Neutral Citation Number: [2011] IEHC 397

THE HIGH COURT

2011 258 JR

BETWEEN

X A (AN INFANT SUING BY HER

MOTHER AND NEXT FRIEND, JPA), JPA

AND SOA

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 25th day of October, 2011

1. This is an application brought by the A. family to quash a decision of the Minister for Justice, Equality and Law Reform dated 7th February, 2011, pursuant to s. 3(11) of the Immigration Act 1999 ("the 1999 Act") as refused to revoke a deportation order which had been made in respect of S.A. Mr. A., an architectural student, is a Nigerian citizen who first arrived in Ireland in March, 2009 whereupon he made an application for asylum. This application for asylum was rejected and that decision was upheld by the Refugee Appeals Tribunal. An application for subsidiary protection was also refused. No issue pertaining either to that asylum application or in relation to the subsidiary protection arises in these proceedings. The deportation order was originally made on 5th October, 2010.

2. Ms. A is an Irish citizen who has resided for most of her life in the State. She has a daughter, Alicia Rose, who is presently aged about three years, as a result of another relationship. Ms. A. contends that Mr. A. is the only father that Alicia has known. The Minister was made aware that Ms. A. was pregnant and that Mr. A. was the father of that child.

3. It appears, however, that Mr. A. failed to report to the Garda National Immigration Bureau and he was arrested on 4th January, 2011. He was subsequently deported on 7th February, 2011.

The supply of information to the Minister

4. At the outset, it should be stated that the manner in which relevant information has been supplied to the Minister is wholly unsatisfactory. This is also reflected in the manner in which the information has been put before this Court. The present application consists of a lever arch file of papers running to some 306 pages. Yet even now, key information regarding this application is, frankly, sketchy in places and requires the court to read between the lines in places regarding the background facts in a manner which is unfortunate.

5. Some examples will suffice to illustrate these points. First, the Minister was not even informed of the applicant's marriage until sometime afterwards. It appears that he was only informed of the birth of the first applicant by letter dated 3rd October, 2011, almost two months after her birth.

6. Second, while much has been made of the fact that Mr. A. acted as a father figure in respect of Alicia, we have not been told of the extent of this involvement. Just as Cooke J. pointed out in *Stevens v. Minister for Justice, Equality and Law Reform*, High Court, 7th December, 2010, we not know, for example, how Mr. A. interacted with Alicia in their respective daily routines and "nothing by way of evidence is given as to the reality of family life in question". Did he, for example, supervise her play or read to her? Did he help with the numerous chores associated with child rearing?

7. Third, nothing has been said about Alicia's natural father. We have not been told very much about him, save that it is to be inferred that he plays no role in the child's life and that she is not maintained by him.

8. Fourth, we have been told very little about Ms. A's personal and financial circumstances. Thus, there is nothing in the court papers which expressly deals with issues such as her education, qualifications and employment prospects. Nor have we been told what her income is and or how she manages her daily routine in respect of the two children. While certain country of origin information and travel advisories in respect of Nigeria were exhibited - documents which, I concede immediately, were of great assistance to the court - little else has been said about Ms. A's own capacity to travel or to move to Nigeria. Has she lived in an African country before? Has she tried to obtain a visa to visit her husband? Could she afford such a trip?

9. These were all matters which ought to have been directly before the Minister and, indeed, the Court. Both the Minister and the Court have, to some extent, been left to infer what the answers to these questions are. It seems fairly clear, however, that the Ms. A has limited financial resources and that she has now been left to manage the two children on her own. This is what I am prepared to infer in the circumstances in view of the importance of the deportation order to the A. family. It is, however, an indulgence which might not necessarily be repeated in a future case. It is vital that the information of the kind I have just described should be supplied in future cases of this kind.

10. Against that background, I now propose to examine the substantive issues raised in these proceedings.

The right of the unborn child

11. At the time of the decision, Ms. A. was approximately just over two months pregnant and the Minister acknowledged that this

unborn child would, when born, be entitled to Irish citizenship in view of the fact that her mother was an Irish citizen. In the words of the examination of file memorandum, the Minister accordingly "recognised" this right to life, but the existence of Ms. A's pregnancy appears to have played little role in the substantive decision itself.

12. The applicants maintained that the Minister accordingly erred in law in failing to give appropriate weight to the rights of the unborn child. However, so far as any rights deriving from Article 40.3.3 of the Constitution are concerned, I cannot agree that such rights will generally have any significant role as such in the assessment of the validity of a deportation decision. With the necessary apologies for stating the obvious, Article 40.3.3 is simply concerned with the right to life of the unborn. Save, perhaps, for quite exceptional circumstances of a kind which is presently difficult to envisage, it is difficult to see that a *lex specialis* such as Article 40.3.3 can have any wider application in the sphere of immigration law.

13. This question was comprehensively examined by Cooke J. in *Ugbelese v. Minister for Justice, Equality and Law Reform* [2009] IEHC 598, [2010] 4 I.R. 233. I completely agree with the analysis contained therein which is, I think, unnecessary to repeat here. (I should perhaps here record that I appeared as counsel for the Minister in that case). On the substantive point, Cooke J. observed [2010] 4 I.R. 233, 252:-

> "…the only right of the unborn child as the Constitution now stands which attracts the entitlement to protection and vindication is that enshrined by the amendments in Article 40.3.3 namely, the right to life or, in other words, the right to be born and, possibly, (and this is a matter for future decision) allied rights such as the right to bodily integrity which are inherent in and inseparable from the right to life itself. The deportation of a non-national parent cannot, in the court's judgment, be said to be in any sense an interference with that right.
>
> It follows that the Minister was under no obligation to consider for the purpose of the contested decision, the possible implications of the impact of the decision on the alleged rights. The Minister has not, accordingly, made any error of law."

14. In sum, therefore, Article 40.3.3 therefore has no direct role in relation to this matter and the Minister did not err in his treatment of this issue.

The rights of Ms. A. under Article 41

15. There can be no suggestion that the family rights protected by Article 41 are in some way absolute. Yet, at the same time, the rights thereby conferred cannot be regarded as being purely theoretical, the essence and substance of which must be respected at all times. This very point was made by Cooke J. in *Ugbelese* where he said ([2010] 4 I.R. 233, 241):-

> "The judgment of the court as given by Denham J. in the *Oguekwe* case [2008] 3 I.R. 795 identifies, in effect, two key factors involved in the exercise required of the Minister when deciding whether a deportation order should be made in such cases. First, the Minister must consider all facts relevant to the personal constitutional rights of the child and secondly, he must identify a "substantial reason" which requires the deportation of the non-national parent. Having ascertained "the facts and factors affecting the family" and the child in each case "by due inquiry" he must consider the circumstances in a fair and proper manner so as to arrive at a decision which is reasonable and proportionate in all of those circumstances.
>
> In other words, the personal and Convention rights of the child and of the family are not absolute but may be required to yield, or be subordinated to, the public interest of the State in the common good in controlling its frontiers where, after due investigation and consideration, a reasonable and proportionate decision is made that there is substantial reason for interfering with those rights."

16. What, then, are the relevant factors which must be weighed in the balance to ensure that any such decision is "reasonable and proportionate"?

17. First, Mr. A.'s links with Ireland are weak. He was born in Nigeria and lived there for all of his life until he came to Ireland in early 2009 in order to seek asylum. When his asylum application was rejected, he could have had no expectation that he would be permitted to remain here. Measured against that, however, is the fact that he is married to an Irish citizen and that he is also the father of an Irish citizen.

18. Second, Mr. A. got married in September, 2010 in circumstances where his immigration status was precarious. This is a factor of which he and his wife, Ms. A., must be taken to have been aware. It is certainly a factor which is entitled to weigh heavily with the Minister in considering whether to make a deportation order: see, *e.g.,* the comments of Fennelly J. in *TC v. Minister for Justice, Equality and Law Reform* [2005] IESC 42, [2005] 4 I.R. 109 at 122.

19. Third, Ms. A.'s links with Nigeria are particularly weak. It may be inferred that she has never been to the country and that she has no experience of living in any African country.

20. Fourth, it is clear that a deportation order is in principle permanent in its effect, save only that it may be revoked by the Minister in the exercise of his discretion under s. 3(11) of the Immigration Act 1999: see, *e.g., U. v. Minister for Justice, Equality and Law Reform (No.1)* [2010] IEHC 452.

21. Fifth, the Minister's decision must always respect the essence and substance of the right of the married couple under Article 41. A decision which, in practice, compels the couple to life more or less permanently apart is, by definition, a very significant interference by the State with a core principle valued and protected by Article 41. Such a decision is one which, quite obviously, requires compelling justification: see, *e.g.,* my own judgment in *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92. While the necessity to uphold the common good and the integrity of the asylum system may well supply that justification, it is nonetheless imperative that the respective rights of the applicants and the interests of the State must be fairly weighed by the Minister.

Application of these principles to the facts of this case

22. We may now proceed to apply these principles to the facts of the present case. In many ways, the Minister's decision turns on the conclusion that Ms. A. would be free to travel to Nigeria to join her husband. For several reasons, which we may now set out, this cannot be regarded as an altogether realistic and proportionate appraisal of the issues at hand.

23. First, in order even to travel to Nigeria, Ms. A. would be required to secure a Nigerian visa. Even if Ms. A. were to be granted a

visa for tourist purposes, one imagines that a residence visa would not be easy to secure. There is nothing in the examination of file memorandum which suggests that this question has been considered and the Minister appears to have blithely assumed that Ms. A. would be permitted to join her husband in Nigeria without let or hindrance. Nor is it clear that Alicia - who, of course, has no biological ties to Mr. A. - would be permitted entry by the Nigerian authorities.

24. Second, Ms. A. is the mother of two very young children (albeit that only one of them had been born at the time of the Minister's decision), both of whom are Irish citizens. It may be inferred that she is totally dependent on social security payments for her means of support. Nigeria is not marketed in this jurisdiction as a tourist destination and there are no direct flights between the two countries. It is not easy to see how this young mother could afford to bring herself and her child to Nigeria for even one visit, never mind keep up regular contact with her husband.

25. Mr. Callanan SC, counsel for the Minister, suggested that some other country might serve as a meeting point. But we may take it that no other European country would be prepared to give Mr. A. a tourist visa given his immigration record and even though, as a Nigerian citizen, Mr. A. would have visa free access to many neighbouring states, a trip to neighbouring African countries lying to the north of Nigeria such as Niger, Algeria or Libya would seem unpromising from the perspective of Ms. A. and her two young children. It might prove possible for the A. family to meet in countries such as Morocco or Egypt, save that the cost is likely to prove prohibitive for a family in the circumstances of Ms. A.

26. Third, the country of origin information available to the Minister paints a daunting picture for any prospective visitor to Nigeria. The documents supplied by the applicants' legal advisers included travel warnings issued by various countries. Even allowing for the cautious and precautionary nature of such documents, these travel advisories suggest that the European traveller enters a chaotic and even dangerous country at his or her peril. Two examples may be taken as representative.

27. The US warning in 2009 states that, for security reasons, US Embassy officials require express permission from the US Government to travel to a variety of different states in Nigeria and that many foreign oil companies have implemented an "essential travel only" policies for their personnel. The British warning from 2010 is even more alarming, urging all British nationals to leave certain areas of the country, such as the Niger Delta states, as more than 200 foreign nationals had been kidnapped in that region since 2007. The warnings are not confined to these areas. Thus, for example, travellers to Lagos are urged by the British Embassy to complete all non-essential travel by 10pm at night.

28. Save, perhaps, for senior executives or specialists employed in the gilded world of international finance or the oil industry - and who, no doubt, live in "gated" communities specially designed for ex-patriates and whose lifestyle may be taken to be remote from that of average Nigerians – it is difficult to see how any average Irish family would ever contemplate consider moving to Nigeria. It is clear from the country of origin information that the risks posed to immigrants from Western countries are considerable.

29. This would be especially true of Ms. A, since she has no independent means and it is not easy to see how she and her two young children could survive in a country with no social security system worth speaking of. Moreover, unlike the applicant's spouse in *Omoregie v. Norway* [2008] EHRR 761, it may be assumed that Ms. A. has no prior experience of living in African countries.

30. All of this is to underscore the reality of what is currently proposed, namely, that the A. family will be forcibly separated, more or less permanently. As this very application exemplifies, it is true, of course, that Mr. A. can apply to have the deportation order revoked under s. 3(11) of the 1999 Act. Nevertheless, as things stand, it is not clear to me how this couple could ever realistically have any real inter-personal contact or how their marriage could actually survive what may amount to a permanent separation. It is sobering to reflect that the couple's daughter - who was admittedly born several months after the Minister's decision – might never actually get to see her father during her childhood. Again, this is somewhat different from the decision of the European Court of Human Rights in *Omoregie,* where the deportation order in question lasted a maximum of five years.

31. The file analysis relied heavily on a judgment of Clark J. in *U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 371, a case whose facts were not dissimilar to the present one. Here Clark J. observed:-

> "The choice the wife now faces is whether to remain in Ireland and raise her son here without her husband, or relocate to Nigeria with him and raise their son together there. This is a choice faced by many couples who come from different countries or even different parts of large countries. Married inter-racial or inter-religious couples often face choices which involve compromise and sacrifices in relation to their choice of residence, standards or beliefs. Adults who marry must make these decisions themselves without seeking the answers in constitutional rights which are neither guarantees nor immunities but must be seen in the context of social order and the common good. The Court is satisfied that the applicants have not established that the Minister had insufficient regard to the wife's constitutional rights when deciding not to revoke the deportation order made against her husband."

32. But whatever may possibly have been the situation in *U.*, in the present case it is a pure fiction to say that Ms. A. has a choice worth speaking of. This type of case is accordingly very different from the circumstances of cases such as *L. and O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 where, for example, it was open to the Nigerian parents of an Irish born children to return to the country of origin of both parents where both grown up and had established links. Naturally, in line with the establish practice of this Court since *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] I.L.R.M. 50, I would normally defer as a matter of judicial comity to the prior views of my judicial colleagues (see, *e.g.,* my own judgment in *KI v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66). Yet the matter here is so fundamental and goes to the heart of our system of constitutional protection that, absent a binding Supreme Court decision on the point, I deeply regret that I cannot regard myself as bound by the views expressed by Clark J. in *U.*

33. The essential point here is that the Constitution protects the fundamentals of marriage and it insists that the State respects the essence of that relationship. It is not indifferent to the plight of those who have been forcibly separated by State action and, adapting freely the language of a famous Bach chorale, it sees to it that these rights are available to us for our protection in our hours of deepest need. That is very reason why these rights are deemed to be fundamental and it behoves the judicial branch of government to ensure that these constitutional rights are taken seriously so that, in the words of O'Byrne J. in *Buckley v. Attorney General* [1950] I.R. 67, 81, they are given "life and reality".

Conclusions

34. Since I am of the view that the Minister has not fairly weighed the rights of the applicants, I will accordingly quash his decision refusing to set aside the deportation order pursuing to s. 3(11) of the 1999 Act.