Neutral Citation: [2013] IEHC 381

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2012 No. 181 J.R.]**

**IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), AND IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED) AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000**

**BETWEEN**

**A.S.M.A, R.M.A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A.S.M.A (BRAZIL))**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Paul McDermott delivered on the 30th day of July, 2013**

**Background**

1. The is an application for leave to apply for an order of *certiorari* by way of judicial review quashing deportation orders made against the applicants. Though initially an issue was raised that an extension of time for the granting of leave was required before this application could proceed, that submission was, quite properly in the court's view, not pursued by the respondents.

2. The first named applicant, ASMA, is the mother of the second named applicant, RMA. ASMA was born on 18th November, 1974. RMA was born on 2nd September, 1998, and is still a minor now aged fourteen. ASMA's husband, HA, RMA's father, came to Ireland to work in 2002. ASMA followed her husband to Ireland on 15th October, 2005. She accepted that she overstayed her permission to remain when her visa expired on the 30th October. The couple brought their son to Ireland on the 28th January, 2006, aged seven years and four months.

3. In November, 2006, HA was arrested, prosecuted and convicted of a sexual offence. He was sentenced to four months imprisonment which he has served. The relationship between the married couple broke down. Notwithstanding her illegal status within the State, ASMA had been able to maintain herself and her son since that time by working as a cleaner and with some support from her brother in law who also resides in Ireland. RMA continued to have contact and maintain a relationship with his father who still remains in the State. However, ASMA contends that she is in fear of her husband and of being obliged to live with him if returned to Brazil without adequate state protection.

4. ASMA is firmly of the view that Ireland offers her and her child a better and safer future than that available to her at home in Brazil. From the evidence produced to the court it would appear that that is a sensible view and a choice that it would be reasonable to make if it were open to ASMA in this case, and is consistent with her continuing role as a loving and caring parent seeking to act in the best interests of her child. She describes in her affidavit how, if deported to Brazil, she would probably be obliged to return to live with her husband in poverty in an area prone to extremely high levels of crime, juvenile delinquency and daily drug dealing involving minors and violence. She believes that RMA's educational potential would be seriously diminished and his social life shattered at a difficult and impressionable age. However, they are both in Ireland illegally and do not have the legal right to make a choice of residence in this jurisdiction.

5. Both ASMA and RMA applied for asylum on the 16th October, 2007. The application was refused by the Minister under s. 17(1) of the Refugee Act 1996, as amended. The applicants were notified of this decision respectively on the 14th November, 2008. Then, by letters dated the 4th and 12th December, 2008, applications seeking subsidiary protection and leave to remain in the state were submitted to the Minister on their behalf. These applications also failed and a deportation order was made in respect of both applicants on the 20th January, 2012, when RMA was thirteen years and four months old. HA's asylum application had also failed by this stage and a s. 3 application was under consideration in his case at the time of the making of the deportation orders against the applicants.

6. At the hearing of this application, the grounds upon which leave was sought were reduced to a challenge to the making of the deportation orders on the grounds that the first named respondent failed to consider the effect of a deportation order on the rights of RMA as a child under Article 8 of the European Convention on Human Rights and Fundamental Freedoms and the United Nations Convention on the Rights of the Child. ASMA's application was linked to and is dependent for its success upon the success of RMA's application. Counsel for the applicants confined the argument to the following matters set out in the statement of grounds dated 29th February, 2012, and which may be summarised as follows:-

> (1) In failing to consider the practical consequences of removing the minor applicant from his schooling and present safe environment and the corresponding practical consequences for the minor applicant of relocating to a dangerous crime and drug ridden area in Brazil, the Minister failed to make a reasoned assessment of the interference with his rights pursuant to Article 8 of the European Convention on Human Rights and/or his Charter Rights and/or his rights pursuant to the United Nations Convention the Rights of the Child.
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> (2) In failing to consider the practical consequences of removing the applicants from their present safe environment and the corresponding practical consequences for the applicants of relocating to a dangerous crime and drug ridden area in Brazil and where they would have no practical protection to withstand the will of the estranged husband of the first named applicant, the Minister failed…to make a reasoned assessment of the interference with their rights pursuant to Article 8 of the European Convention on Human Rights and/or their Charter rights and/or the minor applicant's rights

pursuant to the United Nations Convention on the Rights of the Child.

(3) The Minister acted in breach of the principle of the best interests of the child.

(4) The Minister erred in law in failing to give reasonable consideration to the long period of time the applicants have resided in the State.

(5) The deportation decisions are disproportionate.

(6) The deportation decisions insofar as they were based on the country reports relied upon are irrational and unreasonable.

**Deportation**

7. Section 3 of the Immigration Act 1999, vests a wide discretion in the Minister for Justice and Equality to deport those who are illegally present in the State. This provision is calculated to ensure that the state is in control of its borders, meets international obligations and administers and applies its immigration policy in a consistent manner. (See *A.O. & D.L. v. Minister for Justice* [2003] I.R. 1). It is an executive power the exercise of which involves the fair consideration of a wide number of issues, some of which are set out in s. 3 of the Act. It is not for the court to act as a court of appeal from any decision taken by the Minister but when requested to review the decision, the court may consider a challenge on the basis that the order was made illegally, or contrary to the norms of fair procedures, or without regard to, or in breach of the rights of the proposed deportee under the provisions of the European Convention on Human Rights. It is only if the decision itself is on the established facts unreasonable, irrational or disproportionate, that the court can otherwise intervene by way of judicial review. Section 5 of the Illegal Immigration (Trafficking) Act 2000, provides that leave can only be granted if there is a "substantial" basis upon which to challenge the impugned order. In this case the applicants contend that the orders are fundamentally flawed because of a failure on the part of the Minister in making the orders to respect the applicant's rights under Article 8 of the European Convention.

8. Under s. 3(6) of the Immigration Act 1999, a decision maker is obliged to have regard to:-

"(a) The age of the person;

(b) The duration of residence in the state of the person;

(c) The family and domestic circumstances of the person;

(d) The nature of the person's connection with the state, if any;

(e) The employment (including self employment) record of the person;

(f) The employment (including self employment) prospects of the person;

(g) The character and conduct of the person both within and (where relevant and ascertainable) outside the state(including any criminal convictions);

(h) Humanitarian considerations;

(i) Any representations duly made by or on behalf of the person;

(j) The common good; and

(k) Considerations of national security and public policy, so far as they appear or are known to the Minister."

9. RMA is not an Irish born citizen child. Both applicants are and remain illegally within the state. It is clear in relation to the deportation order that the relevant factors pursuant to s. 3(6) of the 1999 Act have been considered and consideration has also been given to the potential interference with the private and family law rights of the applicants under Article 8 of the European Convention which involved a consideration of the nature and history of the family unit. The real issue that arises is whether the relevant factors that ought to have been considered when making this decision, were considered adequately and in accordance with law and with particular emphasis on the best interests or welfare of the child.

**Article 8**

10. Article 8 of the European Convention on Human Rights and Fundamental Freedoms provides:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

11. In exercising his discretion as to whether to make a deportation order the Minister has a legal duty under s. 3 of the European Convention on Human Rights Act 2003, not to act in a manner that is inconsistent with the state's obligation under the provisions of the Convention. The decision to deport the applicants must, therefore, be informed by the provisions of Article 8 and the jurisprudence of the European Court of Human Rights insofar as the decision affects the private and family life of the applicants. In these cases the deportation orders are challenged on the basis of an alleged failure by the Minister to properly address the issues raised in respect of RMA under Article 8. The submissions made on behalf of the applicants focused for the most part upon RMA's circumstances as a minor. It is clear that ASMA's challenge taken on its own merits and divorced from her son's application, does not appear to have any substantial ground upon which to seek leave.

12. The Minister must consider:-

(1) Whether the deportation would interfere with the private or family life of the applicants. In essence, this means that the Minister should inquire into whether the applicants have established links in this country sufficient to meet the criteria of the terms private or family life:

(2) The Minister must then assess whether this interference is justified under Article 8(2) of the Convention by asking:-

(a) Whether the measure is based upon and adopted in accordance with law.

(b) Whether the aim pursued falls within the categories listed in Article 8(2), and

(c) Whether the deportation is necessary in a democratic society. In this context the decision maker must strike a balance between the interests of the applicants and the public interests applicable to the particular facts of the case.

13. The applicants submitted that there is a legal obligation on the Minister to consider the best interests of the child when considering whether to make a deportation order. That obligation is said to arise from the proper interpretation of s. 3(6)(a) of the Immigration Act 1999, which requires a decision maker to have regard to, *inter alia*, the age of the person. It is submitted that s. 3(6)(a) must be interpreted in accordance with Article 40.3 of the Constitution: it is said that the applicant child has a personal right under Article 40.3 to fair procedures which includes a right to have his best interests or welfare considered by the decision maker. It is also submitted that the provision must be interpreted in a manner consistent with the State's obligations to respect the child applicant's rights to private and family life under Article 8 which includes a right to have his best interests considered. It was further submitted that when considering the child applicant's case, the Minister must act in accordance with the provisions of Article 3.1 of the United Nations Convention on the Rights of the Child to which Ireland is a party. It provides:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

14. The applicants contend that the failure to consider the welfare or best interests of the child applicant adequately or at all, was a breach of his personal rights under Article 40.3 of the Constitution. In addition, it was contended that there was a failure to address the best interests of the child adequately when considering the issues arising under Article 8 of the Convention. In the cases of *Boultif v. Switzerland* (Application No. 54273/00 August 2nd, 2001) and *Uner v. The Netherlands* (Application No. 46410/99, Grand Chamber, October 18th, 2006), the European Court of Human Rights clearly established that the best interests of the child should be considered when making a deportation order. In determining whether a deportation was necessary in a democratic society (following a determination that there was an interference with an applicant's rights under Article 8, which was otherwise in accordance with law and pursuant to a legitimate aim), the court set out a number of "guiding principles" to be followed. These included the following matters relevant to this case, namely, the duration of the applicant's stay in the country from which he is going to be expelled: the nationalities of the various persons concerned: the applicant's family situation and whether there are children in the family and, if so, their age. These principles were further considered in *Uner* in which the court added two criteria which it held to be implicit in those identified in *Boultif* namely:-

> "The best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
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> the solidity of social, cultural and family ties with the host country and with the country of destination."

15. The contention is made that Article 3.1 of the UN Convention means that the best interests of the child must be considered as "a primary consideration" in determining whether to deport the child. It is submitted that s. 3 of the Immigration Act 1999, must be interpreted in accordance with the State's obligations under the provisions of the Convention and that the child's best interests must be a primary or main consideration in the deportation decision.

**The Examination of File**

16. The examination of file on the basis of which the decision was made, follows the usual sequence of issues which the decision maker must address under s. 3 of the Immigration Act 1999. It refers briefly and factually to the age of the mother and child, the duration of the applicants residence in the State and the fact that both are here illegally. It accurately describes the family circumstances, the separation of the parents and the father's contact with the child. The applicants' connection with the State is as asylum seekers who have failed in their application. Mrs. ASMA's employment record was reviewed. She had worked for fourteen years in Human Resources and Accounting and had twelve years of education. She was now working as a cleaner. RMA was attending primary school at the time of the decision. Mrs. ASMA's employment prospects were regarded as poor because she had no work permit and the high level of unemployment: her prospects were unlikely to improve. Both applicants were regarded as well integrated in Irish society and living a peaceful life. It was noted that ASMA stated that when living in Brazil, the family resided in a very poor and dangerous neighbourhood.

17. It was noted that RMA was said to suffer from asthma and bronchitis suffering bouts of illness on a regular basis when living in Brazil but had enjoyed better health as a result of living in Ireland. This improvement was attributed to his improved standard of living and the lack of stress in his daily life. It was claimed that living conditions in Brazil with the family would not meet conditions appropriate to the child's development and would not be in accordance with the standards appropriate under the United Nations Convention on the Rights of the Child. However, a conclusion was reached that there was nothing to suggest that both or either of the applicants should not be returned to Brazil.

18. No representation was made about the prohibition of refoulement when seeking leave to remain under section 3. However, aspects of child welfare were considered under that heading as follows:-

> "RMA's mother on his behalf stated the conditions in Brazil for the family would not meet the conditions appropriate to (his) development as set out in the Convention on the rights of the child – the above country of origin (information shows that) in Brazil, Law No. 8069/1990 (Children and Adolescent Statute) ensures total protection for Brazilian kids and teenagers and establishes that the right to their fundamental rights should be the absolute priority (of) the State."

19. The examination of file also contains an assessment of a potential interference with the applicants' rights to private and family life under Article 8 of the Convention. In a very short review of the issue of private life, it was concluded that:-

> "It is accepted that if the Minister decides to deport ASMA and RMA that this has the potential to be an interference with their rights to respect for private life within the meaning of Article 8(1) of the ECHR. This relates to their education and other social ties that she has formed in the State as well as matters relating to their personal developments since their arrival in the State."

20. Having considered the facts of the case, it was decided that deportation would not have consequences of such gravity as to potentially engage the operation of Article 8 and were not therefore constitute a breach of the right to respect for private life.

21. A similar short review of the right to family life was also carried out. It was simply stated that deportation would not interfere with family life.

**The Claim**

22. Grounds 1, 2, 3, 5, 10 and 11 of the statement of grounds challenge the decision on the basis that there was a failure to consider the best interests of the child adequately or at all in the course of the decision making process. It is contended that the best interests of the child are not mentioned in the examination of file as part of the matrix of issues considered. If the best interests were considered, it was further submitted that no adequate reasons had been given as to how the best interests of the child were served by his deportation or weighed against any other considerations. This argument is advanced together with the further proposition that the decision maker was obliged to consider the welfare or best interests of the child as part of the right to fair procedures under Article 40.3 of the Constitution. Further, it was contended that the best interests of the child under Article 40.3 or Article 8 of the Convention should have been "a primary consideration" of the decision maker having regard to the provisions of Article 3.1 of the United Nations Convention. It was further submitted that if these submissions were correct, the Article 8 family rights of the first named applicant were not adequately considered.

23. It is not the function of this court to exercise an appellate jurisdiction in respect of the Minister's decision or to substitute its own discretion for that of the Minister. The order in this case can only be reviewed based on an error of fact or law so serious as to undermine the decision or if otherwise unreasonable.

24. Having considered the evidence and submissions made in this case, the court is satisfied that the applicants have established substantial grounds upon which to seek leave to apply for judicial review. The court is not satisfied that they should be as wide as those canvassed in the statement of grounds, or the written and oral submissions.

25. The court is not satisfied that there is any substantial ground established in Grounds 6 and 8 which are the subject of the determination by Hogan J. in *LAJ & Ors v. Minister for Justice* (Unreported, High Court, 2nd November, 2011). Neither is the court satisfied to grant leave on the grounds that s. 3 of the Immigration Act 1999, is unconstitutional or incompatible with the European Convention on Human Rights, which as already been considered in the decision of Kearns P. in *Sivsivadze v. Minister for Justice and Equality* (Unreported, High Court, 21st June, 2012).

26. The court is, however, satisfied to grant leave on the following grounds:-

> (i) The respondent in deciding to deport the second named applicant failed to have any or any adequate regard for the best interests of the child and/or to consider the child's best interests as the primary consideration in the making of the decision contrary to Article 8 of the European Convention on Human Rights and Article 3.1 of the United Nations Convention on the Rights of the Child.
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> (ii) The respondent failed to protect or vindicate the right of the second named applicant to have his welfare and/or best interests considered adequately or at all pursuant to the provisions of Article 40.3 of the Constitution.
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> (iii) The respondent failed to give a reasoned decision as to how the best interests of the child were considered.
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> (iv) As a consequence of the matters set out in Grounds 1, 2 and 3 above, the respondent failed adequately to consider the family rights of the first named applicant in accordance with Article 8 of the European Convention on Human Rights.

27. The court notes that the matters canvassed by the applicants in this case are similar to those raised in the case of *Dos Santos & Ors v. the Minister for Justice and Equality & Ors* (Unreported, High Court, MacEochaidh J., 30th May, 2013) in which leave to apply for judicial review was granted.