Neutral Citation Number: [2010] IEHC 386

HIGH COURT

JUDICIAL REVIEW

2010 396 JR

BETWEEN

I. S. O. F. (A Minor) AND FOUR OTHERS

APPLICANTS

AND

MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

AND

ATTORNEY GENERAL AND HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Cooke delivered 2nd day of November, 2010.

1. This is an application for leave to seek a number of reliefs by way of judicial review including, in particular, an order of *certiorari*, in relation to a deportation order issued in respect of the fifth named applicant dated 9th March, 2010. To obtain leave the applicants must, of course, establish the existence of substantial grounds as to why that order is unlawful and ought to be quashed as required by s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

2. The fourth named applicant ("Mrs. F.") and the fifth named applicant ("Mr. F.") are husband and wife, nationals of Nigeria and the parents of the first, second and third named applicants. They arrived in the State in 1999 and the first and second-named applicants who were born on 6th April, 1999 and 22nd January, 2001 respectively are Irish citizens. The third named applicant was born in the United States of America in February 2002 while Mrs. F. was visiting her sister there and that child is a U.S. citizen as a result.

3. The two adult applicants were granted permission to remain in the State on the basis of their parentage of the Irish born children as from April 2000 and the permission of Mrs. F. has been renewed repeatedly since and is currently valid until 9th March, 2011. They also have three other children who were born in Nigeria and who are now adults. One continues to live in Nigeria. Two other daughters are in the State and have been granted permission to remain.

4. On a date unknown to the respondent and which the applicants have not found necessary to particularise in this proceeding, Mr. F. left the State on a trip to the United Kingdom where he was arrested, charged and subsequently convicted on 3rd August, 2004 of conspiracy to defraud and sentenced to four years imprisonment with a recommendation for deportation.

5. During 2005 in anticipation of his release from prison, representations were made on behalf of Mr. F. to the Immigration and Citizenship Division of the Department of Justice with a view to his being permitted to re-enter the State. His then current permission to remain had expired on 19th April, 2004. Having first asked for more information to be provided in order to enable the representations to be considered, the Immigration Division wrote to Mr. F.'s solicitors on 9th November, 2005 in these terms:

> "As I indicated in my letter of 17th October, 2004, Mr. F. has no current permission to remain in Ireland and as such Ireland is under no obligation to take him back. However, consideration was given to the possible renewal of his previous residency. Following careful consideration of all aspects of his case, and the representations that were received, it has been decided to refuse the request to take Mr. F. back in the interest of the common good. He has shown a pattern of personal behaviour that could pose a present threat to public policy. Accordingly, this pattern of personal behaviour outweighs the right of his Irish born children to his company in the State and as such I refuse him leave to enter and remain in Ireland."

6. On 26th December, 2005, Mr. F. illegally entered the State by road from Belfast. Over the following weeks he says that he obtained a new passport from the Nigerian Embassy in Dublin and at the end of January or early February 2006 presented himself to the Garda National Immigration Bureau with a view, as he puts it, to "regularising" his situation.

7. A first deportation order dated 7th March, 2006, was made in respect of Mr. F. but challenged by judicial review proceedings which were compromised and the order was revoked by consent in March 2007. On 21st April, 2008 the respondent notified Mr. F. of a further proposal to make a deportation order under s. 3 of the Immigration Act 1999 in response to which submissions were apparently made on his behalf by his then solicitors. Having changed solicitors, new submissions or representations were made on his behalf by letter of 14th September, 2009 and these were later supplemented by further documentation and representations on 23rd October and 17th December 2009. Additional submissions and documentation were submitted by letter of 20th January 2010.

8. The second deportation order of 9th March, 2010 which is the subject matter of the present proceeding was notified to the fifth named applicant by letter of 15th March, 2010 from the Repatriation Unit which gave the reasons for the Minister's decision to make the order in the following terms:

> "The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in s. 3 (6) of the Immigration Act 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State."

The letter required Mr. F. to leave the State by 1st April, 2010 and to present himself to the GNIB on that date in order to make arrangements for his removal from the State.

9. As usual, the letter notifying the order enclosed the departmental memorandum entitled "Examination of File under Section 3 of The Immigration Act 1999, As Amended". Counsel for the applicant did not take issue with the Court's observation at this memorandum ("the File Note") was, at least on its face, thorough, comprehensive and detailed in its analysis and assessment of Mr. F's history and circumstances and the situation of the applicant family. The File Note runs to some 28 pages and contains a careful summary of the representations and information put forward on behalf of Mr. F. and the family members by reference to each of the subheadings (a) – (k) of s. 3 (6); to the prohibitions on refoulement in s. 5 of the Refugee Act 1996 and s. 4 of the Criminal Justice (U.N. Convention Against Torture)Act 2000; followed by a detailed consideration of the rights and entitlements of the family including the Irish citizen children under Article 8 of the European Convention on Human Rights and Articles 40, 41 and 42 of the Constitution. Thus, on its face, the File Note follows carefully the advices given as to the approach to be adopted in making a deportation order set out in the judgments of Denham J. in cases such as *Dimbo v MJELR* (Unreported, [2008]IESC 26, and *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 (see in particular para. 85 of the latter judgment).

10. Although in the statement of grounds upon which the present application is based references are included to the respondent having taken into account "irrelevant considerations and/ or failed to take account of relevant considerations in his decision", in the manner in which it was argued before the Court, the challenge to the legality of the decision is based upon the proposition that the Minister's conclusion to the analysis and evaluation set out in the File Note is irrational and unreasonable because it is clearly disproportionate in the particular circumstances of this family to impose a "sanction of deportation" and thus a "lifelong expulsion" of Mr. F. from the presence and company of his wife and children.

11. This is not a case, accordingly, in which the decision is said to be vitiated by any material mistake of fact as regards any part of the history or circumstances of the applicants. In effect, the challenge seeks to rely upon the judgments of the Supreme Court in the case of *Meadows v. MJELR* [2010] IESC 3 and effectively invites the Court to examine the evaluation made in the file note with a view to determining whether the result is proportionate.

12. As counsel for the applicants acknowledged during argument, the High Court has, since the handing down of the judgments in Meadows, pointed out in a number of judgments that in order to substantiate a challenge to a decision of this nature as irrational or unreasonable because of its disproportionality, it is not sufficient merely to disagree with the evaluation made or the balance struck in the File Note. (See for example *S.O. & O.O. v MJELR* (Unreported, Cooke J. 1 October 2010.) It is not enough, in the view of the Court, to simply assert that the Minister ought to have given greater weight to some factors or less to others. The onus of establishing the unlawfulness of the decision lies with the applicant. The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister. As the Supreme Court made fully clear in the *Meadows* case, the test to be applied in assessing whether an administrative decision of this nature is irrational or unreasonable (including unreasonable by virtue of disproportionality,) remains that established in the *Keegan* and *O'Keefe* cases. Accordingly, the function of the Court is to consider the manner in which the evaluation has been made by the Minister as apparent from the order, the covering letter and the contents of the File Note, and ask itself in paraphrase of the terms formulated by Henchy J.: "Does the conclusion to deport the applicant flow from the premise upon which it is based; or does it, by reason of some flaw or failure in the way in which the balancing exercise was apparently approached, result in a conclusion which 'plainly and unambiguously flies in the face of fundamental reason and common sense?'"

13. As already indicated above (see para. 9,) the author of the File Note in this case expressly recognised that the deportation of Mr. F. would necessarily interfere with both his private life and family life as protected under Article 8 ECHR. But having analysed the factors considered relevant, it was concluded that, on balance, the interference would not be so grave as to involve an infringement of that Article because it would be in accordance with Irish law (s. 3 of the Act of 1999) and be necessary in a democratic society in pursuit of a pressing social need which was proportionate to the legitimate aim being pursued by the State. A threefold pressing need and legitimate aim was identified namely:

> (1) Maintaining control of the State's borders and operating a regulated system for the control, processing and monitoring of non-nationals in the State;
>
> (2) To prevent disorder and crime: and
>
> (3) To ensure the economic wellbeing of the country.

14. Equally, over some four pages of the File Note, the author examines, analyses and evaluates the information as to the circumstances of the family including the best interests and constitutional rights of the Irish born children. At pages 26 -28 the author explicitly recognises the rights and interests of the children in having the care and company of both parents. The representations made by the parents as to the role of the father in the care of the children is described. The author observes:

> "While the Minister must consider the best interests of the child, he is not obliged to act in the best interests of the child. The rights of all parties must be weighed and balanced in a fair and proportionate manner."

15. Without going in unnecessary detail into the variety of matters weighed in the balance in the File Note, it is clear that the following factors were treated as important on either side of the exercise. So far as concerns the interests of the State:-

> • Mr. F. had shown a "flagrant disregard for the integrity of the asylum and immigration procedures and laws of the State" by re-entering the State illegally when he had been expressly refused permission in December 2006;
>
> • He had been convicted of a serious crime in the United Kingdom and had received a substantial prison sentence;
>
> • Both because of the current economic climate and that conviction, Mr. F. had very poor prospects of every obtaining employment in the State;
>
> • While claiming to have had and to wish to continue his role as father to the children and as primary carer for them in the

home, the family had existed without him during the two and a half years of his absence in the United Kingdom and, should they wish to do so, the mother and children would be entitled to return with him to Nigeria.

16. So far as concerns the countervailing entitlements and interests of the family the File Note recognises that:-

> • Mrs. F. is in fulltime employment and since his return has relied on her husband's presence in the home to care for the children extensively;
>
> • In addition to the minor applicants, there are two other non-national children with the family in the State;
>
> • It is acknowledged that educational facilities for the children would be inferior in Nigeria;
>
> • Two of the children are now adults and Mrs. F. is entitled to continue to reside in the State with the three minor children if she so chooses; so that the first named applicant can continue an Education Plan which has been established for his attention deficit hyperactivity disorder (ADHD).

17. In substantiating the proposition that the balancing exercise thus set out in the File Note was nevertheless unlawful by reason of the disproportionality of the decision reached, counsel for the applicants identified four particular considerations as flaws in the process:

> (a) The finding that Mr. F.'s employment prospects were extremely poor, while not unreasonable having regard to the economic climate and the conviction, was nevertheless wrongly brought into the equation to the disadvantage of the family in circumstances where Mrs. F. was in fulltime employment and able to support the family while he was the primary carer for the children in the home;
>
> (b) No consideration was given to possible alternative measures short of deportation to protect the integrity of the immigration system such as prosecution of Mr. F. for the illegal re-entry;
>
> (c) The indefinite duration of the order in expelling the applicant from the State rendered it disproportionate;
>
> (d) While acknowledging that the Minister was obliged to "consider the best interests of the child" but not act in those interests, the Minister had failed to give "due regard" to the interests of the children by making them the primary consideration in the balancing exercise.

18. In the judgment of the Court these four factors identified in the File Note whether taken individually or collectively could not be said to constitute a substantial ground for maintaining that the conclusion reached fails to follow from the premise upon which it has been based or that it plainly and unambiguously flies in the face of fundamental reason and common sense. All of the matters, factors, circumstances and events pertinent to the applicants and their history as considered in the File Note are based upon undisputed facts or correct information. That is their premise. It is not alleged that the balancing exercise has been distorted by the inclusion of irrelevant material or the omission of matters that would be relevant, merely that the emphasis or weight is misplaced. In that sense the conclusion stands squarely on the premise from which it is drawn namely the circumstances and history of the family and the conduct of Mr. F.

19. It must be borne in mind that Mr. F. had been given temporary permission to remain in the State on the basis of being the parent to the two Irish born children (see para. 3 above,) but forfeited that permission by his own conduct in the United Kingdom. He then effectively compounded his difficulties under the immigration laws of the State by the deliberate re-entry in December 2005 in defiance of the explicit refusal of permission to do so. It could not, in the judgment of the Court, therefore be said that it was in any sense unreasonable or disproportionate for the Minister to regard those factors as grave and substantial reasons for seeking to ensure the interests of the State in preventing crime and disorder and maintaining the integrity of the immigration system should prevail.

20. It is true that the proportionality of a decision of this nature depends upon the adverse consequences it will have being no greater, so far as is practicable, than is required in order to protect the interests or aim which the State seeks to pursue. For that reason there may well arise cases in which it is appropriate and possible to consider measures alternative to deportation. That, however, is not the case here. In effect, Mr. F. has had the benefit of one possible alternative in the past and, as indicated above, forfeited the temporary residence permission which he had been granted. Contrary to the submission made on behalf of Mr. F., the maintenance of the integrity of the immigration system is not necessarily maintained adequately by a prosecution for illegal entry in circumstances where the person concerned has already abused the immigration system. To oblige the Minister to resort to a prosecution (even assuming he would be in a position to ensure that one was initiated by the Director of Public Prosecutions), while also foregoing the possibility of deportation would be tantamount to requiring him to grant a new permission to reside thereby permitting Mr. F. to benefit from the deliberate disregard of the prohibition on his entering the State. The integrity of the immigration system by which the State exercises its sovereign authority to stipulate the numbers and identities of foreign nationals who are permitted to enter and reside in the State and the conditions for doing so, could not be said to be maintained if the Minister can be required to forgo depriving an illegal entrant of a advantage acquired by deliberate misuse of the system.

21. It is also true that the duration attached to any disadvantage by an administrative decision is a factor which bears upon its proportionality and that a deportation order under s. 3 of the Act of 1999 is made without limit in time. That feature of the exercise of the statutory power must however, be viewed in the full context of that section including, notably, the fact that the Minister is empowered under subs. (11) at any time to amend or revoke a deportation order. Counsel for the Minister confirmed to the Court that all applications for revocation are duly considered on their merits when received. The making and execution of an order does not therefore preclude the deportee applying at some point in the future for its revocation in order to enable a revisit to the State to be made. Furthermore, although counsel for the applicants has characterised the deportation order as involving a "lifelong expulsion" of Mr. F. thereby implying a complete loss of contact with the family, Mrs. F and the children are not refugees and there is no reason why they are precluded from visiting the fifth named applicant in Nigeria or elsewhere.

22. As indicated, the criticism made of the File Note in relation to the finding as to the poor employment prospects of Mr. F., is not that it is unreasonable or unjustified but that it is given undue weight by the failure to have regard to the fact that Mr. F.'s role is that of a primary carer in a household where the other adult is in fulltime employment. It was suggested that if the roles were reversed and it was the father who had permission to reside and was in fulltime employment, it would clearly be untenable and incompatible with the recognition in Article 41.2 of the Constitution of the role of the woman in the home, to base a decision to deport the mother on a finding that her employment prospects were poor.

23. It must first be remembered that under para. (f) of s. 3 (6) of the Act of 1999, the employment prospects of the proposed deportee must necessarily be investigated and considered by the Minister. The Court does not consider that any undue or disproportionate use has been made or emphasis placed upon the finding. The Minister was clearly entitled to take a forward-looking view of the circumstances of Mr. F. and was both entitled and obliged to respond to the case that had been made on his behalf in the representations of 13th January, 2010 where it was said that: "The applicant is committed to working to support his family when it is legally possible."

24. Finally, it was submitted that: "In assessing the children's rights under Article 40.3 it was not sufficient solely to consider their 'best interests'. The respondent had to have 'due regard to their welfare' as child citizens of the State and their welfare had to be assessed according to their best interests." It was argued that the respondent was obliged to treat their welfare as the "first and paramount consideration" as provided for in s.3 of the Child Care Act 1991.

25. It seems to the Court that, on any reading of the detailed evaluation made in the File Note this is precisely what the Minister has done. He has looked at all facets of their life and circumstances including their ages, stages of education, the circumstances that would face them if they did choose to move with their mother and father to Nigeria, the ADHD condition of the eldest child and the descriptions given in the representations as to the nature and quality of family life as it has existed since their births. Indeed, although reference is made to the fact Mr. F. was absent from that family for two and a half years, the author of the File Note has not sought to exclude from consideration his involvement with the family since his unlawful return. The passage in the File Note is, in the judgment of the Court, correct in stating that the Minister must consider the best interests of the children but "is not obliged to act in the best interests" in the sense of "act only or exclusively" in the interests of the children to the exclusion of any other interests. The Minister had given due regard to the interests and welfare of the children by satisfying himself that the two possibilities relevant to their best interests remain open to them. They can remain in the State with their mother if that is the choice made by the family thereby continuing to have access to the standards of education, healthcare and other facilities that their interests and welfare require. Alternatively, if they consider that their best interests lie with the continued presence and care of both parents, they are entitled and able to return to Nigeria with the father. The State is not bound by the choice of residence the family wishes to make and it does not follow that a decision to deport the father becomes disproportionate by reference to its impact on the position of the children because the choice to remain is made. The position might be otherwise if for some legal or practical reason it was impossible for the family to return as a unit to the deportation destination.

26. The expression quoted from s.3 of the Child Care Act is addressed in that act to the Health Service Executive for the purposes of its discharge of its particular statutory functions. It has no application to the discharge of the Minister's functions under s.3 of the Act of 1999. The obligation to have due regard to the interests and welfare of the children derives from the protection afforded them under the Constitution and the Convention. It is possibly difficult to appreciate how the interests of the State which are always general and social in character (being related to the common good and the public interest,) can be set against the interests of children and family members when these are identifiable in terms which are by contrast, concrete, direct and immediate. Nevertheless, that is what the law requires the Minister to do and the Court is satisfied that, having regard to the matters expressly considered by the Minister and particularly the salient factors listed above in paragraphs 15 and 16, it could not be argued that the balance struck by him in the present case unambiguously flies in the face of reason or commonsense.

27. For all of these reasons the Court is satisfied that the arguments thus advanced do not serve to establish the existence of any substantial ground to the effect that the decision was invalid or ought to be quashed by reason of any disproportion in the evaluation made and the balance struck as between the interests of the State and the interests of the fifth named applicant and his family.

28. The application for leave to seek judicial review must therefore be refused.