Neutral Citation Number: [2010] IEHC 296

THE HIGH COURT

JUDICIAL REVIEW

2010 569 JR

BETWEEN

J.B. (A MINOR), D.Q.B. & A. B.

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 14th day of July, 2010.

1. There are two applications before the Court in this proceeding: an application for an interlocutory injunction to restrain the deportation of the third named applicant on foot of an order made under s. 3 of the Immigration Act 1999 dated 1st April, 2010 and an application for leave to seek judicial review of that order with a view to its being quashed.

2. As compared with other applications to injunct deportation which come before this Court in analogous circumstances of Nigerian parents with an Irish-born citizen child, this case is unusual in that the parent to be deported is the mother and the child, while born in the State, was conceived in Nigeria when her father, the second named applicant was visiting the third named applicant there in early 2009. The father had been granted residence in the State in 2005 on the basis that he was living here with his brother who had in turn been granted residence as the father of an Irish born child.

3. The child was born here on 10th November, 2009, his mother having come here, she says, to find her boyfriend and make him face up to his responsibilities, her father in Nigeria having disowned her. She nevertheless applied for asylum, a claim which was understandably rejected. This led to the refusal of a declaration of refugee status and then to the making of the deportation order of 1st April, 2010. In advance of the making of that order representations had been made to the Minister on behalf of the third named applicant by a letter of her solicitor dated 28th September, 2009.

4. The deportation order is, as usual, supported by the Minister's memorandum of examination of file compiled within the department setting out the analysis of the statutory considerations under s. 3 (6) of the Act of 1999, the statutory prohibitions against deportation and the representations made to the Minister as well as the appraisal of the rights of the applicants both under the Constitution and the European Convention of Human Rights.

5. The case to be made as to the illegality of the contested order if leave is granted is essentially directed at the adequacy of the appraisal made in balancing the interests of the State in implementing the deportation against the countervailing interests of the applicants as a family. Reliance was placed in particular upon the invocation by Fennelly J. in his judgment in *A.O. and D.L. v. Minister for Justice* [2003] 1 IR 1, of the entitlement and birthright of every person born on the island of Ireland to be part of the Irish nation as declared in Article 2 of the Constitution. This, it is argued, illustrates the fundamental right of any Irish citizen child to grow up and to be educated in the State in order to be able to take full advantage of the benefits of being an Irish citizen. In the circumstances of this family where the child is not yet a year old and the father alone is entitled to work (although he has in fact been unemployed since January, 2010,) it is submitted that it is disproportionate to deport the child's mother given that less restrictive measures would be available to secure the two substantial reasons associated with the common good which are identified in and relied upon at the conclusion to the file note namely "to safeguard the economic wellbeing of the country" and "to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-nationals in the State".

6. The Court has decided to grant leave in this case but only upon two grounds which are more limited and more closely focussed than those canvassed in the Statement of Grounds. Several of the grounds and arguments raised do not, in the Court's view, justify the grant of leave. In a case where the file note clearly demonstrates that the Minister's analysis has carefully and thoroughly extended over all the required considerations mentioned above it is not a valid ground for judicial review simply to allege that the contested order breaches the Constitution or violates Convention rights; or fails to weigh relevant factors adequately or that it is unreasonable or *ultra vires*. It is not enough simply to disagree with the Minister's appraisal as disproportionate or unbalanced: it is necessary to particularise some specific omission of a relevant consideration; some mistake of fact or error of law; some irrelevance or other flaw which is so material to the tenability of the conclusion as to render the decision unlawful by reason of the excessive impact of the deportation on the family as compared with the interests of the State which are sought to be pursued or protected.

7. Thus, it is clear that no issue arises in this case by reference to Article 8 of the Convention. Unlike many of the cases considered by the Strasbourg Court with regard to the removal or exclusion of a family member from a contracting state in the context of Article 8 (*Beljoudi, Boultif*, for example,) the connection between this State and the adult applicants is recent and, in the case of the third named applicant fortuitous and possibly contrived. As indicated above, the third named applicant became pregnant in Nigeria when her boyfriend was on holiday there and the child happens to have been born in the State because she pursued his father here. Both parents are natives of Nigeria and have spent most of their lives there. The child is entitled to Nigerian citizenship. Not only are there no insurmountable obstacles to them preserving their existing brief family life by relocation to Nigeria, there are no actual difficulties of language, religion, culture, politics or any other relevant factor which would make it difficult for them to do so. The child has not yet, one would assume, learned to talk and even perhaps to walk and so may well be able to adapt to the country of his alternative citizenship. Having regard to the settled principle of Article 8 that no Contracting State is obliged to accept a choice of residence made by non-nationals, no stateable case can be made in these circumstances that the adult applicants have such an established family life in this country that the expulsion of the third named applicant would constitute an interference with that life of such gravity as to make it unlawful. The second named applicant has been a settled (although not necessarily a permanent,) resident only since 2005: the third named applicant entered the State illegally and has been here on that basis a little over one year.

8. The other issue raised which the Court considers manifestly unstateable is that expressed in somewhat diffuse terms at para. 7 of the grounds relied on in s. 5 of the Statement of Grounds. It is said that there is no "independent review mechanism" available to the applicants of decisions made under s. 3 of the 1999 Act which would, as it was put, "allow a full and independent assessment to be made of all of the facts and circumstances of the case". Although the provision is not mentioned in the Statement of Grounds, this appears to be an attempt to invoke Article 13 of the Convention which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

9. The Court considers this argument to be unfounded because it is for the very purpose of quashing the contested order that the present application is now before the Court. It is not disputed that the judicial branch of this State is constitutionally established as independent. The High Court is thus an independent national authority in that sense. A decision of the Minister to deport is explicitly subject to the remedy by way of judicial review before the High Court by virtue of the legislative scheme of the 1999 Act and s. 5 of the Illegal Immigrants (Trafficking) Act 2000 which, by laying down the terms of access to the remedy of judicial review, expressly recognises the supervisory jurisdiction of the Court in relation to deportation orders. If a decision to deport made by the Minister is bad it can be quashed by judicial review. It is sometimes suggested that judicial review is not a full effective remedy as compared with a right of appeal because the High Court cannot substitute a new decision for that of the administrative decision maker. It can only quash the decision for error of law, error fact or manifest unreasonableness including, nowadays, disproportionality. That is, in this Court's judgment, to underestimate the comprehensive and flexible character of the modern judicial review remedy in this jurisdiction. The High Court can annul and set aside a decision by *certiorari* and injunct its implementation by prohibition. It is true, as mentioned, that the Court cannot itself make a new decision but by the judicious and flexible use of declaratory relief it can identify why an impugned decision is mistaken or fails to comply with the obligations arising out of the European Convention of Human Rights Act 2003. By that means it can circumscribe the terms upon which the administrative decision maker is required to make a new decision. In the view of the Court, the jurisdiction of the High Court in the review of administrative decisions including deportation orders is at least as ample by way of effective remedy as that of the administrative courts of continental jurisdictions or, for that matter, the Court of Justice of the European Union under Article 263 of the Treaty on the functioning of the Union. Furthermore, insofar as the concept of "effective remedy" extends to an entitlement to compensation where a right or freedom has been violated, the High Court has jurisdiction in the exercise of its judicial review function to award damages. Thus the scope of the jurisdiction of the High Court in reviewing the legality of a decision made under s. 3 of the 1999 Act clearly fulfils the criteria established by the case law of the Strasbourg Court for the provision of an effective remedy before a national authority in accordance with Article 13. The High Court is independent and its orders in judicial review are binding and enforceable. Furthermore, as is made clear by the judgment of Denham J. in the Supreme Court in the *Oguekwe* case, the High Court in reviewing the validity of a deportation order is not only entitled but obliged to ensure that the order has been validly made in the light of any substantive arguments raised based upon alleged violation of Convention rights and freedoms.

10. A further part of this claim can also be eliminated. In the Court's judgment no arguable case can be raised as to the validity of the two reasons identified as substantial reasons for the deportation by the Minister in the conclusion to the file note as mentioned above. In circumstances where the second named applicant is not in employment and the third named applicant has poor prospects of employment in the current economic climate, it cannot be said that the conclusion on this point is without valid foundation or unreasonable. It is submitted nevertheless that this approach is inconsistent with the constitutional recognition of the contribution made by a wife and mother to the common good by her work in the home. That is possibly so as an observation but the Minister is entitled to be concerned when assessing the need for deportation as against granting leave to remain to have regard to the realities of current economic conditions. How is the third named applicant to support her child if she remains when neither she nor the child's father is in employment and has no apparent means of support other than the public purse? Secondly, this is not a case in which it could be said that the Minister's concern for the State's interest in maintaining the integrity of its asylum system and control of its borders was unfounded or unreasonable. This is a case in which the asylum system has, in effect, been manipulated. The child was conceived while the father was on holiday in Nigeria. The third named applicant came here to find him but made what was in effect a bogus asylum application presumably in order to gain time so that the child would be born in the State. In accordance with Irish law of course the child is an Irish citizen with rights which must be vindicated but that does not preclude the Minister having legitimate regard to the circumstances in which the child's citizenship was contrived to be obtained when considering the continued presence in the State of the parent.

11. On the face, of it the Minister's analysis in the file note has carefully followed the guidelines set out in the *Oguekwe* case in the Supreme Court in considering the constitutional rights of the child and in seeking to balance the interests of the child against those of the State in deporting the mother. Nevertheless the Court is satisfied that an issue of sufficient substance has been raised as to the adequacy of the consideration given to the fact that the child is so very young and that it is the mother who is to be deported. Has the correct proportionate balance been struck in considering the position of the child if left in the State on the one hand or if forced to leave with her mother on the other? Have any less restrictive solutions been considered and why were they regarded as unacceptable?

12. In the view of the Court the only substantial issue raised in this case relates, therefore, to the entitlement of this very young infant to either be protected against a constructive or *de facto* deportation with its mother or to be required to forfeit the care of its mother in order to exercise its constitutional entitlement to remain in the State. This is a serious issue and is therefore one of substance which ought not to be adjudicated upon in a leave application. As has been pointed out by counsel, the consequence of a deportation order in these circumstances should the child remain with the father in exercise of her entitlement as a citizen, is that the mother may never be entitled to visit her here as she grows up. Once deported, the third named applicant, at least in principle, is banned for life from re-entering the State.

13. For these reasons the Court is satisfied that a substantial ground has been raised in this case which justifies the grant of leave but the basis for the challenge will be more directly focussed on those tenable issues as identified above. Leave will therefore be granted to seek the reliefs sought in s. 4 of the statement of grounds at paras. (i), (iv) and (vi) (the remainder are superfluous). Leave may be sought on the basis of the following two grounds:

> (i) The respondent 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 third named 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;
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> (ii) While stating that a deportation order was the least restrictive process available to achieve the legitimate aims of the State identified as substantial reasons for the deportation, the respondent did not in fact consider and weigh in the balance any other less restrictive measures available to him to control the limited or temporary presence of the third named applicant in the State.

14. As these are substantial grounds as to the possible invalidity of the deportation order, it follows that a fair issue for trial has been established. Having regard to the young age of the child and its effective dependence from day to day on the care of its mother, the balance of convenience clearly lies with permitting mother and child to remain together pending the determination of the proceeding. An interlocutory injunction will therefore be granted pending the hearing of the substantive application.

15. There is a preliminary issue raised as to the need for an extension of time for the bringing of this application. The delay in this case is only marginal. The deportation order was communicated by letter of 14th April, 2010 which was presumably received on the 15th or 16th April, such that the period expired on or about 30th April. This proceeding was initiated on 5th May. Having regard to the implication of the issues for the future of the Irish child the Court is satisfied that there is good and sufficient reason to grant the short required extension.