Neutral Citation Number: [2011] IEHC 404

THE HIGH COURT

[2011 No. 796 J.R.]

BETWEEN /

LAT, AFT (A MINOR SUING THROUGH HER FATHER

AND NEXT FRIEND LT), MFT (A MINOR SUING

THROUGH HER MOTHER AND NEXT FRIEND BG)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of November, 2011

1. This application for judicial review of a deportation decision made on the 29th July, 2011, presents but a single issue of law, namely, whether a deportation order made pursuant to s. 3(1) of the Immigration Act 1999 ("the 1999 Act") must be made *personally* by the Minister for Justice and Equality.

2. The applicants in the present proceedings are Nigerian nationals and are the subject of a deportation order made in the name of the Minister on 29th July, 2011, by Noel Waters, the Director General of the Irish Naturalisation and Immigration Service of the Department of Justice and Equality. It is the authority of Mr. Waters to make this decision in the name of the Minister which is the important issue of law which arises in this case. The deportation order has not been challenged on any other grounds.

3. It may be said immediately that no challenge has been made to Mr. Waters' general competency and it is clear from his affidavit that he is probably the most experienced civil servant in the State so far as immigration maters are concerned. Nor is it disputed but that Mr. Waters has been duly authorised by the Minister to make such orders. If, however, on its proper construction, s. 3(1) of the 1999 Act requires the Minister to make the decision personally, then it is plain that the ensuing deportation decision is invalid in law, irrespective of the general competency and status of Mr. Waters or whether the making of the order was otherwise justified.

4. The present proceedings originally came before me on 17th October, 2011, in circumstances where the applicants sought an interlocutory injunction restraining their deportation pending the outcome of a leave application. At the prompting of the Court, it was agreed that that application would be tried as the full hearing of the judicial review application itself. Given that the legal issue was such a net one, this seemed to be the most efficient use of judicial resources.

5. It is against this background that we may now consider the legal issue thus raised.

The Carltona Doctrine

6. *Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560 is the eponymous decision of the English Court of Appeal which conveniently describes a key constitutional doctrine governing the relationship between civil servants and the responsible Minister. Here private property had been requisitioned by a civil servant acting under the authority of the Minister pursuant to war-time regulations. The Minister in question had not, of course, actually taken the decision, but Lord Greene M.R. rejected the argument that the decision to requisition the property was invalid on that ground ([1943] 2 All E.R. 560, 563):-

> "In the administration of government in this country the functions which are given to ministers...are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in this country. It cannot be supposed that this regulation meant that, in each case, the minister in question should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department. Public business could not be carried on if that were not the case."

7. This principle has been expressly approved in this jurisdiction by the Supreme Court: see *Tang v. Minister for Justice* [1996] 2 I.L.R.M. 46 and *Devanney v. Shields* [1998] 1 I.R. 230. As the late Professor Wade pointed out in a passage from *Administrative Law* (7th Ed., at p. 357) (which was quoted by Hamilton C.J. in *Devanney*) "strictly speaking, there is not even delegation in these cases". The civil servants rather acts in the name of the Minister pursuant to a general principle of law which, in this jurisdiction, is buttressed by the provisions of s. 2 of the Ministers and Secretaries Act 1924 by virtue of which the Minister is invested as a corporation sole. The Minister thus has political responsibility for the acts of his civil servants and, of course, he is accountable in this regard to Dáil Éireann: see Article 28.4.1 of the Constitution. The Minister is also free to take any particular decision himself. The point nevertheless is that his responsible civil servants are free to take such decisions in the name of the Minister, save where this principle is negatived, either expressly or impliedly, by either the context of the relevant legislation or, perhaps, by the general law.

8. In what type of cases might the Minister be expected to take the decision personally by way of exception to the *Carltona* doctrine? There might, one supposes, be instances where the legislation stipulated that this should occur: "the Minister shall personally consider...." or "where the Minister is personally of the opinion that...". Speaking for myself, however, I cannot think of a case where the Oireachtas has ever actually expressly so imposed such a requirement in any statutory provision of this nature.

9. Insofar, therefore, as there are exceptions to the *Carltona* doctrine they would seem to arise by necessary implication. As Denham

J. put it in *Devanney* ([1998] 1 I.R. 230, 261) there are "exceptions in matters of significant importance where the Minister is expected to make the decision personally." The issue here really comes to down to whether this is one such case, but before examining this question, it may be convenient to discuss briefly the leading authorities.

The decisions in *Tang, Devanney* and *Oldahinde*

10. In *Devanney* the Supreme Court held that while the office of the District Court clerk was an important one, the decision to appoint nonetheless did not require to be taken personally by the Minister. This was in part because, as Keane J. noted, the role of the Minister vis-a-vis that the appointment was a purely formal one since he was in practice merely giving effect to a recommendation which had earlier been made by either by the Civil Service Commissioners or by an official responsible for personnel within the Department: see [1998] 1 I.R. 230, 263.

11. The decision to deport is, however, far from a purely formal one. It often requires a detailed appraisal of the facts, the application of Government policy, together with a consideration of statutory prohibitions (*e.g.,* the prohibition of *refoulement* in s. 5 of the Refugee Act 1996), constitutional provisions and the ECHR. I appreciate that up to very recent times the practice has been that the decision to deport has been taken by the Minister personally and this Court is well familiar with deportation orders which have been personally signed by previous occupants of the post of Minister for Justice and Equality. Indeed, a previous Minister informed the Dáil that "the ultimate step, that of deportation, is undertaken...only with the express authority of the Minister in the form of a signed deportation order": see 600 *Dáil Debates* at Col. 750 (12th April, 2005). But the usage of statute can only be of limited assistance in construing the vires of the Minister and it is entirely open to the present Minister to change existing practice assuming, of course, that there is a legal basis for doing so.

12. In *Tang*, in judgments delivered two years prior to *Devanney,* the Supreme Court upheld, applying *Carltona* principles, a decision made by a civil servant which refused the applicants leave to remain in the State. It is true that both Hamilton C.J. and Denham J. stressed that the decision at issue there did not amount to a deportation order. But those comments were made solely in the context of whether the applicants could still make a submission to the Minister on this question, which the Supreme Court affirmed that they could. The emphasis on the fact that the decision did not amount to a deportation order should not be understood as the Court tacitly suggesting that the *Carltona* principle might not apply to a decision of that nature. Indeed, Denham J. stressed that nothing "relating to the issue of deportation [is] relevant to the decision at issue in this case": see [1996] 2 I.L.R.M. 46, 63.

13. It is true that in *R. v. Home Secretary, ex p. Oladehinde* [1991] 1 A.C. 254 the House of Lords applied the *Carltona* principle to uphold the validity of a deportation order which had been made by a senior official and not by the British Home Secretary personally. In that case, however, the House of Lords had stressed that there had been three explicit limitations on the power of the Home Secretary to devolve decision making to his officials, so that the House was naturally "very slow to read into the statute a further implicit limitation": see [1991] A.C. 254 at 303 per Lord Griffith. For that reason, however, the legislation at issue here is not strictly comparable and the potential weight which might otherwise attached to that decision is consequently diluted.

Examining the 1999 Act

14. An examination of the 1999 Act yields little by way of assistance on this point, since it refers consistently to the Minister without any qualification, unlike the British legislation in *Oldahinde*. One returns, therefore, to a straightforward examination of the question of whether the structure, the context and the nature of the powers thereby conferred impliedly limit the scope of the *Carltona* doctrine. In the end, the matter is almost one of first impression.

15. While I accept that the decision to deport is often a complex one which has significant implications for the individual who is the subject matter of the order, I am not satisfied that it is of such intrinsic importance to the community at large that the decision can be made only by the Minister personally. It must also be recalled that the Minister for Justice has many onerous obligations. It cannot be suggested that the Oireachtas must have intended that he alone should personally take the decision to deport a given individual in every single case, since this would mean that he had responsibility for potentially hundreds of such decisions in any given year.

16. It follows, therefore, that this is also a case governed by *Carltona* principles and that the nominated civil servant remains free to make the decision in question. Of course, as I have already stressed, the Minister remains accountable to Dáil Éireann for all such decisions, both as a matter of constitutional law (in Article 28.4.1) and as a matter of political theory and reality.

Conclusions

17. It follows, therefore, that, for the reasons just stated, the deportation decision in the present case was lawfully made in the name of the Minister by Mr. Waters given that the application of the *Carltona* doctrine cannot be said to have been impliedly negatived by the provisions of the 1999 Act. In these circumstances, I must accordingly dismiss this application for judicial review.