THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 480 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, AS AMENDED

BETWEEN

V.M.M, P.M., R.M. (A MINIOR SUING BY HER MOTHER AND NEXT FRIEND, P.M.), T.M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, P.M.) AND S.M. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, P.M)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

RULING of Mr. Justice Richard Humphreys delivered on the 8th day of June 2017

1. What is before the court is an *ex parte* application for leave pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and an application for an injunction restraining the removal from the State of the first named applicant.

Facts
2. The first named applicant and his wife, the second named applicant, are nationals of South Africa. The wife has been present legally in Ireland since 2002. The husband arrived in 2008 and sought asylum under a false name and a false Zimbabwean nationality. That application was refused by the Refugee Applications Commissioner and appealed unsuccessfully to the Refugee Appeals Tribunal.

3. In February 2011, the husband left the State. A deportation order was made against him in the false name on 25th December, 2014. The parties then married on 13th August, 2015, after the deportation order. In the meantime, the husband had come to Ireland and left in accordance with the limited period allowed for entry without a visa. He then returned on a more long term basis on 28th November, 2015, and applied for permission to remain to join his spouse. That permission was granted on 28th July, 2016, but in the process of taking his fingerprints for the purpose of processing that permission, it emerged that he previously had been the subject of a deportation order in a different name.

4. The husband then made a s. 3(11) application on 25th August, 2016. By letter dated 3rd March, 2017, the husband was notified that that application had been refused but that in exercise of the powers under s. 3(11) the Minister was instead amending the deportation order to include the husband's correct name as an alias, alongside the incorrect name.

5. On 13th May, 2017, the husband made a second s. 3(11) application complaining, *inter alia*, that the amendment was made without notice to the husband and that the husband was the primary carer of the children of the family and that the deportation would have an adverse impact on the family and the rights of the members of that family.

Relief sought
6. The statement of ground sets out seven reliefs. They are as follows:-

> (a) "*Leave to apply for judicial review under s. 5 of the Illegal Immigrants (Trafficking) Act 2000*" which in effect is a broad heading for the remaining items, as we are dealing at this point with the application for leave and then the injunction.
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> (b) "*An order extending time for bringing the proceedings*." Ms. Teresa Blake, S.C., who appears with Mr. Geoffrey Nwadike, B.L., for the applicants, accepts that the application is out of time. I will assume without deciding that there are grounds for extending time, and will proceed to consider the application on that basis.
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> (c) "*An order of certiorari quashing the decision of the respondent, dated 3rd March, 2017, amending the deportation order issued on 25th September, 2014, in circumstances where no notice of the intention to amend was given to the applicant nor the opportunity to comment on it*." An order under s. 3(11) of the Immigration Act 1999, is an order that is specifically subject to s. 5 of the 2000 Act, so substantial grounds for that relief are required for the purposes of granting leave.
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> (d) "*An order of mandamus requiring the respondent to consider the additional evidence submitted on behalf of the first named applicant by letters dated 13th May, 2017, in respect of his application and to make a decision in accordance with law and in respect of the same*." It seems to me there are no arguable grounds for that relief. There is no basis to suggest that the Minister will not in due course consider the second s. 3(11) application lawfully and it is simply not appropriate to seek *mandamus* a couple of weeks after making an application. It is not a relief that could ever be granted under these circumstances, so I reject the notion that there are grounds for leave to seek relief (d).
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> (e) Relief (e) is an injunction which I will come to in due course.
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> (f) Reliefs (f) and (g) seek further and other relief and costs.

7. The primary issue therefore is whether there are substantial grounds for *certiorari* of the s. 3(11) order.

Are there substantial grounds for judicial review?

8. The first three paragraphs of the statement, under the heading of grounds, are factual narrative, as is the next paragraph under the heading of first revocation application, as are the next two paragraphs under the heading of amendment of deportation order, sub

paragraphs (a) to (i) of which are introduced by the phrase "*The procedure engaged in by the respondent is unlawful for a number of reasons*".

9. There are then complaints that the manner of amending the deportation order was disproportionate, arbitrary and a breach of Article 41 in the Constitution, that the individual circumstances of the husband and family have not been properly weighed and considered, that the procedures are in breach of art. 8 of the ECHR, contrary to the UN Convention on the Rights of the Child, and contrary to what is described as the fundamental right of a child to grow up in the country of his or her birthplace with his or her family, although there is no such right. The statement continues with an alleged violation of art. 14 of the ECHR and an allegation that the respondent took into account irrelevant considerations or failed to take into account relevant considerations.

10. It is important in assessing whether those complaints amount to substantial grounds to bear in mind to what actually happened in this case, which is that the first named applicant engaged in a fraud on the immigration system by submitting an asylum application in a false name with a false nationality and pursuing that application both before the Refugee Applications Commissioner on appeal to the Refugee Appeals Tribunal and continued the fraud to the extent of registering the children's births in the false name; a registration which currently stands, and while Ms. Blake informs me that the applicants are seeking to have that corrected, the Minister does not appear to have been informed that such an application has been made.

11. The second aspect is that the first named applicant accepts that he did submit a false application, so he is certainly not in a position to take any issue factually with the amendment made by the Minister to identify the actual identity of the person who made the fraudulent application. Furthermore, nothing has been put forward as to what he would have said differently had he been given specific notice of the possibility of that correction.

12. Thirdly, the correction was triggered by the applicant's own application under s. 3(11). Admittedly the order amending the deportation order was not the precise order applied for but it is very much within the contemplation of s. 3(11) which provides that the Minister may by order amend or revoke an order made under the section, including an order under that subsection. That provision does not require notice to the applicant but in this case the first named applicant made a specific application for an order revoking the order and the Minister then made an order under s. 3(11), albeit one not revoking the order but one amending the order to reflect the correct factual position as set out by the first named applicant himself.

13. It seems to me that there are absolutely no grounds of substance for any complaint as to the lawfulness of the Minister's entitlement to make that amendment.

14. The next heading under which the s. 3(11) order is challenged is the failure by the respondent to take into account the effect the deportation of the first named applicant will have on the children and the entire family, and reference is made to the first named applicant being "*highly involved in the children's lives*", and being the primary care-giver. A suggestion is made that the Minister, as it is put in ground 2 under this heading, "*basically endorsed the deportation order issued on 25th September, 2014 without taking into consideration the detrimental effect it will have on the family especially the children*". The difficulty with this line of argument, it seems to me, is that it is simply not correct to say that the Minister did not take into account the impact on the family. The Minister considered the issue and while she did not take it on board to the extent of finding that it justified a revocation of the order, that is a matter for the Minister rather than the court.

15. At p. 11 of the analysis the Minister accepts the possibility of interference with the family rights of the applicants, and at p. 13, she specifically considers the post-citizenship situation should the wife be ultimately granted Irish nationality on the basis of long term-lawful residency. It seems to me there are not arguable, still less substantial grounds for the contention that the Minister did not take into account impact on the family. The manner in which those matters were taken into account was unfavourable to the first named applicant, but a right to have one's circumstances taken into account is not a right to succeed in one's application. It seems to me there are no substantial grounds under this heading either.

16. On that basis it seems that leave has to be refused in this case.

Should an injunction be granted applying *Okunade* and *L.C.*?

17. On the basis that leave is being refused, the application for an injunction would fail *in limine*, certainly on the first leg of the test as set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 at p. 193 *per* Clarke J. to the effect that if the applicant had not established an arguable case the application must be refused.

18. In case I am wrong about that, I will go on to consider the remaining elements of the *Okunade* test. The first one is giving all appropriate weight to the orderly implementation and measures which are *prima facie* valid and that here supports the default position of permitting deportation. The second element is giving such weight as may be appropriate to any public interest in the overall operation of the particular scheme in which the measure under challenge was made and again that here supports permitting deportation.

19. The third element is giving appropriate weight if any to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest to the specific measure not implemented pending resolution of the proceedings. Ms. Blake places reliance on the impact on the children, the fact that two of the children have special needs, physical and emotional, the fact that the first named applicant is significantly involved in their lives, the children having lived here throughout, the functioning of the family, the undue impact she submits of the deportation, the submission that the deportation is not necessary to secure the effective implementation of the Irish immigration system and the fact that the first named applicant would have an entitlement under the policy document on non-EEA family reunification of December 2016 to apply for family reunification.

20. I do have regard to all those matters, but so did the Minister, and it seems to me they are not matters that can outweigh the default position of permitting deportation as set out by the Supreme Court in *Okunade*, especially given the background of fraud on the immigration system in this case. Children are not a shield against deportation arising from parental conduct (see *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (Unreported, Supreme Court, 16th July, 2015) in which at para. 26 of the judgment of MacMenamin J. it is stated that "in Butt v. Norway *[Application No. 47017/09, 4th December, 2013] the [Strasbourg] court made clear that, as a general principle, the status of children would generally be identified with the conduct of their parents, failing which, parents might exploit the situation of their children in order to secure a residence permit for themselves and for the children".*)

21. The next heading in *Okunade* is that the court should give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in the circumstances where that measure may found to be unlawful.

22. Here there is no protection issue, as might have been the case in *Chigaru v. Minister for Justice and Equality* [2017] IECA 167, a

decision I have also fully considered (subject of course to *P.O.*). Admittedly the applicant will suffer an impact in terms of his relationship with the family. As Ms. Blake puts it, "*the family life in Ireland will be in disarray*". That is certainly unfortunate but it is a matter that the first named applicant should have thought about before making a fraudulent asylum claim.

23. The final *Okunade* issue is the question of all due weight being given to the strength or weaknesses of the applicants' case. If I am wrong about the applicants not being entitled to leave, I would certainly be of the view that such points as they have are very much on the weak end of the spectrum.

24. The Minister's position as set out in the analysis at p. 11 was that by his actions, the first named applicant demonstrated not only a lack of candour but a flagrant disregard of Irish law and the immigration/asylum laws of this State. That is repeated at p. 13 where the Minister goes on to say that he had a history of breaching the immigration laws of the State and that was aware of his precarious immigration status at the time of his marriage.

25. Those conclusions, it seems to me, are inevitable given the admitted facts as set out by the applicant.

26. The other element of relevance apart from *Okunade* is the Supreme Court decision in *L.C. v. Minister for Justice and Equality* [2007] 2 I.R. 133 at p. 155 where McCracken J. for the Supreme Court points out in that case that it was inappropriate to grant an injunction in a s. 3(11) case where there was no appeal and could be no appeal from the decision of the High Court refusing relief in relation to the deportation order itself. He goes on to say that; "*If the court were to grant an injunction such as is being sought by the applicant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order. There might indeed be circumstances, although it is hard to envisage them, where the Supreme Court might exercise its inherent jurisdiction to grant an injunction which could have this effect, for example it might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order, and which is one of such gravity as might stay implementation of the deportation order. No such case has been made out before us*."

27. Ms. Blake points to the amendment of the deportation order as such a new fact, but it seems to me that that does not remotely come within the circumstances envisaged by the Supreme Court. The fact of the original asylum application being made in a fraudulent name was known at all material times to the first named applicant. It does not in any way constitute a new fact by reason of the Minister correcting it. The fact that we are now dealing with proceedings not challenging a deportation order, but a belated application to revoke such an order, means that such jurisdiction to enjoin enforcement if any as the court may have should be exercised only in exceptional circumstances of which this is not one.

28. Reliance is placed on two judgments of O'Regan J.; firstly in *M.I. v. Minister for Justice and Equality* [2017] IEHC 174 which is on somewhat different facts and not particularly analogous to this case; and secondly *I.D. v. Minister for Justice and Equality* [2017] IEHC 15, which is a substantive rather than an injunctive decision where the Minister had failed to engage both with the constitutional rights of the applicant and had failed to take into account relevant information. Neither of those points apply here. It seems to me that the case is not of any great assistance to the applicants.

29. Finally, Ms. Blake makes the point that the original deportation order was premised on deportation to Zimbabwe whereas the first named applicant is South African; but given that the Minister now has possession of the first named applicant's South African passport, there is no reason to believe that there is any risk of deportation to Zimbabwe.

Order

30. For all those reasons, I will order that the applications for leave to apply for judicial review and for a stay on deportation be refused.