Neutral Citation: [2016] IEHC 426

THE HIGH COURT

JUDICIAL REVIEW

[2015] No. 658 J.R.

Between

F. E. C., P. N. C.

and

E. C., D. C., S. C., Z. C. (minors suing by their next friend P. N. C.)

Applicants

and

MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Mr. Justice Colm Mac Eochaidh delivered on the 25th day of July 2016.

Introduction:
1. The first and second named applicants are husband and wife. The third to fifth named applicants are minors suing by their Mother, the second named applicant. The applicants reside together as a family unit.

2. The applicants are seeking leave to seek an order of *certiorari* quashing the decision of the respondent of the 19th October, 2015, refusing to revoke the deportation order of the 29th November, 2015, against the first named applicant. In accordance with the decision of Humphreys J. in K.R.A. v. The Minister for Justice and Equality [2016] IEHC 289, [2015 No. 299 J.R.], s. 5 of the Act of 2000 applies to this application. The application must establish substantial grounds that the decision is unlawful to obtain leave to seek judicial review.

Immigration history:
3. The first and second named applicants applied for asylum in the State on the 21st September, 2004. These applications were refused and deportation orders were issued on the 29th November, 2005. The third named applicant was born on the 27th October, 2006, and is a Nigerian national. An application for asylum was made on his behalf and the second named applicant was permitted to remain in the State pending the issue of a decision on her son's asylum application.

4. The first named applicant was deported in 2007. He returned to the State illegally in or around June 2008 using a passport in the name of F. E. E.. He has since remained in the State without permission. The fourth named applicant was born in the State on the 9th October, 2008, and an application for asylum was similarly made on his behalf. The fifth named applicant was born on the 3rd March, 2010, and is a Latvian national owing to his father's Latvian citizenship. The second named applicant has since lost contact with the father of the fifth named applicant and the first named applicant is the child's *de facto* father.

5. The second named applicant was granted a stamp 4 permission to remain in the State on the 25th February, 2014, which extended to her Nigerian national sons, the third and fourth named applicants. On the 26th November, 2014, the first named applicant applied for revocation of the extant deportation order of the 29th November, 2005. The respondent refused this application by decision dated the 6th October, 2015, affirming the deportation order and amending same to include the name "F. E. E.."

Legal Grounds:
6. The first ground upon which relief is sought is set out as follows:-

> "1. In refusing to revoke the deportation order against the first applicant, the respondent breached the applicants' rights to respect for private and family life pursuant to article 8 ECHR. The respondent placed undue weight on the interest of the state in protecting the integrity of the immigration and asylum system and failed to place sufficient weight on other factors pertinent to the particular facts of this case…"

7. In support of this ground, counsel for the applicants, Ms. Aoife McMahon B.L., sets out the factors, purportedly established by the European Court of Human Rights in *Nunez v. Norway* (App. No. 55597/09, delivered on the 28th June 2011) that she says should have been considered by the respondent in assessing the first named applicant's revocation application. Those factors are set out in *Nunez* as follows:-

> "…Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. … Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that e persistence of that family life within the host State would from the outset be precarious."

8. This ground is augmented by written submissions which allege that:-

> "…the respondent erred in law in failing to adequately weigh all the pertinent factors, as establihed in the above case law of the European Court of Human Rights, in determining whether or not to revoke the deportation order against the first applicant…"

9. This ground is formulated as one might plead an appeal point, framed in a general way. I have carefully read the written submissions, and I have not been able to detect what precise legal complaint is said to undermine the decision in suit. Paragraph 15 of the written submissions attempts to explain the ground as follows:-

(i) "While the documents submitted and relevant factors were listed, there was no analysis of what weight these should be given as against the countervailing interests of the state."

I am not in a position to identify the legal argument attempted to be made here. No authority has been cited in support of the suggested proposition that it is unlawful not to provide an "analysis of what weight should be given" to "submitted documents and relevant factors" "as against the countervailing interests of the state".

(ii) "There was no consideration of the fact that the family unit would effectively be ruptured…"

As far as I can tell no such case was expressly made in any of the numerous submissions delivered to the Minister. The submissions on the rights of the children to the companionship of their father is expressly identified and considered in the decision.

(iii) "… no consideration of … the extent of the first applicant's ties with the state"

My reading of the decision is that any evidence or case made in relation to the applicants' connections with the State were fully considered.

(iv) "…no consideration … [that] this was not a case of deportation following a criminal conviction..."

No illegality could attach to the failure of the respondent to take account of what this case was not about or to otherwise actively consider some other irrelevant feature.

(v) "There was no consideration of the fact that the first and second applicant had been married before entering the state and so this was not a case of family life being created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious."

The decision maker was not faced with the creation of family life by contracting an Irish marriage in Ireland, and a resulting requirement to give due recognition to consequences thereby arising. The decision maker was not obliged to consider irrelevant factors, and any argument that there was a failure to consider irrelevant factors - such as the fact that parties were married before entering the State - is a patently unstateable ground. In any event, family life was created and extended by the birth of children in the State and was fully considered. I cannot detect any identifiable legal complaint here.

10. Finally it was argued that the best interests of the children were not subject to "adequate analysis." This plea fails to identify a legal error in the decision in suit which sets out the submission made in respect of the children. The decision expressly states that the best interets of the children have been considered.

11. In my view, no arguable grounds, much less substantial grounds are made out here in line with the Supreme Court decision in *G.K. v. M.J.E.* [2002] 2 IR 418 in which Hardiman J. found:-

"A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."

12. Ground number two is set out in the following way:-

"In treating the first applicant in a different manner to the second applicant in circumstances where they are in the same situation in all respects except for their sex, the respondent breached the prohibition of discrimination under article 14 ECHR."

13. Counsel for the applicants submits that the respondent breached both Arts. 8 and 14 E.C.H.R. in refusing to revoke the first named applicant's deportation order in circumstances where the deportation order against the second named applicant had already been revoked and they have at all material times been in similar positions.

14. This ground must fail because there is no evidence that the only difference between the circumstances of the first and second named applicant is gender. It is clear from the papers that the Minster has decided that the second named applicant shall have temporary permission to remain in the State. Where complaint is sought to be made about the difference in treatment between these persons, it was incumbent on the parties to exhibit all relevant decisions of the Minister in relation to the second named applicant. This ground must be refused.

15. The third ground concerns the principle of "the paramount importance of the best interests of the child" which counsel for the applicant submits has been adopted in the jurisprudence of the European Court of Human Rights in the *Nunez* decision (supra). Counsel for the applicant submits that the material facts in *Nunez* are similar to the facts of this case and that the principle of the best interests of the child was the "tipping factor" leading the European Court of Human Rights to find a violation of Art. 8 E.C.H.R. in *Nunez*.

16. I am not of the view that this ground is made out. The points of contrast with the *Nunez* case are that the E.C.H.R. lists the particular aspects of the circumstances of the children which lead the court to conclude that it was "not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children (see para. 84 of the decision of the E.C.H.R. in *Nunez*). Insufficient particularity of pleading renders it impossible to appreciate how it is that the decision failed to consider the best interests of the children when the decision expressly states that it has done so. This ground must be rejected.

17. The fourth ground upon which relief is sought alleges a breach of constitutional fair procedures on the part of the respondent in her failure to bring to the attention of the first named applicant the lack of documentation attesting to the fact that he had been in the State since 2008 and not 2014.

18. Counsel referred to the requirements of the constitutional right to fair procedures in the context of an inquisitorial body such as the R.A.T. as set out in the decision of Edwards J. in *M.(K). v. R.A.T.* [2007] IEHC 300 as follows:-

"[The process of procedures] must be such as afford any person who may be affected by the decision of such body a

> reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest.
>
> …
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> If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it.
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> …
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> In setting out the above, I would wish to make clear, that the obligation to fairly draw the attention of the applicant or the applicant's advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination."

I note that these comments are apposite for a fact finding tribunal established to establish or refute an entitlement to refugee status.

19. I find that the decision of Cooke J. in *E.A.I. v. Minister for Jutice* [2009] IEHC 334 is a more useful authority because it addresses the role of the court in reviewing a decision on an application for revocation. Cooke J. said at para. 7:-

> "7. As Clarke J. pointed out in the case of *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 380, the circumstances in which a person refused refugee status can challenge the making of a deportation are necessarily limited and require the special circumstances which he describes in that judgment. It follows, obviously, that in a case where a valid deportation order exists, as here, the circumstances in which a refusal under section 11(3) of the 1999 Act to revoke such an order may be challenged are even more restricted.
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> 8. No conditions or criteria are stipulated in the section for the exercise of the Minister's power. Clearly however, it follows from first principles that the Minister must consider fairly the reasons put forward by an applicant for the request to revoke and he must also satisfy himself that no new circumstances are shown to have arisen since the making of the deportation order which would bring into play any of the statutory impediments to the execution of a deportation order at that point such as, for example, a change of conditions in the country of origin which would attract the application of the prohibition against refoulement in section 5 of the 1996 Act.
>
> 9. The Minister is not however obliged to embark on any new investigation or to engage in any debate with the applicant or even to provide any extensive statement of reasons for a refusal to revoke. Once it is clear to the Court that the Minister has considered the representations made to him and has otherwise exercised his power to decide under section 3(11) in accordance with all applicable law, the Minister's decision is not amenable to judicial review by this Court."

In view of these comments the respondent was not obliged to revert to the applicant to discuss weaknesses in his application for revocation. I reject this ground.

20. The fifth ground concerns the effect of deporting the first named applicant, as the fifth named applicant's *de facto* father, on the genuine enjoyment of the substance of the rights attaching to the fifth named applicant's status as a European Union citizen, based on judgments of the Court of Justice of the E.U. in *Zambrano* (case C-34/09) and the decision in *Dereci* (case c-256/11) which, according to the applicant, clarified that the right in *Zambrano* extends beyond situations in which the E.U. citizen child will not have to leave the Member State of which he or she is a national, Latvia in this case, to situations in which he or she will have to leave the territory of the E.U. as a whole.

21. No case was ever made to the respodent that the fifth named applicant would be deprived of his E.U. rights if the father was deported and, thus, no illegality can attach to a failure to deal with a submission never made. Nor is this case made on affidavit, and mother and step father have sworn affidavits in the case. It was never submitted to the Minister that if the father/step father is deported to Nigeria, the family will be compelled to leave the State and the E.U. also. Substantial grounds are not made out.

22. The sixth ground upon which relief is sought relates to alleged breaches of arts. 6 and 7 of Council Directive 2005/85 E.C. on minimum standards on procedures in Member States for granting and withdrawing refugee status. It is submitted that, while the State is entitled to determine the cases in which a minor can make an application for international protection on his or her own behalf, it must respect the right of such applicants to remain in the State pending the determination of their application. Interpreting the right to remain in light of Art. 24 of the Charter of Fundamental Rights on the rights of the child, it is submitted that the State must also uphold minor applicants' right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

23. I cannot find any submission to the Minster which argued that the deportation order should be revoked in view of outstanding asylum applications of minor applicants. No evidence has been furnished to support this ground on the affidavits. The Minister cannot be faulted for failing to consider matters never submitted in connection with the revocation application. This ground is not made out to the requisite standard.

24. Leave to seek judicial review is refused.