THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 4 J.R.]

BETWEEN

MARS CHIDERA PETERS IGBOSONU (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND MICHAEL IGBOSONU) AND MICHAEL IGBOSONU

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 4th day of October , 2017

1. The second named applicant arrived in the State with his family in April, 2007, aged around seventeen, and has resided in the State since that date. He is the father of the first named applicant, who is an Irish citizen, and is in a relationship with the child's mother who is also an Irish citizen. On the 30th January, 2009, the second named applicant was convicted of sexual assault and received a custodial sentence of two years, with one year suspended. The offence was the digital penetration of the vagina of a woman who fell asleep beside the second named applicant on a bus. In June, 2012, there was a proposal to deport the him. However, after that the Minister granted the second named applicant permission to reside in the State for a period of six months from the 7th August, 2013. The second named applicant's sentence was subsequently increased by the Court of Criminal Appeal to five years with two suspended and he was readmitted to custody where he remained until April, 2015. A subsequent application for permission to remain in the State was refused. He then began a new relationship. A deportation order was issued on the 27th May, 2016. An application to revoke this order was made on the 1st August, 2016, based *inter alia* on the rights of the child, unborn at that time. That application was refused. The first named applicant was born on the 15th November, 2016, and leave was granted on 3rd January, 2017, for the present proceedings challenging the s.3(11) decision.

2. I record my thanks to Mr. Conor Power S.C. (with Mr. Paul O'Shea B.L.) for the applicants and Mr. David Conlan Smyth S.C. (with Mr. Timothy O'Connor B.L.) for the respondents.

Can the applicant mount a s.3(11) challenge based on factors that were present when the deportation order was made merely because those factors were mentioned in the course of considering new factors?

3. There is repeated jurisprudence that the deportation order should not be challenged at the s.3(11) stage based on information that was available at the time of the original deportation order, which I discussed in *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289. The only matter which has changed since the making of the order is the birth of the first named applicant. Mr. Power, in the course of an able submission, contended that original offence was considered in the course of a s.3(11) examination but that does not mean that every day is a new day, and that mentioning the offence restarts the clock for challenge. It does not bootstrap the offence into being a new point. The main thrust of his challenge is misconceived because the second named applicant cannot challenge the Minister's reliance on the conviction in the context of these proceedings for the simple reason that that issue was there at the time of the original deportation order.

Was the decision refusing to revoke the deportation order proportional to the end sought to be achieved?

4. If I am wrong about the foregoing I will go on to consider this question. Mr. Power submits that "*the court has considerable jurisdiction to undertake a proportionality assessment by virtue of the decision of Hogan J. in* N.M. (DRC) v. Minister for Justice *[2016] IECA 217*". However at para. 53 of that decision, it was held that the court cannot review the merits of the decision. It can of course quash for unreasonableness, lack of proportionality, or if the decision unconstitutionally strikes at the substance of rights without justification, or is tainted by logical or factual error, and there is nothing startlingly new there in the discussion of that issue in *N.M*. Proportionality is not a wide, merits-based review as emphasised in *Meadows*, perhaps most forcefully in the dissenting judgment of Hardiman J. Mr. Power has a list of various factors which he alleges the Minister failed to consider including the time elapsed since the offence, the second named applicant's history in the State since then (relying on *E.A. v Minister for Justice* [2012] IEHC 371 in relation to the Minister's lack of consideration of the second applicant's alleged status as a settled migrant for certain periods), travel information to the effect that the child could not reasonably travel because of a necessity for inoculations, the family members the first named applicant would have in the State and various other matters. The allegation of failure to consider relevant matters is fundamentally misconceived. All these matters were before the Minister and absence of narrative discussion is not equivalent to failure to consider.

5. Mr. Power argued that the Minister had not discussed the second named applicant's likelihood of reoffending. That is also a misconceived argument. It is not for an applicant to programme and dictate the format and content of the Minister's considerations.

6. While the court can review for proportionality it must be to some extent deferential in doing so where judgments of public policy arise. It is perfectly reasonable for the Minister to send a clear message that non-nationals will be deported if they breach the criminal law of the State. Firstly, to uphold public policy and common good by reason of dealing with and marking the individual past offence even without the risk of future recidivism, secondly to prevent future reoffending by the individual concerned, or thirdly *pour encourager les autres*. Any one of those factors is a legitimate reason to adopt such a stance.

7. Proportionality also has to be viewed in the light of the precarious status of the second named applicant. The Minister accepted that art.8 of the ECHR applied and did carry out a proportionality assessment. However, while there are some periods of lawful residence, the relevant family life of the second named applicant was formed at a time when he was aware of his precarious situation. In such circumstances removal of a non-national family member would only breach art. 8 in exceptional circumstances (*C.I. v. Minister for Justice* [2015] IECA 192 *Nunez v. Norway* (Application No. 55597/09, European Court of Human Rights, 28th June, 2011)). Mr. Power relies heavily on the decision of the U.K. Supreme Court in *Hershan Ali (Iraq) v. Secretary of State for the Home Department* [2016] UKSC 60. However, in that decision the court did note having regard to the U.K. immigration rules, which are presumptively compatible with the ECHR, that great weight should generally be given to the public interest and the deportation of a foreign offender who had received a custodial sentence of more than twelve months. There is nothing fundamentally defective in the Minister's art.8 assessment. Article 8 is not a catch-all charter to hold up the deportation system. In *O.O. v. Minister for Justice and Equality* [2015]

IESC 26 *per* Charleton J. at para. 31, the question of the precarious status of the parties emerges as a central factor in that case. The Supreme Court in that case also placed reliance on *Butt v. Norway* (Application No. 47017/09, European Court of Human Rights, 4th March, 2013).

8. Fundamentally, the decision in this case involved an assessment of proportionality which is within the margin of appreciation conferred on the Minister, as stated by Clarke J. in *A.M.S. v. Minister for Justice and Equality* [2014] IESC 65 at para. 7.15. The court should only interfere where the Minister's consideration of that balancing exercise is clearly wrong so that it is demonstrated that the Minister could not reasonably have come to the view that the balance should be proportionately exercised in the way in which it was. As Murray C.J. said in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 at p. 723 that "*it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken".*

Was there a less restrictive process?
9. Reliance is placed on *Fleming v. Ireland* [2013] 2 I.R. 417 to suggest that the burden should possibly shift to the Minister to show that any alleged breach of rights is not disproportionate. Firstly there may be a distinction between the challenge to a statutory prohibition (as in *Fleming*) and a challenge to an administrative decision. Secondly the nature of the rights conferred on an illegal non-national who has been in breach of criminal law may be considerably less than that conferred on a person who has lawful status to remain in the State. But independently of that, the second named applicant's main complaint is that he was entitled to a positive reception to his "*less restrictive*" proposal, namely that he should be allowed to be present in the State for a limited time. It would make an absurdity of the immigration law of the State if an illegal non-national was entitled as a matter of law to positive acceptance of his own proposal to be allowed to remain rather than to be deported. It is not for an illegal non-national to adopt the bold if not impertinent stance of demanding that the Minister be prevented from making a decision that is entrusted to him by the Constitution and the law of State in the exercise of the executive power. No one could ever be deported if that somewhat absurd argument was to be accepted.

Were the best interests of the child considered, should the decision in *A.O.* have been relied on and was the judgment of the European Court of Justice in Case C-34/09 *Gerardo Ruiz Zambrano* complied with?
10. There are a number of intertwined points made about the first named applicant. The first named applicant will not be forced to leave either the State or the European Union. Any decision will be made by the first named applicant's mother. Therefore there is no *Zambrano* issue (see *E.B. (a minor) & Ors v Minister for Justice and Equality* ([2017] IEHC 531) and *M.Y. v. Minister for Justice and Equality* [2015] IEHC 7). It is argued that the Minister failed to undertake necessary enquiries as suggested in Case C133/15 *Chavez-Vilchez*. But there is no basis to suggest any such failure. Pursuant to the decision in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151, the Minister is required to engage in the proportionality exercise where members of a family are Irish citizens, but that has been done. Denham J., as she was then, noted in *A.O.* and *D.L. v. Minister for Justice* [2003] 1 I.R. 1 at para. 52 that the constitutional right of an Irish-born child to the company, care and parentage of its parents within the State was not absolute and unqualified and she went on to say in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 that in making a deportation order the Minister should weigh the factors and principles in a just manner to achieve a reasonable and proportionate decision and be satisfied there was a substantial reason for deporting the non-national parent in a manner that was not disproportionate. The Minister complied with these requirements. Clearly the Minister was entitled to conclude that it is not disproportionate to deport a non-national who has committed a serious criminal offence.

11. Mr. Power says that the child's best interest had to be considered but the Minister states in the decision that he did consider them. Mr. Power asks "*to what end and what were the considerations"*, and complains that it is simply set out that such best interests were considered, but an applicant is not entitled to a more detailed set of reasons. The making of a deportation decision is not a form of dialogue with an applicant.

Were the rights of the second named applicant's partner relevant if she were to become the wife of the second named applicant?
12. That is a hypothetical argument, and in essence it is part of the art.8 challenge which I have already dealt with. It is not a ground for invalidating the decision.

Order
13. The order, for those reasons, will be to dismiss the proceedings.