Neutral Citation [2016] IEHC 670

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 676 J.R.]**

**BETWEEN**

**XI MEI LIN AND XING JIAN ZHENG AND XIN YI LIN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND) AND ZOE XIN YUE ZHENG (A MINOR SUING BY HER MOTHER AND NEXT FRIEND)**

**APPLICANTS**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of November, 2016**

1. The second named applicant, who is the father of the family in this case, arrived in Ireland in 2003 without permission. The first named applicant, the mother, arrived in 2009, also without permission. The third and fourth named applicants are children born in 2011 and 2016. The parents have been self-employed running a Chinese restaurant since May, 2015. They informed the Minister of this in January, 2016.

2. Mr. James Buckley B.L. now applies on behalf of the applicants for leave to seek judicial review of deportation orders made against the applicants and notified by letters dated 25th July, 2016.

3. The substantial grounds test applies to this leave application 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.

**Are there substantial grounds to challenge the finding that the applicants are not of good character?**
4. Mr. Buckley submits that the respondent erred in holding that the applicants are not of good character solely on the basis of their residing and working within the State without permission. This submission is made in the context where "*state bodies associated with their working activities treated them as compliant with relevant laws, and they have never been convicted of any criminal offence*". There are no substantial grounds for this submission. Presence in the State without permission is unlawful by virtue of s. 5 of the Immigration Act 2004. Failure to present oneself to an immigration officer on arrival is an offence by virtue of s. 4(2) and (9) of that Act, as is failure to register by virtue of s. 9(8) of the Act. Clearly it was open to the Minister to hold that contravention of these requirements went to the character of the parents, and there are no substantial grounds to contend otherwise.

**Are there substantial grounds to challenge the finding that the applicants remained in the State without the permission of the Minister?**
5. Mr. Buckley submits that it was not open to the Minister to find that the applicants, particularly the child applicants, remained in the State without the permission of the Minister. He submits that this is particularly so in relation to the fourth named applicant, who was born here.

6. However, presence in the State without the permission of the Minister (as envisaged by s. 5(1) of the 2004 Act which provides that "*no non-national may be in the State other than in accordance with the terms of any permission…*") is an objective rather than a subjective state of affairs. None of the applicants have permission to be in the State, and accordingly their presence in the State "*for all purposes*" unlawful (see s. 5(2)). That is an objective situation and does not depend on any finding of fault on behalf of the applicants. Admittedly it is not the fourth named applicant's fault that upon birth, her presence in the State became illegal, but no grounds at all, let alone substantial grounds, have been shown as to why the continuing presence of each of the applicants in the State is other than wholly irregular. They have therefore remained in the State without the permission of the Minister and no grounds have been demonstrated otherwise.

**Are there substantial grounds for contending that the decision embodies an error in relation to the requirements of the common good?**
7. It is submitted that the finding that the deportation of the applicants would be conducive to the common good is erroneous, particularly insofar as it is based on a finding that the applicants have remained in the State without permission. But at the level of generality, it is not conducive to the common good that any non-national should be permitted to remain in the State without the permission of the Minister and contrary to the statute law of the State, which for good measure the court is obliged to "*uphold*" (Article 34.5.1° of the Constitution). The Minister's finding is virtually axiomatic given the irregular nature of the applicants' situation.

**Are there substantial grounds to contend that it is unlawful to deport the child applicants?**
8. The statement of grounds contends that the Minister "*has acted ultra vires or disproportionately in issuing deportation orders against minor children who were born in the State without having first considered whether they may be granted a residence permission*". That is not a substantial ground for challenging the order. The Minister is not obliged to consider grating residence permission separately or in advance of a decision on deportation. The statement goes on in the alternative to contend that "*the respondent has acted unreasonably in determining that the common good required the issuing of deportation orders against infant children born in the State*". Again, that is a policy submission and not a substantial ground to challenge the legality of the Minister's decision. It is clearly open to the Minister to make deportation orders against children. Nothing has been pointed to in the Immigration Act 1999 that would preclude that being done.

**Are there substantial grounds for contending that there is factual error in the Minister's analysis?**
9. The Minister's analysis of the parents' employment prospects does not appear to make any reference to the fact that they are actually currently gainfully self-employed. The Minister gloomily concludes that their "*employment prospects are limited*". While minor errors in an analysis do not necessarily create substantial grounds for contending that the decision is invalid, in the particular circumstances of this case, it seems to me that substantial grounds could be said to exist for the contention that a misunderstanding or error has occurred in relation to this issue, sufficient for leave purposes, albeit that on full consideration the error may or may not transpire to be significant (see *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 (Unreported, High Court, 24th June, 2016)

at para. 38 for a similar albeit arguably lesser error which was insufficient to warrant relief).

**Are there substantial grounds for contending that there was an infirmity in relation to service on the third named applicant?**
10. Representations on behalf of the first named applicant were made by Seamus Monaghan and Company on 1st November, 2013, stating that the address of that applicant was 17 Market Court in Sligo. The submissions however included two personal references which referred to an address of 14 Market Court. Confusion thus seems to have arisen in relation to the relevant address which appears to have complicated service of a notice of intention to deport in relation to the third named applicant.

11. Section 6(1) of the Immigration Act 1999 provides for three ways under which a notice under the Act may be served on a person:

> (i) "*by delivering it to him or her*";
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> (ii) by post "*at the address most recently furnished by him or her to the Registration Officer pursuant to Article 11 of the Aliens Order 1946*" or the refugee applications commissioner; or
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> (iii) "*in a case in which an address for service has been furnished, at that address*".

12. A question arises in relation to the application of these formalities to a child the subject of a proposed deportation.

13. While the Act is not explicit in this regard, direct service on a child is generally meaningless. To adapt Benjamin Franklin's phrase: what is the use of handing a notice to a new-born baby? (See Jacob Bronowski, *The Ascent of Man* (London, 1973) p. 271.) Mr. Buckley appeared to suggest in argument that a child had to be directly served. But law must have higher goals than to impose frivolities of this kind on our public administrators.

14. It must be implicit as a matter of general law that service on a parent who is a guardian of the child, on behalf of a child, is effective service on the child. That is consistent with the fact that the Aliens Order 1946 does not require persons under the age of 16 to furnish an address to a registration officer (see Article 11(6)).

15. Thus the question to be asked in this case is whether there are arguable grounds for contending that the parents were not served, in accordance with s. 6, with a notice of intention to deport the child. What is unusual about this case is that the applicants do not seem to have been aware of the proposal to deport against the third named applicant. Under these circumstances, it seems to me that it can be said that substantial grounds exist for the contention that the service on the third named applicant was not duly effected.

**Order**
16. For the foregoing reasons I will order as follows

> (i) that the applicants have leave to seek the reliefs at para. D of the statement of grounds on the grounds at s. E(i), (ii), and (vii);
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> (ii) that leave to pursue the remaining grounds be refused;
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> (iii) that there be a stay on the deportation orders herein pending the determination of the proceedings by the High Court; and
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> (iv) that costs be reserved.