Neutral Citation Number: [2010] IEHC 433

THE HIGH COURT

JUDICIAL REVIEW

2010 1266 JR

BETWEEN

F. S., K. G. AND O.O.G. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND F.S.), P.I. (A MINOR SUING BY HER FOSTER CARER AND NEXT FRIEND F.S.S), U.G. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND F.S.), Ro.G. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND F.S.), Ru.g. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND F.S.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 7th day of December 2010

1. This is a further case in which a failed asylum seeker seeks to resist implementation of a deportation order made against him by asserting that this would constitute an unlawful interference with the rights of a minor Irish citizen under the Constitution and the European Convention of Human Rights. It presents, however, the unusual feature in that the Irish citizen child in question (the fourth named applicant "P") is not the daughter of the deportee in question (the second named applicant). She is the daughter of a friend of the deportee's wife (the first named applicant,) who has been in foster care on an informal basis with the first and second named applicants since her own mother ("Mrs I.", who is not a party to the proceedings,) suffered a stroke in March 2008, and has since been unable to care for her. The third, fifth, sixth and seventh named applicants are the natural children of the first and second named applicants and the essential issue raised in this case turns upon the proposition that P is a member of the family of those applicants and that in deciding to refuse to revoke a decision to deport the second named applicant, the Minister has unlawfully failed to consider the impact of the deportation on the personal constitutional rights of P, together with her rights to family life under the Convention; and to reach and give a rational and proportionate conclusion in balancing her rights against those which the Minster purports to protect on behalf of the State in deciding the implement the deportation order.

2. This is the third time on which the second named applicant has had recourse to judicial review before the High Court in his endeavours to resist deportation and it is therefore necessary to describe briefly the personal history of the applicants.

3. The first and second named applicants are natives of Nigeria. The first named applicant arrived in the State on the 26th October, 2004 and gave birth to the third named applicant two days later on the 28th October, 2004. Exactly two years later on the 26th October, 2006, the second named applicant arrived in the State illegally and claimed asylum. The application was unsuccessful. Before the second named applicant arrived in the State his then partner the first named applicant, had been granted permission to remain temporarily in the State under the IBCO5 Scheme as the mother of the third named applicant. That permission is currently extended until 2013.

4. On the 26th March, 2007, the first named respondent (the Minister) gave notice of his proposal to make a deportation order against the second named applicant and invited representations. In response, on the 18th April, 2007, the second named applicant made an application for subsidiary protection together with an application for leave to remain in the State on humanitarian grounds. In essence, the second named applicant relied on the fact that he was the parent of the third named applicant, an Irish citizen child. By letter of the 4th September, 2008, the Refugee Legal Service on behalf of the applicants brought to the attention of the Minister the fact that they were "fostering a child of a friend who had suffered a stroke" (the fourth named applicant, P). Attached to this was a letter from a medical social worker confirming that Mrs I had suffered a stroke and was in hospital unable to look after P. P was then five years old and her mother was a widow.

5. On the 4th February, 2009, a deportation order was made against the second named applicant and when it was notified to him, there was included a detailed memorandum entitled "Examination of File" setting out the analysis that had been made of his representations for leave to remain and the evaluation of the statutory considerations which the Minister is required to take into account in making such decision under s. 3 of the Immigration Act 1999. In that memorandum there is set out a detailed assessment of the private and family life entitlements of the second named applicant under Article 8 of the ECHR. In particular, consideration is given to the constitutional rights of the Irish born child, the third named applicant. In the course of examining the representations made on behalf of the second named applicant, specific reference is made to the foster care arrangements for P saying:-

> "Due to complications, the mother was unable to care for her daughter and consequently, an informal arrangement was made to have [the second named applicant] and his partner care for the child, while the mother rehabilitated as there were no familial members to help with care. At the time it was not known how long the child would be in their care."

Save for that mention of the position of P, the assessment concentrates upon the impact of a deportation on the relationships between the first and second named applicants as husband and wife and between them and the third named applicant as a family.

6. A judicial review proceeding was brought against the deportation order of the 4th February, 2009, which was compromised by consent on the 27th July, 2009, with, apparently, a view to permitting the Minister to consider further the position of P. The terms of the settlement provided that further information would be submitted to the Minister regarding the position of P in the care of the first and second named applicants and in relation to the position of Mrs I., her current medical position and prospects for recovery.

7. On foot of that settlement an application to revoke the deportation order under s. 3(11) of the Act of 1999, was submitted on the 29th July, 2009. This application was based exclusively upon the information that the second named applicant was the partner of the first named applicant and that they were caring for P since March 2008. It described the medical situation of Mrs I following her

stroke and her inability to look after P. for the foreseeable future due to her hospitalisation. It added: "The applicant also submits that the Minister failed to have regard to the EHCR in particular to Article 8 in relation to the fourth named applicant and that of the applicant's right to respect for family life we (sic) would respectfully request that these facts be taken into account in assessing this application for revocation of the aforesaid deportation order". The application was supplemented by a letter of the 13th August, 2009, attaching a letter from a medical social worker of the HSE confirming that the mother of P. was not "in a position now or in the foreseeable future to care for her daughter" and acknowledging that the first and second named applicants had "a private care arrangement between A… (an uncle of P) and [the first and second named applicants] therefore no state agency are (sic) involved in relation to this". The letter also invoked reliance upon dicta from the judgments in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] I.E.S.C. 25, and *G.A. &K.A. v. Minister for Justice, Equality and Law Reform* (Unreported, McMahon J. High Court, 22nd May, May).

8. That application for revocation of the deportation order was refused by letter from the Repatriation Unit of the Irish Naturalisation and Immigration Service (INIS) dated the 14th September, 2009. Attached to that letter was a nine page memorandum signed off within the Repatriation Unit of the Minister's Department on the 28/8/2009 by way of a statement of the analysis and evaluation of the application and the Minister's reasons for rejecting it. This memorandum deals in detail with the position of P and her foster care with the first and second named applicants and their own daughters. Again, the impact of implementing the deportation order on the second named applicant and his family is discussed and evaluated by reference to Article 8 of the ECHR; and the opposing rights of the family in the State are explicitly identified, analysed and then balanced with a view to reaching the decision. Throughout this memorandum the position of P is discussed in some detail by reference to her personal rights under Article 40 of the Constitution as well as her rights under Articles 41 and 42 and under Article 8 of the Convention. The memorandum notes as follows:-

> "P . . . has resided with [the first and second named applicants] for one year and five months. It is submitted that this is a private care arrangement between Mrs I and her next of kin A… and [the first and second named applicants] therefore no State agency is involved in relation to this. … P. still has significant contact with her mother and the goal has always been to try and unify [Mrs I] and P and have them live together as a family unit."

9. Against this decision to refuse a revocation, a second judicial review proceeding was initiated (2009 No. 964 J.R.) which came on for hearing in the Court on the 27th January, 2010, before Clark J. when leave was refused. In an extempore judgment Clark J. noted that reliance was sought to be placed upon matters which were never put to the Minister prior to the making of the application for revocation. While leave was refused, Clark J. out of an abundance of compassion, placed a stay upon the order desmissing the proceedings for a period of eight weeks in order to enable a new application to be made under s. 3(11) of the Act of 1999, based upon the new facts including the marriage which had since taken place between the first and second named applicants.

10. The new application for revocation which is the subject of the present proceeding was then made on the 23rd March, 2010. This takes the form of a three page letter from the solicitor of the applicants of that date, to which a series of letters and other items were attached. At the same time an appeal was initiated against the decision of Clark J. to refuse to grant leave. That application is still apparently pending before the Supreme Court.

11. The new application for revocation effectively reiterated that which had been made previously while submitting a series of letters and other items from the medical services and the social worker associated with the case. The essential point being made was this:-

> "As a result of the acute illness (of her mother) P has being (sic) residing with [the G.] family since March 2008 and continuous (sic) to reside with them to date. It would appear that this is a private arrangement, but however, there has been various State interventions regarding the circumstances of this particular family."

A letter from a social worker of Wellmont Health Centre is quoted in full to the effect that P would be unable to be cared for by her mother due to the latter's medical condition: although it adds:-

> "Should the [G.] family be deportment (sic) and P . . . have no one to care for her, social services in Kildare will need to be contacted as this is her current catchment area."

There then followed a specific submission in these terms:-

> "[The second named applicant's family includes P] who has been in his care since March 2008 and has developed a close relationship with his other children, in particular O. who attends the same school as herself. … The deportation of [the second named applicant] from the family unit would be in breach of Article 8 of the ECHR," (in respect of which the judgment of Clark J. of the 26th May, 2009, in *A. v. Minister for Justice, Equality and Law Reform)* was expressly invoked.

12. By letter of the 17th September, 2010, the Repatriation Unit informed the applicant of the Minister's decision to refuse this second application to revoke the deportation order. Again, by way of statement with the Minister's reason for his refusing the decision, there was attached to the letter of notification a fourteen page memorandum entitled "Consideration of Application for Revocation of Deportation Order" signed off within the Repatriation Unit of the Department on the 15th September, 2007, and countersigned by superior officers within the Department on the following day. It is this basis for the making of the Minister's decision to refuse revocation which is the subject of the present application.

13. In the meantime, however, a number of events had taken place which are relevant to the arguments raised in the present proceedings. On the 23rd October, 2009, that is well after the making of the deportation order on the 6th February, 2009, and the notification of the refusal of the first application for revocation of that order, the first and second named applicants married at the […… Church,] in Co. Kildare. Secondly, on the 13th August, 2010, the first named applicant gave birth to twins – the sixth and seventh named applicants.

14. Notwithstanding the impression that might be gleaned from the manner in which the case was presented, it is important to bear in mind that this is an application to seek judicial review of a decision on the part of the respondent to refuse revocation of an existing, valid deportation order already made under s. 3 of the Immigration Act 1999. The Court is not therefore concerned with the considerations which arise as to the legality and adequacy of the appraisal the Minister must make when first proposing to deport. Indeed, as already pointed out above the constitutional and Convention rights of the other aplicants (apart from the recently born 6th and 7th named applicants,) have previously been considered on at least two occasions by the Minister. The role of the Court in relation to the review of a refusal to revoke such an order is materially different. This is so both in relation to the grounds upon which such a review may be sought and in relation to Court's degree or intensity of assessment of any reasons which the Minister may give. The law in the matter is well settled having been stated by both the Supreme Court and the High Court in a series of decisions including the following.

15. In *Baby O. v Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169, in considering a similar challenge to a decision under s.3(11) Keane C.J said:-

> *"It was entirely a matter for the first named respondent to determine whether the circumstances relied upon were such that he was obliged to revoke the deportation order already made. I was satisfied that neither the High Court nor this court on appeal has any jurisdiction to interfere with the first named respondent's determination that the change of circumstances would not justify him in revoking the deportation order."*

16. In *Dada v. Minister for Justice, Equality and Law Reform* [2006] I.E.H.C. 169 O'Neill J. said:-

> *"It is clear that the nature and extent of the inquiry which is appropriate in this later phase of the process, thus described, is significantly more restricted than for example in the asylum phase. . . The scope for review by this court of a decision to revoke a deportation order under s. 3(11) is, if anything more restricted still."*

17. In a recent judgment of *H.I. v. Minister for Justice, Equality and Law Reform* (Unreported, 23rd November, 2010) this Court repeated its summary of the law that emerges from these and other cases that it had first suggested in a judgment in *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, 17th December, 2009), in the following terms:-

> *"When an application to revoke is made to the Minister under s. 3(11) of the Act, the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation order was made, no change in circumstance has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin. . . . In dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or inquiry; nor is he obliged to enter into any exchange of observations and replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive narrative statement of his reasons for refusal. Once it is clear to the Court that the Minister has properly discharged those two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with."*

18. Thus, the essential question before the Minister when he was deciding his response to this second application to revoke the deportation order made in the letter of the 23rd March, 2010, was whether the matters put before him as new circumstances or new information were such as would make implementation of the existing order illegal or, in the alternative, constitute sufficient reason to require him to refrain from implementing the order on some other compellable ground. The Minister might conceivably have given a very short answer to that question by pointing out that the representations made involved no new circumstance which had not already been considered. The fact that the first and second named applicants were informally fostering the fourth named applicant following her mother's hospitalisation, had been put before the Minister already in the letter of the 29th July, 2009, and had been acknowledged and addressed in the memorandum of analysis attached to the letter refusing that request dated the 14th September, 2009.

19. However, because of the terms upon which Clark J. had placed a stay on the deportation order on the 27th January, 2010, the Minister gave detailed consideration once more to what was urged in relation to the position of the fourth named applicant in the household of the first and second named applicants and their children.

20. The submission now made is that the Minister's refusal is unlawful in that he has failed to consider or to consider adequately the case made on behalf of P. to the effect that she enjoyed personal rights under the Constitution as an Irish citizen and a right to the protection of her family life under Article 8 of the Convention as the foster child of the first and second named applicants. On the face of it, the proposition that the fourteen page memorandum fails to consider the rights and interests of the fourth named applicant is manifestly unfounded. A large part of the memorandum is devoted to the position of the fourth named applicant and her relations with her own mother and with the other applicants in the present case. The facts in that regard since March 2008, as a given by the applicant's solicitor are fully recorded in the memorandum together with extensive quotations from the letters which had been submitted from social workers and others attached to Wellmount Park Health Centre and Connolly Hospital. As already cited above the medical situation of Mrs I is considered and it is noted that "it is apparent from the social worker reports on file that it has always been the intention to reunite P with her mother once (the mother) overcomes her current medical difficulties". Detailed consideration is given to the information as to the relationship between P and her own mother and particularly the fact that she spends every second weekend with her. It was observed that Mrs I had apparently recovered sufficiently to be able to "bathe, shower and help P. to get dressed, serve up food to her, play with her and put her to bed and care for her when she is feeling poorly". It is observed: "It is clear that there is obviously a very strong mother/daughter bond between Ms. I and P and that Ms. I undoubtedly cares very much for P.".

21. The care arrangement made with the first and second named applicants by the uncle who lives in England is also mentioned. It is further noted that P. has developed a particularly close relationship with the third named applicant who goes to the same school. The position of P is expressly included in the examination of the impact of a deportation on the constitutional rights of the Irish born citizen children. It is acknowledged that P. as an Irish citizen has personal rights under Article 40 of the Constitution including the right to reside in the State and to be reared and educated with due regard to her welfare and to the society care and company of her parents. It is pointed out, however, by reference to the established case law that such rights do not confer upon non national parents or siblings an entitlement to reside in the State. It is considered that povided the Minister is satisfied that there is good and sufficient reason in the interest of the common good, such Article 40 rights do not prevent the removal from the State of the non national parent of the citizen. Insofar as the second named applicant, accordingly, seeks to make the case that he should be treated as coming within the scope of these rights as a foster parent of the fourth named applicant, the Minister's appraisal cannot be questioned.

22. It is clear therefore that the position of the fourth named applicant within the household of the other applicants since March 2008, as a child in their care being fostered by them has been acknowledged and considered. It is described as an informal arrangement, but has official sanction in as much as the first named applicant receives a weekly payment of €170 as a "Guardian's payment (non contributory)" for taking care of P. It is not however, a formal fostering arrangement such as would arise had the child been taken into the care of the HSE and a care plan devised for her placing her with a foster family chosen by the HSE.

23. While it is acknowledged that the Minister's memorandum does recite all of these matters, the illegality or inadequacy of the consideration is identified as lying in the conclusion given to the section headed "Consideration of P I . . ." under subheading "Relationship between P and (the second named applicant)", where the author of the memorandum states: "I conclude that family life does not exist between P. and (the second named applicant)". It is submitted that this is based upon a mistaken understanding of the concept of 'family life' in Article 8 of the Convention. It is argued that in the case law of the Strasbourg Court it is clear that 'family

life' can cover a range of relationships wider than that of the traditional family comprised of a married couple and their natural children. It will include stepchildren and adopted children and, it is submitted, it can also include children being reared by foster parents.

24. It is undoubtedly the case that the concept of "family life" in Article 8 has been interpreted in the caselaw of the Strasbourg court as capable of including relationships wider than those based upon immediate relationships of blood and marriage. It can include those of grandparent and grandchild; (Marckx v Belgium 2 EHRR 330): between uncle or aunt and nephew or niece; (Boyle v UK 19 EHRR 179): between an unmarried couple; (Kroon v Netherlands, 19 EHRR 263): and (where the blood connection is absent) between a transexual male and a child born by donor artificial insemination to his wife; (X,Y & Z v UK; 24 EHRR 143).

25. In the Kroon case the court said: "*… the notion of "family life" in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto "family ties" where parties are living together outside marriage … Although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also saerve to demonatrate that a relationship has constancy to create de facto "family ties"; such is the case here as since 1987 four children have been born to[the applicants*]"

26. In the X, Y & Z case the court observed " *that X is a transexual who had undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's "father" since the birth. … In these circumstances, the court considers that de facto family ties link the three applicants."*

27. What clearly emerges from this case law however is the fact that where the protection of family life under Article 8 is invoked in respect of a relationship which is wider than those of the marital tie (in-laws for example,) and the blood tie between parent and child (grandparents, uncles, aunts for example,) the existence of "family life" and the extent to which a contested measure or action may be claimed to amount to an unlawful infringement is dependent on a careful consideration on a case by case basis of the specific characteristics of the tie asserted. A series of questions will be relevant. How are parties connected: how did the relationship come about: how long has it been established: do they live in the same household: what is the nature, quality or degree of intimacy of the bond between them: what are their ages and what element of emotional or practical dependency exists between them? The more remote the tie or connection and the lower the level of personal bond or dependency, the less likely it will be that a measure of state intervention which disrupts the lives concerned will amount to an unlawful interference which infringes Article 8.

28. It may well be correct in principle that, for example, the "family life" of an orphaned child in long term placement with a foster family is undoubtedly that of the household in which he or she is being reared. That may be the only family the child has. Contrary to the case made here however, the Court is satisfied that the Minister has not erred in the evaluation of the information placed before him by rejecting the proposition that the fourth named applicant has a potential family relationship with the second named applicant or that he has discounted the significance of the care she is receiving with the applicants because it is an informal fostering arrangement rather than a fully formal official placing established by the HSE. Such relationship as has been shown to have been subsisting since March 2008 between P and the [G] family has not been substantiated as having the characteristics of "family life" outside the blood relationship described above to a degree which could render unlawful under Article 8 the removal of the second named applicant from the State by virtue of its impact on any protection the article may afford P in these circumstances.

29. In the judgment of the Court it is clear from a reading of the memorandum as a whole that the Minister has considered very carefully and in great detail the substance of all of the information that has been put before him as to the nature and quality of the relationships of the fourth named applicant, both with her own mother and with the applicants. The reality of her position is that in the emergency that arose when her mother suffered her stroke, the intervention of her uncle from England resulted in her being looked after by the family with whom she has been living since. The position remains, however, that she is not an orphan, she has a mother and at least an uncle and has a close and loving relationship with her mother.

30. As indicated above, the immediate question which the Minister was required to consider was the likely impact of the deportation of the second named applicant upon the interests and welfare of P. on the basis that she was a member of that household and in the care of the applicants. What is significant in the view of the Court is that, notwithstanding the purpose for which a stay was sought from Clark J. on the deportation, namely to permit a new application to revoke to be made by reference to the position of P. within the applicant's family, no serious attempt appears to have been made to substantiate the reality of the relationship as one having family characteristics by furnishing the Minister with information as to the nature or quality of the relationship between the second and fourth named applicants. Apart from the fact that P has lived with the family since March 2008, and has developed a close relationship with the children and goes to the same school as the third named applicant, nothing by way of evidence is given as to the reality of family life in question. What is the daily routine? Who brings the children to school? Who collects them from school? In particular, nothing is said as to the nature of the bond, if any, which has developed between the second named applicant and P.. Does he help with her homework? Does he attend teacher/parent meetings? Does he take the children on outings together? Nothing is said as to how she participates in the normal everyday life of the family.

31. In the judgment of the Court, if a case is to be made that the removal from the State of the second named applicant (who was, when the application to revoke was made, at most, a foster parent of two years standing to an otherwise unrelated child,) will constitute such grave interference as to infringe the right to family life under Article 8 or some personal right of the citizen under the Constitution, it is necessary that detailed evidence be given to the decision-maker as to the nature, quality and character of the family life in question. Nothing of that nature has been done in this case, so that the conclusion that "family life does not exist between P. and (the second named applicant)" was clearly open to the Minister on the information placed before him and therefore correct so far as those facts go.

32. One further observation is appropriate. It has been emphasised in this case that what is in issue is not so much the entitlements of the second named applicant but the interference with the Constitutional and Convention rights of P. as a child, as a citizen and as a member of the applicants' family. But if it is correct that in those capacities P has rights which she can assert as against the State and claims which she can therefore make on the first and second named applicants, it must follow that the latter have corresponding obligations towards P. But the obligations of the first and second named applicants are essentially contractual and not based on any other legal relationship. They have agreed with Mrs I to look after P. for the time being. They receive a social welfare payment for doing so. They do not have custody or guardianship of her. They have no right to remove her from the State if they choose to return to Nigeria. They would appear to have no right to make important decisions for her such as changing her school. If they find the care burden too great or the allowance insufficient they are entitled to return P to her mother or ask Kildare social services to take her into care. These are all, in the judgment of the Court, factors which militate against attributing to the relationship anything in the nature of the "family " or parental character which might attract the protection afforded to a child under the Constitution or Article 8 of the Convention against the respondent.

33. Accordingly, even if it is accepted that in appropriate circumstances a child in foster care can assert an entitlement to the protection of rights in the nature of "family life" for the purposes of Article 8 of the Convention (or, for that matter, the Constitution in the case of an Irish citizen child,) the Minister has not in this instance failed to consider fully and correctly the substance of the relationships which formed the subject of the representations made to him in this request for revocation. It must also be borne in mind that the Minister has also considered and weighed in the balance the more direct and immediate rights of the actual family including the impact of deportation on the rights of the third named applicant who is also an Irish citizen. Having validly concluded that this was an instance in which there was a substantial reason in the interest of the common good for the deportation of the non national father notwithstanding its impact upon the rights of the spouse and their own children, it could not be said to be irrational or unreasonable that the same conclusion is reached in respect of the impact of the deportation on the more remote rights, interests and welfare of a child present in the family in foster care.

34. For all of these reasons the application is refused.