THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 280

[2017 No. 31]

Finlay Geoghegan J.
Irvine J.
Hogan J.

BETWEEN

A.B.M. and B.A.

APPLICANTS/

APPELLANTS

- AND -

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 27th day of October 2017

1. This is an appeal from the order of the High Court (Humphreys J.) made on 16th December, 2016 refusing the application for an order of *certiorari* of a decision of the Minister of 13th July, 2015 which refused to revoke the deportation order made in respect of A.B.M. The order was made for the reasons set out in a written judgment of 29th July, 2016: see *A.B.M & B.A. v. Minister for Justice and Equality* [2016] IEHC 469.

2. The High Court subsequently certified the following points of law of exceptional public importance:

> (i) Does an Irish citizen possess the right pursuant to Article 41 of the Constitution to have his/her non-national spouse reside in the State?
>
> (ii) If the above exists, whether such a right of residence must be the starting point for any consideration by the respondent Minister pursuant to s. 3(11) of the Immigration Act 1999 (as amended).
>
> (iii) Whether the respondent is entitled to consider the insurmountable obstacles criterion contained in the case law of the European Court of Human Rights when considering representations made in respect of the spouse of an Irish citizen pursuant to s. 3(11) of the Immigration Act 1999 (as amended).

3. This appeal was heard at the same time as the appeal in *Gorry v. The Minister for Justice and Equality* in which judgment is also being delivered today. In my judgment in *Gorry* I have set out in greater detail the background facts to the application for *certiorari* in these proceedings and considered the judgment of the High Court judge. This judgment should be read in conjunction with the judgment being delivered today in *Gorry.*

4. It is sufficient for the purposes of this judgment to state briefly the essential facts. The second named applicant, B.A., who was born in Nigeria, became an Irish citizen in 2013. She had originally come to Ireland in September, 2000, whereupon she applied for asylum. That application was refused, but she was permitted to remain in the jurisdiction and she ultimately became an Irish citizen in 2013.

5. The first applicant, Mr. A.B.M. applied for asylum in Ireland in September, 2006 claiming he had recently entered Ireland having left Nigeria in 1999 for Italy *via* Togo. That and all further applications were refused and a deportation order made in respect of him on 18th June, 2008. That was not challenged. Nevertheless, he subsequently failed to present himself to Garda National Immigration Bureau in July, 2008 and was classed as an evader. The applicants, however, were married in Ireland in a civil ceremony on 9th February, 2015. For the purposes of the application to the Minister under review (and in the judicial review proceedings) they were accepted as a couple, one of whom was an Irish citizen, lawfully married to each other and hence a family within the meaning of Art. 41 of the Constitution.

6. The decision of the Minister and the assessment made on his behalf is set out in the judgment in *Gorry*. It is sufficient for present purposes to say that the assessment was first made by reference to Art. 8 of the European Convention of Human Rights (ECHR) and then in relation to "marriage rights under the Constitution". In considering the latter the decision records that B.A. is an Irish citizen and that A.B.M. married her in February, 2015 and that it was accepted that the couple constitute a family within the meaning of Article 41 of the Constitution. The decision then states:

> "With regard to the rights of a non-national married to an Irish national or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the courts, there appears to be no authority which supports the proposition that an Irish citizen, or a person entitled to reside in the State, may have a right, under Art. 41 of the Constitution to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Art. 8 [ECHR] in the consideration above and the conclusions reached therein.
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> All factors relating to the position and rights of the family have been considered, and these have been considered against the rights of the State. The jurisprudence of the European Court of Human Rights has established that a State has a right under international law to control the entry of non-nationals into its territory, subject always to its Treaty obligations. Consideration is also given to the impact of granting permission to remain to [A.B.M.] on the health and welfare systems

> of the State and how such a decision may lead to similar decisions in other cases. In weighing these rights, it is submitted that if the Minister decides to affirm the deportation order in respect of [A.B.M.], there is no less restrictive process available which would achieve the legitimate aim of the State to safeguard the economic wellbeing of the State, and to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. These therefore exist as substantial reasons associated with the common good which requires the deportation of [A.B.M.]."

7. The conclusion and recommendation to the Minister was accordingly to affirm the deportation order. That was the decision made.

8. Leave to apply for judicial review was granted on 27th July, 2015 and on 4th August, 2015 an application for an injunction restraining deportation rejected by the High Court. A.B.M. was deported in September 2015. The judicial review application was subsequently heard by the High Court.

9. In his judgment Humphreys J. declined to follow two conclusions in *Gorry*. First the conclusion *that* a married couple comprising an Irish citizen non-national where they seek to live in Ireland "have a *prima facie* right to do so by virtue of Art. 41 of the Constitution" and that such position is the starting part of any consideration by the Minister on an application that the non-national be permitted to reside in Ireland. Secondly that the "insurmountable obstacles" test was not the appropriate test in a consideration in relation to Article 8 ECHR. Humphreys J. disagreed with both conclusions and the essence of his overall conclusions were:

> (i.) there is no such *prima facie* right (para. 35);
>
> (ii.) the married couple, one of whom is a citizen, should receive *prima facie* acknowledgement and consideration of their status under Art. 41 of the Constitution (para. 35);
>
> (iii.) notwithstanding that Art. 41 uses "somewhat more emphatic language than Art. 8 of the ECHR" that "there is no logical reason why there should be a significantly different position under Art. 41 of the Constitution".
>
> (iv.) There was no invalidity to the Minister's approach to the consideration of constitutional rights (paras. 37 – 47);
>
> (v.) In a consideration in relation to Art. 8 the "insurmountable obstacles" test is the relevant test but not "in the sense of a determinative bar which an applicant must meet or fail to meet". Rather it is "just one of a basket of criteria questions that can be asked as to the overall circumstances".

Appeal

10. The appellants' submission in relation to the issues raised by the three points of law certified by the trial judge are in substance in accordance with the conclusions on the issues in the judgment delivered by the High Court (Mac Eochaidh J.) in *Gorry & Anor. v. Minister for Justice and Equality* [2014] IEHC 29. That judgment was delivered on 30th January, 2014. The legal conclusions therein were followed by the High Court (Eagar J.) on 19th November, 2015 in *Ford & Anor. v. Minister for Justice and Equality* [2015] IEHC 720.

11. In addition to the submissions made on the substantive questions of law the appellants submitted that when the trial judge came to decide this judicial review application that, in accordance with the principles set out in the well-known authorities of *Irish Trust Bank Limited v. Central Bank of Ireland* [1976 – 1977] ILRM 50 and *Re Worldport Limited* [2005] IEHC 189 amongst others, the trial judge ought to have followed the decisions made in *Gorry* and *Ford* on the relevant legal issues unless in accordance with the principles set out in *Irish Trust Bank* and *Worldport* there was a basis for not doing so.

12. In *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, [2012] 2 ILRM 392 Clarke J. referred to *Irish Trust Bank* and *Worldport* with approval and stressed the importance of High Court judges generally following earlier High Court decisions. As these observations from Clarke J. in *Kadri* make clear, the doctrine of precedent is an important part of judicial discipline and ensuring consistency for litigants in a common law system such as ours. While, as Clarke J. recognised, there are, of course, limits to the doctrine of precedent, it is nonetheless important that High Court judges should, in general, follow earlier decisions of that Court unless there are strong reasons in accordance with the jurisprudence referred to by him in *Kadri* for not doing so.

13. As this appeal was heard at the same time as the appeals in *Gorry* and having regard to the conclusions reached on the substantive issues, it is, however, now unnecessary for me to determine the appeal by reference to this separate ground of appeal.

Substantive issues

14. For the reasons set out in the *Gorry* judgments which Hogan J and I have delivered to-day the trial judge was correct in his conclusion that an Irish citizen lawfully married to a non-national does not have a constitutional right, whether termed a *prima facie* right or a right which is not absolute, to have his/her non-national spouse reside with him/her in Ireland. However, the rights which an Irish citizen such as B.A. and a family comprising a lawfully married couple such as A.B.M. and B.A. have pursuant to the Constitution and the obligations imposed on the Minister by the Constitution in considering an application such as at issue in this appeal are considerably more extensive than a mere "acknowledgement and consideration of their status under Art. 41 of the Constitution" as determined by the trial judge herein.

15. Furthermore for the reasons set out in the judgments in *Gorry*, the trial judge herein was in error in his conclusion that the rights of the applicants or the obligations imposed on the State pursuant to the Constitution and those imposed on the State pursuant to s. 3 of the European Court of Human Rights Act 2003 ("the 2003 Act") having regard to Article 8 ECHR are not significantly different. As appears from the judgments delivered to-day in *Gorry*, for the reasons set out therein, the rights of the applicants and obligations imposed on the State where one spouse is an Irish citizen and the couple are lawfully married (and, hence, a family within the meaning of Article 41 of the Constitution) are of a different order to the rights imposed on the State when considering what is in substance an application for the non-national spouse to reside in Ireland pursuant to s. 3 of the 2003 Act having regard to Article 8 ECHR.

16. It also follows for the reasons set out in detail in the judgments in *Gorry*, that, contrary to the decision of the trial judge herein, the assessment by the Minister of the application having regard to the constitutional rights of the applicants was not in accordance with law.

17. The trial judge was, in my view, again for the reasons set out in *Gorry*, correct in his approach to the application of the

"insurmountable obstacles" test having regard to the case law of the European Court of Human Rights. Furthermore, I am in agreement with him that there was no error by the Minister in the consideration given pursuant to s. 3 of the 2003 Act having regard to Article 8 ECHR in the application of the insurmountable obstacles test in the assessment conducted on his behalf. As pointed out in my judgment in *Gorry*, the meaning of the test applied in the assessment in this application was consistent with the case law of the European Court of Human Rights.

Conclusion and Relief

18. It follows from my conclusions on the applicable legal principles set out in my judgment in *Gorry* that I do not consider that the consideration given by the Minister to the constitutional rights of the applicants was in accordance with law. It was not consistent with the obligations imposed on the State by the Constitution for the reasons set out in *Gorry*. Those obligations are of a different order to the obligations imposed on the Minister by s. 3 of the 2003 Act having regard to Art. 8 ECHR. It is clear from the assessment made that there was assimilation in the assessment of the two sets of obligations.

19. I have concluded that as the assessment made by the Minister of the application to revoke the deportation order was not in accordance with law having regard to the constitutional rights of the applicants, which was fundamental to the proper consideration of the application that they are entitled to an order of *certiorari* of the decision of the Minister refusing to revoke the deportation order of A.B.M.

20. However, I do not consider that the application which gave rise to the decision now to be quashed should be remitted to the Minister for a further decision. Events have moved on. At the time of the application to the Minister to revoke the deportation order there was in place a valid deportation order in the sense that it was a deportation order made by the Minister which had not been the subject of any legal challenge. For the reasons set out in *Gorry* there is no constitutionally protected right entitling A.B.M. to reside in Ireland as the spouse of an Irish citizen. It follows that his marriage to B.A. did not of itself alter the validity of the deportation order. A.B.M. was deported in September, 2015. Nothing in this decision should be considered as affecting the validity of the deportation effected. What it does affect is the entitlement of A.B.M. and B.A. to make a further application to the Minister for the revocation of the deportation order and for a visa to permit A.B.M. to enter Ireland and reside in Ireland with B.A., assuming, of course, that in the intervening period they remain lawfully married to each other. That application requires to be considered by the Minister in accordance with law as stated in this judgment and in the judgments delivered today in *Gorry v. The Minister for Justice and Equality*.

21. Accordingly, the Court will grant an order of *certiorari* of the decision of the Minister of 13th July, 2015. It will not make an order remitting the existing application to the Minister for further consideration. There will be an order that the applicants may now make a further application to the Minister for revocation of the deportation order made on 18th June, 2008 and for a visa for A.B.M. to enter and be in Ireland which will fall to be considered in accordance with law and on all current facts relating to the family comprised by the applicants and their child who was born after the decision of the Minister the subject of this appeal and the relevant State interests.