Neutral Citation Number: [2010] IEHC 457

THE HIGH COURT

JUDICIAL REVIEW

2010 396 JR

BETWEEN

I.S.O.F. AND 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 the 17th day of December 2010

1. On the 2nd November, 2010, the Court delivered its judgment on an application made on behalf of the above named applicants for leave to seek judicial review of an order to deport the fifth named applicant dated the 9th March, 2010, made by the respondent. As set out particularly in para. 17 of that judgment, the grounds for which leave had been sought to apply for an order of *certiorari* quashing the deportation order were directed at the validity and adequacy of the evaluation made of the impact of that order upon the rights of the applicants as members of the family of the fifth named applicant. The reasons for making the deportation order had been set out in a detailed memorandum entitled "Examination of File Note" in which the statutory considerations required to be taken into account under s. 3(6) of the Immigration Act 1999, were examined and a balancing exercise was carried out by way of assessment of the justification for making the order having regard to the representations that had been made on behalf of the applicants and the interference which the deportation would constitute with their family life.

2. In essence, the case was made that the evaluation and balancing exercise thus carried out was unlawful because it brought about a result which was clearly disproportionate thereby rendering the decision unreasonable. For the reasons set out in detail in that judgment, the Court declined to grant leave. It considered that no substantial ground had been made out to the effect that the analysis and evaluation made by the respondent leading it to its decision failed to meet the test of irrationality or unreasonableness applicable to judicial review in this context as most recently confirmed by the judgments of the Supreme Court in *Meadows v. M.J.E.L.R.* [2010] I.E.S.C. 3.

3. The applicants now apply for a certificate of leave to appeal against that judgment to the Supreme Court under s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000. Two issues or points of appeal are put forward as the basis for this application as follows:

> 1. In determining, on judicial review, whether an administrative decision which interferes with an individual rights, as protected by the Constitution and/or European Convention on Human Rights, is "proportionate", is the court confined to an assessment of whether the decision plainly and unambiguously flies in the face of fundamental reason and common sense" (i.e. is it based on an accurate appraisal of the facts of the case) or can and/or should the court examine the competing rights involved and determine whether in its view the correct balance has been struck in respect of those rights?
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> 2. If the answer to No. 1. is that the court can and/or should examine the competing rights involved and determine whether in its view the correct balance has been struck in respect of those rights, what other principles by which the correct balance should be determined. For example:
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> (a) does Article 40.3 of the Constitution require that in having due regard to the welfare of the a citizen child, the "best interests" of that child should be weighed as a paramount consideration in the balancing exercise;
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> (b) does the "correct balance" that the degree of interference with the individuals rights must be shown to be "necessary in a democratic society" (to use the words in Article 8.2 of the European Convention on Human Rights);
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> (c) is the following template an appropriate one for assessing whether an interference with a fundamental right is proportionate, ie. that the court should assess the nature and gravity of the individual's asserted right; the degree of interference with that right; the countervailing interest of the decision-maker; and, finally, whether the degree of interference with the individual's right is sufficiently limited that the measures adopted by the decision-maker can justifiably prevail; and
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> (d) should the court allow a margin of discretion of the decision-maker in determining whether the "correct balance" has been struck?

4. The criteria which fall to be applied to an application for a certificate are now well settled and this Court in its judgment of the 26th November, 2009, in *I.R. v Minister for Justice, Equality and Law Reform,* endeavour to summarise the principles which have been laid down in the preceding cases mentioned therein. These include:-

- The point of law proposed to be raised must be one of exceptional importance:

- It must be raised in an area of law which is uncertain so that there is a public interest in resolving the uncertainty for the benefit of future cases;

- The uncertainty of the point of law must be genuine and not merely a difficulty in predicting the outcome of the appeal;

- The point of law must arise out of the court's judgment and not merely out of some discussion in argument at the hearing;

- The requirements of public importance and the public interest in the desirability of an appeal are cumulative requirements.

5. In essence the case made for the grant of a certificate in this instance is based upon the proposition that the judgment of the court creates or reflects an uncertainty as to the state of the law following the judgments of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] I.E.S.C. 3. In the judgments of the majority of the Court in that case, the test as to unreasonableness or irrationality in the judicial review of an administrative or quasi judicial decision was reaffirmed as that which had been laid down by the Supreme Court in the earlier cases of *Keegan v. Stardust Tribunal* and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The court will not interfere with such a decision on grounds of irrationality or unreasonableness unless it is shown that the conclusion upon which the decision was based did not flow from its premise or plainly and unambiguously flies in the face of reason and common sense. The Supreme Court nevertheless made it clear that in applying that test the concept of "unreasonableness" included that of "lack of proportionality". In other words, if an applicant demonstrates that the conclusion upon which an impugned decision was based was clearly disproportionate in that its detrimental impact on the rights or interests of the addressee or other parties concerned, is materially greater than is required to protect the interest sought to be safeguarded and is thus disproportate to the object sought to be attained, the decision can be quashed by the High Court as irrational or unreasonable.

6. The issue now sought to be raised in this application for a certificate is directed in particular at the effect given by the Court in paragraph 12 of its judgment to the *Meadows* decision as follows:-

> "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 to 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'Keeffe* 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 to ask in paraphrase of the terms formulated by Henchy J.:
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> > 'does the conclusion to deport the applicant flow from the premise upon which it is based; or does it, by reason for some flaw or failure in the way in which the balancing exercise was apparently approached, result in a conclusion in which 'plainly and unambiguously' flies in the face of fundamental reason and common sense?'"

7. Inherent in the present application is the proposition that because s. 5(3) of the Illegal (Trafficking) Act 2000, requires that any challenge to the validity of a deportation order can only be made by way of an application for judicial review under O. 84 of the Rules of the Superior Courts, the constraints under which the judicial review remedies are available preclude the High Court from reassessing the proportionality of a deportation order decision in the sense indicated by the *Meadows* judgment. These constraints include particularly the rule of the common law procedure to the effect that the High Court is concerned with the legality of the process by which the decision is reached rather than with the "substantive" merits of the decision itself; the rule that the court does not substitute its own view of the merits for that of the decision maker; and the requirement that the validity of the decision is assessed by reference to the information made available to or required to be known by, the decision maker at the time the decision was made. New information coming to light subsequently is not taken into account for the purpose of assessing validity.

8. In the judgment of the Court, the law in this regard has been settled with sufficient clarity by the judgments of the Supreme Court in the *Meadows* case, such that no point of law of exceptional importance could be said to be raised by reference to those judgments by the ruling now sought to be appealed. The first question proposed (see paragraph 3 above,) is based upon the proposition that there is a necessary contradiction between, on the one hand, confining an assessment of the proportionality of a decision to the issue as to whether it is at variance with reason and common sense; and on the other, examining the competing rights of the parties to determine if a correct balance between them has been struck in the decision. In the judgment of the Court no dichotomy exists as between the necessity to evaluate the decision for disproportionality and the need to do so by applying a test as to whether the evaluation already made is plainly or unambiguously unreasonable. Where the issues raised relate to fundamental human rights (whether absolute as in the *Meadows* case – the prohibition on refoulement in s. 5 of the Refugee Act 1996 – or qualified as in the present case by reference to Article 8 of the Convention,) the High Court is entitled and obliged to make an assessment as to proportionality of the conclusion reached by examining the factors upon which the decision maker has relied in assessing whether the rights which the State seeks to protect can and should prevail over the rights and interests of parties affected by the consequences of the deportation.

9. To a large degree the issue raised here is directed at an apparent distinction between the a review of the validity of a decision by reference to the decision making process and a substantive or "merits-based" reassessment of it. On the one hand, traditional concept of judicial review does not permit the court to re-examine the merits and substitute its own evaluation; on the other hand it is required *pace Meadows* to decide whether the conclusion is proportionate and therefore whether the respective merits underlying the proportionality of the decision have been correctly assessed and balanced. There is, therefore, at the very least a semantic ambivalence as to the distinction between a merits-based/substantive re-examination of a decision and a purely processed-based review of its legality. In the view of the Court the answer to this conundrum is to be found in para. 71 of the judgment of Fennelly J. in *Meadows* where he said the following:-

> "I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, 'substantive', to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court

that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence."

10. This court respectfully considers that this quotation underpins the approach adopted by it in the impugned paragraph 12 of its judgment in respect of which the certificate is now sought. For the avoidance of doubt, the Court would reiterate its understanding of the current state of the law as follows. Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made. (In the case of a deportation order the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary.) In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with "qualified rights" (as in the present case) and "absolute rights" (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection.

11. In other words, if the High Court has a constitutional obligation to vindicate personal constitutional rights in the face of administrative or quasi judicial decisions; and if it has by default a statutory duty under the European Convention on Human Rights Act 2003 to ensure protection under the Convention for rights not otherwise guaranteed by the Constitution, so be it. The remedy of judicial review under O. 84 of the Rules of the Superior Courts is sufficiently comprehensive and flexible in the exercise of the jurisdiction of the High Court to ensure that both of those objectives are met. The mistake is to confuse the jurisdictional rules and procedural incidents of the judicial review remedies with the manner which the criteria for the review fall to be applied.

12. The common law remedies of judicial review and judicial practice in their application have, in the view of this Court, evolved differently in the constitutional framework of this State (and particularly under the influence of the judgment of the Supreme Court in *East Donegal Co-op v AG* [1970] IR 317), as compared with other common law jurisdictions and particularly that of the United Kingdom both before and since the enactment there of the Human Rights Act 1998. Nevertheless, the potential for evolution of the criteria can be seen as reflected in, for example, judgments such as that in which the House of Lords in the United Kingdom held in the context of judicial review procedures in that jurisdiction involving the application of the criterion of proportionality under the Convention that , "… no shift to a merits based review" is required but "the intensity of review is greater than was previously appropriate , and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence*…" and thus goes "beyond that traditionally adopted to judicial review in a domestic setting." (See the speech of Lord Bingham of Cornhill in *R(SB) v Governors of Denbigh High School* [2007] 1 AC 100 at p.116, par. 30.)

13. In this jurisdiction the Supreme Court has, of course, rejected the need to alter the "intensity" or the level of review applied by the Court in judicial review in this way. It remains the case however, as illustrated by the passage cited from the judgment of Fennelly J. (see paragraph 9 above,) that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own.

14. Thus, while the judicial review remedies remain unchanged – although significantly more flexible and comprehensive in the reform of Order 84 in 1986 – and the procedural and evidential rules for their application are constant; the criteria by which they are applied are capable of evolving in order to accommodate rights to protection such as those created by the Constitution or the Act of 2003. By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and commonsense.

15. The Court finds, accordingly, that the first point of law suggested above in the proposal for this certificate does not give rise to any issue which comes within the requirements of s. 5 of the Act of 2000. The more specific queries raised in the second point of law are dependent upon that proposition and accordingly do not require further consideration.

16. There is one further reason why this is not an application in which the criteria for a certificate are met. Under s.5 (3)(a) of the Act of 2000 the point of law raised must be such as makes an appeal in the case desirable in the public interest. There must therefore be a purpose to the appeal: the issue raised must be capable, if successful, of reversing the judgment appealed against. In its judgment of 2nd November 2010, however, the Court has in fact (it believes,) done what is urged in the first proposed question above, namely, examined the competing rights of the applicants and the State and has confirmed that in its judgment a proportionate balance has been struck by the Minister in the impugned decision. (See in particular the Court's judgment at paragraphs 15 to 26.)

17. The application for the certificate is therefore rejected.