Neutral Citation [2016] IEHC 650

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 678 J.R.]

BETWEEN

D.E. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A.E.)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 14th day of November, 2016

1. The applicant is a seven year old boy of Nigerian parentage who was born in the State. He has sickle cell disease with a particular severity.

2. His mother arrived in Ireland on 23rd January, 2009. The applicant was born on 26th March, 2009. A deportation order was made against him on 1st July, 2011.

3. A first judicial review application [2011 No. 637 J.R.] was brought against this order. In *D.O.E. v. Minister for Justice and Equality* [2012] IEHC 100 (Unreported, High Court, 1st March, 2012) Cross J. refused leave to apply for judicial review of the deportation order on the basis that there were no substantial grounds to challenge it due to a lack of evidence of there being exceptional circumstances which would permit the applicant to remain in the State to avail of medical treatment.

4. Between 14th June, 2012, and 22nd July, 2014, the applicant's mother (and by necessary extension the applicant, albeit that he was not responsible) evaded the GNIB.

5. In the meantime an application to revoke the deportation order had been made, which was refused on 8th July, 2014. A second set of judicial review proceedings [2014 No. 526 J.R.] was brought against that refusal.

6. On 24th November, 2014, MacEochaidh J. struck out the second judicial review application on the grounds of mootness because an up-to-date medical report had been submitted which was treated by the department as a second s. 3(11) application. On 29th July, 2016, the second s. 3(11) refusal was issued. That gave rise to the present proceedings, the third judicial review in the matter. The leave application was opened on 23rd August, 2016, and an interim injunction granted by Murphy J.

7. The substantial grounds test applies by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

Are there substantial grounds to challenge the refusal to revoke the deportation order on the grounds of a lack of transparency in the alleged residency "scheme"?

8. Mr. Michael Conlon, S.C. (with Mr. Paul O'Shea, B.L.) in an able argument on behalf of the applicant submits that arising from the report of the Working Group on the Protection Process an informal scheme has been put in place by the Government generally aimed at giving permission to large numbers of illegal immigrants who have been present in the State for more than five years. The working group recommendation on regularising long-term illegals came encumbered with a number of recommended conditions, including that the individuals had not been evading, and it appears from material prepared by the Minister that the department is now *"seeking to identify individual cases where the recommendations* [of the working group] *might apply".*

9. Mr. Conlon relies on *R. (Lumba) v. Secretary of State for the Home Department* [2012] 1 A.C. 245 at paras. 34 – 39, where Lord Dyson states that "[t]*he rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised"*, a statement made in the context of a case about detention.

10. It seems to me that as a general proposition of law to be applied to circumstances such as the present one, it is not apparent that there are substantial grounds for contending that such an approach is operative in the deportation context. There are many obvious reasons why there can be no enforceable legal requirement for the Minister to provide a full statement of the policy being adopted, still less are there substantial grounds for contending that the s. 3(11) decisions are invalid in the absence of such a statement.

11. It must be remembered that this is an applicant whose presence in the State is wholly irregular and unlawful. His challenge to the deportation order was dismissed at the leave stage. He has now had two attempts to revoke that order, the first of which was struck out. If there was ambiguity about the criteria for decisions on revocation of deportation orders, that has clearly existed for some time and does not arise for the first time in relation to his second s. 3(11) application.

12. A requirement that the Minister specify the criteria for making or revocation of deportation orders would result in attempts to "game the system" and would have a distorting effect on how people interact with that system. If any rigid time limit were to be put forward as a threshold for permission to remain, it would result in undesirable conduct such as creating an incentive to delay matters, whether by legal proceedings or otherwise.

13. In any event, even if I am wrong and there is a substantial ground for contending that there is an obligation to set forth criteria, that has been done.

14. While the Minister appears to deny the existence of a formal policy, it has been expressly stated that the government is seeking to identify individual cases where the recommendations of the working group might apply. Thus individuals affected are on notice that if they come within the recommendations, as interpreted by the Minister, their applications may have an enhanced prospect of success. That enables any given applicant to make submissions accordingly.

15. The context of deportation decision is that it is essentially discretionary (leaving aside questions of *refoulement)*: see the Supreme Court decision *in P.O. v. Minister for Justice and Equality* [2015] IESC 64 (unreported, Supreme Court, 16th July 2015) and that of Kearns P. in *Sivsivadze v. Minister for Justice and Equality* [2012] IEHC 244 (unreported, High Court, 21st June 2012) where a complaint that the deportation legislation lacked principles and policies was rejected.

16. Mr. Conlon submits that the mother was not aware that the exception to the working group recommendation regarding evasion was to be applied to children of an evader, and therefore did not have the opportunity to make submissions.

17. But that is to confuse notice of an issue with notice of every detail of the issue. There are no substantial grounds for contending that the applicant was handicapped in making submissions. It was open to those acting on behalf of the applicant to explain the evasion, if it could be explained. The report of the working group in any event gave notice that evasion was a potential issue (even if evasion by children was not specifically referred to). Even though I consider that no notice of the policy being adopted is required, there was a significant degree of notice in this case.

18. Mr. Conlon relies on the fact that the working group report is of the view that the "*best interests of children should be a primary consideration*" (para. 3.138), citing *Okunade v. Minister for Justice Equality & Law Reform* [2012] 3 I.R. 152.

19. The reliance on *Okunade* as authority for the proposition that best interests should be a primary consideration in the deportation context is a fundamental misunderstanding of the law by the working group. That was a decision purely on the question of the balance of justice for the purposes of an interlocutory injunction. It did not lay down the principle that the best interests of the child were to be a primary consideration in substantive immigration decisions. The latter proposition, which appears to have been mistakenly adopted by the working group, has been definitively rejected by the Court of Appeal in *C.I. v. Minister for Justice* [2015] IECA 192 (Unreported, Court of Appeal (Finlay Geoghegan J.)) and *Dos Santos v. Minister for Justice* [2015] 2 I.L.R.M. 483.

20. While it is true that in an injunction context the court might be slow to regard a child's position as derivative (see the Court of Appeal decision in *Chigaru v. Minister for Justice and Equality* [2015] IECA 167 (unreported, Court of Appeal (Hogan J.), 27th July, 2015)), no substantial ground has been made out for contending that there is a legal principle that the Minister in making a substantive immigration decision is precluded from regarding the position of a child as being derivative. There is no basis for contending that the Minister is legally disentitled from regarding evasion as a reason to exclude children as well as adults from the application of the recommendations of the working group.

21. It is true that Lord Hope in *Z.H.(Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4 at para. 44 was of the view that it was wrong to determine the best interests of the child by reference to something for which the child was not responsible. But having regard to the decisions in *C.I.* and *Dos Santos*, the question of best interests is of limited relevance to substantive immigration decision making by the Minister. It may arise peripherally through the ECHR in the context of an art. 8 analysis but that is not the issue here.

Are there substantial grounds to contend that there was a failure to give adequate, rational or *intra vires* consideration to the practicality of access by the applicant to medical services in Nigeria?
22. The law as set out by the European Court of Human Rights in *D. v. UK* [1997] 24 E.H.R.R. 423 and *N. v. UK* [2008] E.H.H.R. 453 is clear that "*exceptional circumstances*" are required to find that the expulsion of a person to a territory with an inferior health system would be contrary to the ECHR.

23. In the present case the applicant has been the subject of a report from Dr. Corrina McMahon dated 26th August, 2014, in which she opines that the applicant's condition is "*really quite severe*" and that he needs more than basic care. It is not apparent that a report pitched at that level can be said to represent a substantial ground for contending that the exceptionally high threshold set in *D.* and *N.* has been met. The evaluation of the medical material is a matter for the Minister in the first instance, and no substantial grounds have been shown to demonstrate that that evaluation was unlawful. The fact that the applicant is on his third go around the process of judicial review of the deportation system does not help in that regard.

Are there substantial grounds to contend that deportation would be contrary to art. 8 of the ECHR?
24. Mr. Conlon suggested that the question of breach of art. 8 (and inferentially the best interests of the child) could be linked to the working group report by reason of the (erroneous) views of the working group as to the relevance of best interests. That argument assumes that the working group report has been adopted as binding government policy and has an official and therefore a binding legal status, which it clearly does not. The Government are seeking to identify individual cases where the recommendations might be applied, not guaranteeing to implement them regardless of the circumstances. In any event, given the unlawful or at best precarious status of the applicant at all times, his rights under art. 8 are minimal to non-existent. No substantial grounds have been made out under this heading either.

Order
25. For the foregoing reasons I will order:

(i) that the application for leave to seek judicial review be refused;

(ii) that the matter be adjourned to enable any application for leave to appeal, which if made, should be on notice to the respondents;

(iii) that the applicant serve the CSSO with a copy of this judgment within 7 days in any event; and

(iv) that the injunction restraining deportation of the applicant be discharged.