its substantive validity. Although the grounds to be advanced are couched in terms of errors of law and errors of fact they are, in the view of the Court, essentially directed at the reasonableness and proportionality of the appraisal made by the Minister under the various considerations taken into account and examined in the memorandum. Thus, in ground

(iii) it is alleged that the Minster "failed to consider whether there were any obstacles, special reasons or insurmountable obstacles to the applicants establishing their home in the Democratic Republic of the Congo". On the face of it that assertion is clearly wrong. As indicated above, the memorandum addresses directly the question of proportionality of the deportation by reference to the concept of possible obstacles to the family remaining together by relocation to the DRC. As already pointed out above in the section under the heading of "s. 5 of the 1996 Act" extensive information on the situation in the DRC is consulted and cited including reports on the security and political situations both generally and in specific areas. Regard is had to reports on activities including abuses of the armed forces; on the judiciary and on corruption in public services and on the availability of protection for human rights. The conclusion already quoted at para. 9 above is given. It is therefore untenable to claim that, in the words of grounds such as those at paras (iii), (iv), and (vii) that the Minister "failed to consider" the situation in the DRC and whether it constituted an obstacle to the deportation of the second named applicant or to the other applicant relocating with him. In reality, these grounds invite the Court to take a different view of that issue from the Minister. In the view of the Court that is not a ground for judicial review. The Minister's assessment of that issue could only be judged to be unlawful if the appraisal made in the particular circumstances of the family's case were so manifestly unreasonable or disproportionate as to be untenable.

21. It is important in this regard to bear in mind the rationale for the recourse to the concept of "insurmountable obstacles" in this context. Under Article 8 of the Convention (and in the case of Irish citizens under Articles 40 and 41 of the Constitution), family members are recognised as enjoying a right to stay together and children as having an entitlement to the society and care of their parents. As has been confirmed in a series of judgments of the Supreme Court, those rights are not however absolute and a State may be entitled to interfere with family life by the deportation of one or more members of the family in certain circumstances. One of the factors which bears upon the reasonableness or justification for the State's interference with such right is whether or not the family has the possibility to remain as a unit together by accompanying the deported member. An unlawful violation of such rights may occur if the deportation of one member results in the inevitable break-up of the family because the remaining family members have no right or possibility of choosing to stay together. Such a situation would arise, for example, where for some reason of nationality, ethnicity, religion or political history, the spouse of a deportee would be refused permission to enter the country of deportation. In such a case the family members could not choose to keep the family unit together by accompanying the deportee.

22. As the ECHR case of *Boultif* illustrates, the notion of such an "insurmountable obstacle" is not confined to clear cut legal impediments to relocation but may include practical considerations which render it either physically impossible or grossly unreasonable to expect the family members to exercise a choice in favour of accompanying the deportee. In that case the deportee was a native of Algeria and was to be deported there. His wife was a Swiss citizen who had never been to Algeria, spoke no Arabic and had no other ties with Algeria. The Court accordingly formed the view that she could not be expected to follow her husband to Algeria and establish family life with him there.

23. The circumstances of the present case are, obviously, of completely different character. As the memorandum points out, the first named applicant is herself a citizen of the DRC and had lived there with her husband prior to arriving in the State in 2003. She is accordingly legally entitled to re-enter that country should she choose to accompany the second named applicant and, unlike the spouse in the *Boultif* case, was born and brought up in the DRC, knows the conditions there and, as an individual, faces no practical or legal impediment to re-establishing family life there other than the difficulties posed for all inhabitants of that country by its conditions of unrest and instability. To that extent the memorandum analysis is clearly correct in concluding that, should they wish to do so, the applicants as a family have an available choice of maintaining the family as a unit.

24. The first named applicant has, however, made it clear that she has no intention of returning to the DRC so long as she has permission to remain in the State with the three children.

25. In her affidavit in the present proceeding she quotes extensively from documentation which was before the Minister by way of country of origin information and takes issue with his opinion that it would be open to her and the children to return to the DRC. She says it is "extraordinary and utterly unreasonable in the light of the country of origin information that he has extensively quoted from in the examination of file". She further asserts: "I should state that apart from the threats to our children from the conflict in the DRC, the widespread human rights abuses and criminality in general, I am also deeply concerned about the lack of educational or healthcare facilities for our children." She maintains that the conditions of conflict and the absence of basic healthcare and educational facilities constitute "insurmountable obstacles" to allowing her children to return to the DRC.

26. In the judgment of the Court this disagreement, however strong and possibly heartfelt it may be, does not constitute in these circumstances a ground for contending that the Minister's decision is unlawful. It is expressly acknowledged that the minor citizen children cannot be deported and also that if they chose to go to the DRC with their parents they could return at any time. It is equally acknowledged that the first named applicant does not face deportation either but is entitled to choose to remain here with the children so long as she has permission to remain should that be the decision of the family. What is crucial from this point of view is that the family does have a choice and, if it is decided that it is in the best interests of the children that they should remain in the State with their mother, the exercise of that choice does not render the Minister's decision unlawful.

27. The Minister's assessment takes account of the precarious conditions in the DRC and balances that factor amongst a series of factors taken into consideration when weighing the entitlement of the State to pursue its own interests as identified above against the impact of the deportation on the position of the family and the rights and entitlements of its members. Having regard to the fact that the family could choose to remain together while taking into account the second named applicant's criminal record and his poor prospects of finding employment with which to support the family if it remains in the State, the Minister has clearly, in the Court's judgment, complied thoroughly and carefully with the approach that is required to be made to this determination as outlined by the Supreme Court in its judgments in cases such as *Dimbo v. MJELR* [2008] IESC 1 and *Oguekwe v. MJELR* [2008] 3 I.R. 795. As already indicated, the Court considers that the grounds proposed to be advanced on the application do not constitute substantial grounds for the illegality of the Minister's decision but seek to urge the Court to make a different appraisal or assessment of the issues concerned. Thus, for example, it cannot seriously be suggested that the Minister "erred in law and erred in fact in determining that the third and fourth named applicants were of adaptable age and would therefore be able to adapt to the conditions" in the DRC. At the time the analysis was made the two eldest children were slightly over six years of age and therefore in the very early years of schooling. No further information or representations had been put before the Minister in relation to the children's situation or integration in the State. It could not therefore be said to be in any sense unreasonable to conclude that they were of an age at which they might well adapt to life in the DRC when in the care and company of two parents who are themselves nationals of that country and resident in it until seven years ago.

28. For these reasons the Court is satisfied that no stateable case is made out for the existence of any error of fact or mistake of law on the part of the Minister in discharging the obligations he is under when making a determination for the purpose of s. 3 (1) of the 1999 Act. He has taken into account all of the statutory considerations required by s. 3 (6) as well as the information and representations put before him on behalf of the applicants against the making of a deportation order. The reasons relied upon by the

Minister are stated cogently and appear to be founded in undisputed facts relating to the position of the family, their personal history and the conduct of the second named applicant including, in particular, the existence of a substantial number of convictions for offences in the District Court. The Minister has also clearly weighed the factors which favour the rights and interests of the family members including the Convention and constitutional rights of the children as against the rights of the State identified in the memorandum. Contrary to the contentions advanced in the grounds proposed to be raised, the conclusions reached by the Minister cannot be said to be unbalanced, unreasonable or disproportionate in the circumstances. In effect, the central plank of the case proposed to be made against the Minister's decision relies upon the proposition that conditions in the DRC are so bad that it is unreasonable to expect the first named applicant and the children to accompany the second named applicant in the event of deportation. It is said because it would be so unreasonable to keep the family together by returning to the DRC there is an insurmountable obstacle and that the Minister's failure to accept that proposition necessarily brings about an infringement of their Convention and/or constitutional rights. As already indicated above, the Court considers this approach to be based upon a misunderstanding of the nature of the exercise that is required to be performed in this regard. Once it is established that the family members have a choice as between remaining in the State and accompanying the deportee in order to preserve the family unit even where the latter option involves hardship, the consequence of making a deportation order is not the necessary and inevitable break-up of the family unit. The choice lies with the members of the family. If they then choose, as in this case, to remain and not accompany the deportee, the validity of the decision to deport depends upon the reasonableness and proportionality of the impact which the deportation will have in those circumstances on the subsequent family life of those who remain as compared with the weight to be given to the factors relied upon by the Minister for considering that the particular interests of the State in that situation should prevail. In the present instance the Court is satisfied that no ground of substance has been advanced which would enable the Court upon a hearing of a substantive application to conclude that the Minister had acted unlawfully in the conclusion reached in this case.

29. In these circumstances it is unnecessary to consider the issue as to whether good and sufficient reason existed in this case for an extension of time for the making of the application as leave will be refused.