Neutral Citation Number: [2011] IEHC 9

THE HIGH COURT

JUDICIAL REVIEW

2009 660 JR

BETWEEN

T. A. AND OTHERS

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 14th day of January 2011

1. This is an application for leave to apply for an order of *certiorari* to quash a decision made by the respondent under s. 3(11) of the Immigration Act 1999, in which he refused to revoke deportation orders made against the first and second named applicants on the 27th July, 2004. The essential issue, accordingly, is whether subsequent events or new facts or information put to the Minister since the making of the deportation orders are such as to render the execution of the orders now unlawful.

2. The only events of that nature which arise in this case are the birth to the first named applicant of two children on the 2nd July, 2005 and 29th July, 2007 respectively. These two children, a boy and a girl are Irish citizens.

3. In effect, the file note supporting the refusal decision shows that the Minister has approached this issue as he would the making of an original order to deport under s 3(1) of the Act by considering the impact of the deportation of the first and second named applicants (who are mother and nephew) on the family unit as constituted since those births. The note sets out the Minister's assessment of the information relating to the circumstances of the family members (including the natural father of the two Irish citizen children who does not live with them,) together with his evaluation of the rights of the individuals concerned both under Article 8 of the European Convention on Human Rights and by reference to the constitutional rights to the Irish born children. It expressly seeks to balance the opposing rights and interests of the applicants and of the State.

4. In this regard the author of the file note appears to have endeavoured to follow carefully the guidelines laid down by the Supreme Court in a series of cases including, for example, that of *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795. Of particular relevance to the matters which arise in this case are the points indicated in the non exhaustive list set out in the judgment of Denham J. at para. 85 including the following:

> "1 The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.
>
> 2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.
>
> 3. In such a case as this, where the father of an Irish born child citizen, the mother (who has been given residency), and the Irish born citizen child are applicants, the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.
>
> 6. The Minister should consider expressly the Constitutional rights, including the personal rights, of the Irish born child. These include the right of the Irish born child to:-
>
> (a) reside in the State,
>
> (b) be reared and educated with due regard to his welfare,
>
> (c) the society, care and company of his parents, and
>
> (d) the protection of the family, pursuant to Article 41."
>
> The Minister should deal expressly with the rights of the child in any decision.

5. It may well be that when read as a whole the file note in this case adequately indicates that all of this has been properly done.

6. However, this is an application to which the lower threshold of "arguable case" applies rather than that of "substantial ground" in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 and the case is unusual in the following respects:

> (a) It is the mother who is to be deported and after an unusually long period – 10 years – in the country;
>
> (b) The two citizen children are very young being 5½ and 3½ years only;

(c) They have a natural father who is resident in the State but who appears to be a member of a different family unit with little contact with his two children, such that the implication arises that the two children are wholly dependent on their mother.

7. The file note analysis understandably accepts this as being the reality of family situation and, at least by inference, appears to adopt the approach that on the deportation of the mother and her nephew, the two Irish born children will also relocate to Nigeria.

8. In the analysis, the Minister quite properly, in the Court's view, considers whether the mother is free to take the two Irish children with her to Nigeria by satisfying himself that no "insurmountable obstacle" prevents their entering and living with her in Nigeria. It also considers that they are so young that they are at an "adaptable age" so that there is no practical or unreasonable difficulty short of an insurmountable obstacle to their actually establishing a life for themselves in Nigeria.

9. The one aspect of this case which, however, seems to justify a more substantive examination of the Minister's analysis and his reasons for concluding in favour of the prevalence of the aims of the State over the rights and interests of the applicants, lies in those unusual features of the particular family circumstances. Counsel for the applicants contends, and counsel for the respondent accepts, that the analysis proceeds on the assumption that if the deportation is implemented the two Irish born children will go to Nigeria with their mother and cousin. This was possibly a reasonable and even inevitable assumption in the absence of any indication prior to the making of the decision as to the mother's intention in the event of deportation and the total absence of any information offered as to the nature of the relationship, if any, between the natural father and the two Irish children.

10. However, the issue then arises in the light of the guidance of the Supreme Court as to whether the Minister had, in these circumstances, any obligation to make further inquiry as to the feasibility of any alternative which would enable the children to continue to reside in the State if that was what their mother wished for them and as to how the interests of the two children would be affected in practice if (a) they actually went to Nigeria with their mother and (b) in the alternative, they remained in the State without her.

11. As counsel for the applicant points out, the analysis in the file note undoubtedly considers their personal and family life rights both under the Convention and the Constitution, but does so effectively as legal entitlements only. Apart from saying that they are entitled in law to enter and live in Nigeria, there is no assessment as to how, in practice, they might actually live and be supported there. The Minister had before him a letter written by the mother on the 29th October, 2008, in which she had said: "I will be in danger of being imprisoned as I was arrested with a gang of accused murderers which had guns and ammunitions as in the vehicle that I boarded. (sic) I have no home and relatives to go back to as I do not know where my family are since I escaped to this country".

12. While the issue of *refoulement* may be been dealt with in 2004, the question arises as to whether there was an obligation on the Minister to inquire further as to what the practical consequences for the lives and welfare of the children might be in those circumstances in Nigeria.

13. If that question or the reply given to it raised doubt as to the possible well being of the two Irish born children in Nigeria, was there an obligation on the Minister then to inquire as to whether their welfare might be better secured by their remaining in the State and whether any arrangement was feasible which would enable them to do so in the absence of their mother?

14. The reasons why it seems to the Court that these questions arguably arise stems from the guidelines cited above from the case law of the Supreme Court. In points 6 and 7 of the list the Minister is advised to "consider expressly" the constitutional and Convention rights of Irish born children, including their right to reside in the State and to be reared and educated "with due regard to their welfare".

15. Point 2 of the list as quoted above does acknowledge that "save in exceptional cases" the Minister has no obligation to inquire beyond the matters put to him or available on the departmental file. But is a case "exceptional" where the deportation of a parent raises the possibility that very young infants dependent on their mother may be left without that parent in the State and does that possibility create an obligation of "due inquiry" to ascertain whether "due regard to their welfare" might better be met by their remaining in the State either with their mother for some limited period of years or without their mother in some alternative arrangement including foster care?

16. As indicated, this is an application for leave only and by reference to the lower threshold and it may well be that on full consideration of the case law and a full reading of the file note and background to the present case, no such obligation on the Minister arises in these circumstances; or that it will be shown that it has been adequately met. However, if the *Oguekwe* guidelines are to be followed in balancing the interests pursued by the State against the effect of the encroachment upon the rights and welfare of very young citizen children including their right to reside in the State, it appears to the Court to be at least arguable that there may be, as it were, a gap in the analysis, evaluation and inquiry set out in the file note in the present case to the extent that it makes no further inquiry into how the welfare of the two Irish children would be secured in practice if living in Nigeria with their single mother and, in the alternative, whether any arrangement was feasible to secure their right to reside and grow up in the State either with or without the presence of their mother.

17. There will therefore be an order granting leave to the first, third and fourth named applicants to apply for the reliefs identified in s. 4 of the statement of grounds at paras. (a), (b), (f), (g), and (h). The reliefs sought at para. (c) and (d) are unnecessary.

18. That application may be made upon the basis of a single ground as follows:

> "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 Nigeria 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."

19. In relation to the second named applicant a position arises which is unsatisfactory in practical terms but appears inevitable in law. The second named applicant is said to be a nephew of the first named applicant who arrived in the State as an unaccompanied minor a year after his aunt in 2001. He has lived with her since and at all stages his asylum application and other representations to the Minister were considered jointly with those of the first named applicant. Separate deportation orders were made in respect of them in 2004, but on the basis of a single evaluation and supporting file note.

20. As already indicated, the present proceeding is directed at a refusal to revoke those deportation orders, but only on the basis of the subsequent births of the third and fourth named applicants. The questions which arise and which justify the grant of leave relate exclusively to entitlements of those applicants as Irish citizens and the proportionality or reasonableness of the encroachment which the deportation order will make upon their rights. Although it is true that the second named applicant has been a member of the family unit in question for the last ten years, it does not appear to the Court that any distinct case has or can be made to the effect that the otherwise valid deportation order made in respect of the second named applicant on the 29th July, 2007, has been rendered incapable of implementation as unlawful because of the subsequent birth of the third and fourth named applicants. It may well be that having regard to the unusual circumstances the Minister will refrain on humanitarian grounds from deporting the second named applicant separately pending the conclusion of the present proceeding; but the Court does not consider there is any basis upon which it could intervene to injunct such a deportation or to grant leave in respect of the quashing of the distinct deportation order in his case having regard to the nature of the arguments that have been raised and the ground that has been allowed.

21. Accordingly, the order of the Court granting leave will not extend to the second named applicant.