Neutral Citation [2016] IEHC 654

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 724 J.R.]**

**BETWEEN**

**JEFF OKUOMOSE ODEH AND RHODA ODEH AND ANGELOU OWEN ODEH (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, JEFF OKUOMOSE ODEH)**

**APPLICANTS**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 7th day of December, 2016**

1. The applicants are a married couple and their child. The second named applicant who is the mother arrived in the State in 2002, while pregnant. The third named applicant, on birth, became an Irish citizen. On that basis, the second named applicant was permitted to remain in the State. The first named applicant remained in Nigeria, but came to the State unlawfully and clandestinely, through the United Kingdom in May, 2015. His presence in the State is, therefore, of relatively recent vintage.

2. He now seeks leave to challenge a deportation order made against him dated 15th August, 2016.

3. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

4. I initially gave a decision on this application on 14th November, 2016 but on foot of that ruling Mr. Ian Whelan B.L. submitted that a factual misunderstanding had arisen and that the initial ruling should be revised prior to perfection of the order in accordance with *In re Suffield and Watts* (1888) 20 Q.B.D. 693, *Paulin v. Paulin* [2010] 1 W.L.R. 1057 and *In re McInerney Homes Ltd.* [2011] IEHC 25 (Unreported, Clarke J., 21st January, 2011), which I have decided to do in the circumstances.

**Are there substantial grounds to contend that the decision is invalid by reason of the use of an "insurmountable obstacle" test?**

5. Ground E (ii) contends that the insurmountable obstacles question "*is the incorrect test and the decision is therefore invalid*". This is a misunderstanding. It is not an all or nothing test but it is a factor to which the Minister can have regard. I do not read the decision of Mac Eochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] 2 I.L.R.M. 302 as holding to the contrary.

6. There are no substantial grounds for contending that the decision is invalid because it refers to "*insurmountable obstacles*". The insurmountable obstacles question has been set out in numerous decisions of the European Court of Human Rights (see e.g. *Omoregi v. Norway* (Appl. No. 265/07, 31st July, 2008); *Üner v. Netherlands*, (2007) 45 E.H.R.R. 14), and has been noted with approval in *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 995 (unreported, High Court, 2nd December, 2009) *per* Clark J. at para. 98. Furthermore, the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 cited with approval a quotation from *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, which posed the insurmountable obstacles question. (See also *A.A. v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 564 (Clarke J.)).

7. A decision is not invalid because it mentions insurmountable obstacles, or even because it gives that question importance, as long as it considers the circumstances in the round. The applicant has not established substantial grounds to challenge the decision under this heading. In any event, given that the first named applicant failed to make any submission to the Minister under s. 3, the basis for advancing this point is lacking.

**Are there substantial grounds for contending that the Minister's view of humanitarian considerations was not reasoned?**

8. Ground E(iii) contends that the respondent erred in law and failed to provide reasons in holding that the humanitarian considerations in the applicant's case were not of sufficient weight to displace the conclusion that the Minister should deport the first named applicant. However, in an *ad misericordiam* matter such as the consideration of humanitarian claims, extensive reasons are not required. The Minister's form of words is perfectly legitimate in the context of a broadly discretionary decision such as this. In any event, given that the first named applicant failed to make any s. 3 submission to the Minister, the basis for advancing this point is also lacking.

**Remaining grounds**

9. In the light of further submissions and clarification from Mr. Whelan I will however grant leave on the remaining grounds which relate essentially to the family rights of the applicants (Grounds E(i), (iv) and (v)).

**Injunction sought**

10. In the light of the further submissions and having regard to the fact that leave is being granted and that the mother (whose position in the State was originally precarious or unlawful as the father's is) has been granted permission solely by reference to parentage of the third named applicant, on balance outweighs the factors militating against an injunction such as the limited duration of the first named applicant's presence in the State, as well as the clearly unlawful and clandestine mode of entry. Thus applying *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 I will restrain his deportation until the determination of the proceedings.

**Order**

11. For the foregoing reasons I will, by way of revision of the original ruling on this application, order:

(i). that the application for leave to apply for judicial review be refused insofar as it relates to grounds E(ii) and (iii);

(ii). that leave be granted in relation to grounds E(i), (iv) and (v);

(iii). that the deportation of the first named applicant be restrained until the determination of the proceedings or further order in the meantime, with liberty to apply.