Neutral Citation Number: [2011] IEHC 112

THE HIGH COURT

JUDICIAL REVIEW

2009 533 JR

BETWEEN

J. C. P. C. (A MINOR SUING BY HIS MOTHER AND NEXT

FRIEND M. S. O. F.) AND M. S. O. F.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

ATTORNEY GENERAL AND HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Ryan delivered the 3rd February 2011

1. This case concerns the proposed deportation by- the Minister of the adult applicant, Ms. M S O F, the mother of the minor applicant, J C P C. Ms. M S O F is aged 32 years and is a citizen of Brazil. She is a married woman but she and her husband are separated.

2. In February 2003, Ms. F came to Ireland alone and was given permission to enter the State as a visitor. She overstayed her permission and remained here for over 3½ years until she left the State voluntarily on the 7th December, 2006. During her time in Ireland, when she lived in Roscommon and Loughrea, Ms. F did casual work and sent remittances to her family in Brazil.

3. Ms. F came back to Ireland some seven months later, on the 27th July, 2007. She was once again given permission to enter the country, but this time for one week only. Again she overstayed to work to support her family in Brazil. Her son R was then and still is living in Brazil with Ms. F's parents and other family members.

4. On the 4th October, 2007, Ms. F was discovered in Roscommon by the local Immigration Office and was refused permission to remain in the State. On the 9th July, 2008, the Minister sent a notice under s. 3(3) of the Immigration Act 1999, of his intention to issue a deportation order. Ms. F did not make any submissions in response to this notice. She says in her affidavit that this was because she did not come into possession of the notice until the end of July, by which time she was heavily pregnant. The fact is, whatever the reason, that the Minister did not have any submissions before him as to why the order should not be made.

5. On the 7th August, 2008, Ms. F gave birth to J. He is an Irish citizen because his father was lawfully resident in the State for the requisite period. J is the other named applicant suing by his mother. The relationship between Ms. F and the child's father did not last. He has married another women and lives in Ireland. He does not spend any time with J but does make small financial contributions.

6. On the 18th September, 2008, the Minister made a deportation order in respect of Ms. F and she was notified of the order on the 3rd October, 2008. She made an application on the 13th October, 2008, for the revocation of the order under s. 3(11) of the Immigration Act, on the basis of a change in personal circumstances. That application was refused and the applicant was notified by letter of the 28th April, 2009, which also enclosed the file note recording the details of the consideration of the case.

7. The applicant made a further request for revocation under s. 3(11) in submissions made on the 11th May, 2009. That application is central to the present proceedings. Again the revocation request was refused and the applicant was notified on the 19th May, 2009 and was supplied with the relevant file analysis.

8. Proceedings were issued seeking to challenge the deportation on the 19th May, 2009. On the 19th May, 2009, the applicants applied for, and were granted by this Court, an interim injunction restraining the deportation of Ms. F on the ground that baby J had not been vaccinated against serious diseases and could not receive such treatment for some time. That injunction has continued.

9. The statement of grounds dated the 19th May, 2009, seeks substantive reliefs as follows:-

> (i) An order of *certiorari* quashing the decision of the 19th May, 2009, to affirm the deportation order – this is the refusal to revoke under section 3(11).
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> (ii) A declaration that the deportation of Ms. F would be in breach of J's legal rights.
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> (iii) An injunction restraining deportation.
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> (iv) An order of *certiorari* quashing the deportation order dated the 18th September, 2008, and
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> (v) an extension of time to permit that application to be made
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> (vi) A declaration that the provisions of the Immigration Act 1999 are incompatible with the European Convention on

> Human Rights by reason of their failure to provide for an independent appeal mechanism by which a decision made under s. 3 of the Act, which interferes with an Irish child's right to have his or her parents reside in the State and which thereby interferes with the child's rights under Article 3 and 8 of the European Convention on Human Rights, can be appealed against.

10. Further ancillary relief is also sought.

By notice of motion dated the 17th November, 2010, the applicants seek to add further grounds to their leave application. The additional relief sought is as follows:-

> A declaration that s. 3 of the Immigration Act 1999, insofar as it requires the respondent when issuing a deportation order to make such order indefinite and therefore lifelong, is disproportionate such that it is unconstitutional and/or incompatible with the European Convention on Human Rights (pursuant to s. 5 of the European Convention on Human Rights Act 2003).

11. What is being challenged? The applicants are seeking leave to challenge (i) the deportation order and (ii) the s. 3(11) decision of the 19th May, 2009. As to the deportation order, the time limit of fourteen days (s. 5 of the Illegal (Trafficking) Act 2000) from the date of notification was long expired when proceedings were instituted. The second applicant was notified of the order on the 3rd October, 2008, and the notice of motion is dated 19th May, 2009. She did not challenge the deportation order but made submissions seeking to have it revoked under section 3(11). The statutory period for challenging an order may be extended by this Court for good and sufficient reason. The applicants, however, have not put forward any good and sufficient reason why the time should be extended for challenging the order. More fundamentally, the pleadings and submissions do not disclose any grounds of complaint that it was unlawfully made or that the process or reasoning leading to its execution was legally flawed. The Minister made the order on the information that was available to him at the time. In these circumstances it is difficult to see how the deportation order could be open to legal challenge.

12. The proceedings are in time in respect of the second s. 3(11) consideration and refusal which is dated the 19th May, 2009. The Minister rejected the application to revoke and affirmed the deportation order. This decision and the file analysis that gave rise to it are the focus of the application for leave to bring judicial review proceedings. One point of significance arising from that is that the threshold for leave is lower than it would be if the order itself were being challenged. On this hearing, the applicants have to establish that they have a "stateable case, an arguable case in law": *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374.

13. It would normally be a feature of a s. 3(11) decision that the Minister is only required to consider any changes notified to him which have taken place since the making of the deportation order and which affect the circumstances of the case. That is on the basis that the changes actually occurred since the deportation order. It is not legitimate for an applicant to drip feed the Minister with new pieces of information as time goes on, if he or she could have put all the material before the Minister at the one time. This has been condemned by the court on a number of occasions. The Minister has not made the case that the second applicant did that or set out to mislead him. In fact, the application to revoke when it was made was considered by reference to the then existing circumstances which included the major development that had taken place, namely the birth of the first applicant. The case was therefore considered by the Minister in relation to the Irish citizen child and the Minister contends that the consideration was satisfactory and as complete as necessary to meet all legal requirements. In other words, the Minister does not in this case rely on any narrower function under s. 3(11) as compared with the requirements of s. 3(1). It is the proposed deportation that is in issue and the arguments are directed to that question, notwithstanding that the procedure is an application for leave in respect of the s. 3(11) decision.

14. In the circumstances, it makes little difference to the rights of the applicants whether the case is considered as an attack on the deportation order itself or on the refusal to revoke it. Having said that, it is right to say that the order must in the circumstances be considered valid and no actual grounds of challenge to the making of the order have been advanced on behalf of the applicants.

15. I do not propose to extend the time for challenging the deportation order. I will allow the addition of ground (vi) [effective remedy] of the challenge to the s.3(11) decision but not the new relief or the associated ground. The permitted ground arises out of the submissions made to the Minister on the 11th May 2009. The other claim is speculative and conditional, it could and should have been made in time and it could be prejudicial to the respondent.

16. The case for revocation of the deportation order was made to the Minister in the submissions of the 11th May 2009 and was set out in seven points that can be summarised as follows:

> 1. The system was in breach of Article 13 of the Convention in failing to provide an effective remedy.
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> 2. Deportation of the mother would result in the constructive deportation of the citizen child, whose right of residence to be effective required his principal carer to be present. This right was recognised by the European Court of Justice in Chen, 19th October 2004, Case C-200/02.
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> 3. The mother was breast-feeding her child.
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> 4. The Supreme Court in *Oguekwe v The Minister for Justice* [2008] IESC 25 and *Dimbo v The Minister for Justice* [2008] IESC 26 mandated fact specific findings as to the citizen child's rights and the Minister's consideration failed to do so.
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> 5. The child would face dire conditions in Brazil but the Minister did not take that into account.
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> 6. The Minister's conclusion that the child was entitled to Brazilian citizenship was questionable.
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> 7. The possibility of a relationship with his father required the child to be in Ireland.

17. This second application under s. 3(11) for revocation of the deportation order is the factual basis of the present proceedings.

18. The applicants submitted that the respondent's decision breached Article 3 of Protocol 4 of the European Convention on Human Rights (ECHR). Article 3 states:

> 1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

19. The applicants argued that the deportation of the second applicant will have the effect of expelling the first applicant from the State during his childhood and constitute a constructive expulsion for the purposes of Article 3 of Protocol 4.

20. When a deportation order is made in respect of a single parent of a young infant, it is likely that the result will be that the child will leave with the parent. Cooke J. considered the issue of constructive deportation in *B. (a minor) v MJELR*, (High Court, 14 July 2010) and granted leave to argue the case on the grounds that:

> • the Minister failed to consider and to weigh correctly the balance of the opposing interests of the applicants and the State, the possibility that the deportation of the applicant would constitute a de facto or constructive deportation of her Irish citizen child by reason of the child's very young age and dependence on his mother; and
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> • while stating that a deportation order was the least restrictive process available to achieve the legitimate aims of the State identified as the substantial reason for the deportation, the respondent did not consider and weigh in the balance any other less restrictive measures available to him to control the limited or temporary presence of the applicant in the State.

21. In that case, the Minister also proposed to deport the mother of an Irish citizen child. Although there were some factual differences, the cases are sufficiently similar that the grant of leave is relevant to the present case. I propose to follow that decision and to grant leave on those grounds.

22. In *Zhu and Chen v. Secretary of State for the Home Department* (Case C-200/02) [2004] E.C.R. I-9925 the European Court of Justice recognised a derivative right of residence of a parent of a Union citizen child, albeit in very particular circumstances. The Court held that nationality rights were matters for the member states to regulate and it was open to a person lawfully resident in one state to travel to another to acquire a benefit for a child born in the latter member state. In Zambrano, Case C-34/09, the Opinion of the Advocate General supports the applicants' argument. It is of course true that Zhu and Chen was decided in the context of the free movement regime, that Zambrano has yet to be decided by the Court and that the Opinion has been the subject of controversy. Nevertheless, in the circumstances of this case and on the basis of Zhu and Chen, I think that the applicants have made out an arguable case and are entitled to leave as follows:

> • The Minister did not consider or properly consider the submission that the jurisprudence of the European Court of Justice supported the case that deporting the child's mother would deprive his right of residence of any useful effect.

23. The respondent accepted that living conditions for the applicants in Brazil were less favourable than in Ireland but submitted that there was no obligation on the Minister to compare and contrast social and political systems before he made his decision. The applicants argued that it was insufficient for the examination to quote long extracts from country of origin information dealing with conditions and then to express very brief conclusions without attempting to relate any of it to the applicants. In this connection a very recent judgment of Cooke J concerning applicants from Nigeria is relevant: *T.A. (a minor) and others v Minister for Justice, Equality and Law Reform*, 14th January 2011. There is at least one significant distinguishing element in that case and it must of course be borne in mind that the judgment could not have been debated by Counsel in this case. This judgment is helpful because it reflects my own view that this point is indeed arguable in this case. The submission was made about conditions in Brazil. The consideration of the question appears to be substantially similar. In the circumstances, I adopt Cooke J's formulation of the issue. He stated the ground thus:

> • The respondent erred in law in his evaluation and balancing of the interests of the State against the rights, interests and welfare of the third and fourth named applicants as Irish citizens to reside and be reared in the State in the care of their parents, by failing to make adequate inquiry into and give due consideration to (a) the practical consequences for the minors of their relocating to [the proposed country of return] to be reared there and (b) the feasibility of their exercising their right to reside as citizens in the State in the event that the first named applicant should choose that they do so.

24. I reject other grounds advanced by the applicants. They also relied *inter alia* on Articles 8 and 13 of the Convention but I do not accept that an arguable case has been made out. These issues have been decided many times by this Court. There is no basis for suggesting that the consideration of the case was deficient because the file analysis did not specify the child's private rights under the Convention and make a discrete evaluation and measurement of the proposed interference. Family rights were addressed as were the Constitutional rights of the citizen. As for the effective remedy point, the argument has repeatedly been rejected: see for example: *J.B. v. Minister for Justice* (Unreported, High Court, Cooke J., 14th July, 2010) [2010] I.E.H.C. 296; *M.B. v. Minister for Justice* (Unreported, High Court, Clark J., 30th July, 2010); *O.S.D. v. Minister for Justice* (Unreported, High Court, Clark J., 30th July, 2010); *A.P.A. v. Minister for Justice* (Unreported, High Court, Cooke J., 20th July, 2010).

25. Let me emphasise that I go no further than saying that I consider these points to be arguable at a full hearing. The threshold is low. The applicants have established arguable grounds for leave to challenge by judicial review the decision of the respondent to affirm the deportation order. The leave is in respect of the reliefs I, II & III of paragraph 4 of the Statement on the following grounds:

> • The Minister failed to consider and to weigh correctly the balance of the opposing interests of the applicants and the State, the possibility that the deportation of the applicant would constitute a *de facto* or constructive deportation of her Irish citizen child by reason of the child's very young age and dependence on his mother; and
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> • While stating that a deportation order was the least restrictive process available to achieve the legitimate aims of the State identified as the substantial reason for the deportation, the respondent did not consider and weigh in the balance any other less restrictive measures available to him to control the limited or temporary presence of the applicant in the State.
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> • The Minister did not consider or properly consider the submission that the jurisprudence of the European Court of Justice supported the case that deporting the child's mother would deprive his right of residence of any useful effect.
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> • The Minister erred in law in his evaluation and balancing of the interests of the State against the rights, interests and welfare of the first applicant as an Irish citizen to reside and be reared in the State in the care of his mother by failing to make adequate inquiry into and give due consideration to (a) the practical consequences for the child of relocating to Brazil to be reared there and (b) the feasibility of exercising his right to reside as a citizen in the State in the event that

the first named applicant should choose that he do so.