THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 490 JR]

BETWEEN

JACKSON YAO WANG (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND MING QIN LING) AND OTHERS

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of October, 2017

1. The third named applicant is a Chinese national, the father of the first and second named applicants who are Irish citizens. The mother is also Chinese, and the couple have a third child who is of Chinese nationality. All members of the family have resided here as a unit. Between 2000 and 2005 the father had student permissions. From 2005 to 2013 he had permission to remain in the State under the IBC 2005 (Irish Born Child) Scheme. That permission to remain in the State expired on 11th August, 2013. The father was convicted of a number of offences under s. 7 of the Criminal Law Act, 1977 on the 31st July, 2013, under ss. 15 and 21 of the Misuse of Drugs Act, 1977 on the 30th September, 2013, and of two further counts of attempting to cultivate cannabis plants and criminal damage on the 8th April, 2014. He received terms of imprisonment including terms of eight years, with two years suspended. His wife avers that he could have got a reduced sentence had he agreed to leave the country but he was unwilling to do so. A deportation order was made against him on the 13th June, 2016, which is challenged in these proceedings.

2. I wish to record my thanks to Mr. Colman FitzGerald S.C. (with Mr. Gavin Keogh B.L.) for the applicants and Mr. David Conlan Smyth S.C. (with Ms. Natalie McDonnell B.L.) for the respondents for their helpful submissions. I will deal with the applicant's contentions in turn.

The alleged failure to consider the constitutional rights of the family and its members (in particular the children).
3. In my view this argument is a non-starter. The constitutional rights of the children are expressly considered. The result of the weighing process is a matter for the Minister unless it is clearly unreasonable or unlawful which it is not. It is clear from *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151, *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1 and *Oguekwe v. Minister for Justice and Equality* [2008] IESC 25 that such rights are not absolute. How the decision is worded is not for the applicant to dictate. There is no doctrine that the decision must be phrased in the form of constitutional rights being the starting point.

The alleged failure to consider the best interests of the children.
4. As I pointed out in *O.O.A. v. Minister for Justice and Equality* [2016] 7 JIC 2924, [2016] IEHC 468 at para. 37 the best interests of the child can be outweighed by other factors. At p. 23 of the analysis the Minister accepts that it is in the best interests of the children to be raised by both parents, so that issue was clearly considered. However, best interests are not determinative nor could they be. Here it is concluded that such interests were outweighed by other factors, and that is a matter for the Minister unless such a determination is clearly unreasonable or unlawful, which it is not. On the contrary, it is clearly reasonable. Serious offending requires serious consequences either to deal with a past offence or to prevent future reoffending or *pour encourager les autres* and to send out a clear signal. Any one of these rationales could apply to outweigh the factors militating in favour of upholding the best interests of the children.

The alleged failure to uphold the EU law rights of the citizen children.
5. There is no evidence that the citizen children will in fact be compelled to leave the State if the father is deported. In fact the evidence is very much the contrary. Therefore there is no *Zambrano* issue (see Case C-34/09 *Gerardo Ruiz-Zambrano, M.Y. v. Minister for Justice and Equality* [2015] IEHC 7 and *E.B. (a minor) & Ors v Minister for Justice and Equality* (29th January 2016)). *Zambrano* only applies where a deportation would deprive children of the substance of their EU law rights. For example when both parents are proposed for removal and there is an EU citizen child there could be a *Zambrano* issue preventing deportation of both parents until the child turns eighteen. On the other hand (assuming that there was an objective reason to legitimately differentiate between the parents – as here) there would not appear to be an obstacle to deporting one of the parents immediately and the other when the child turns eighteen. Mr. Conlan Smyth points out that Advocate General Sharpston in her opinion in *Zambrano* delivered on the 30th September, 2010, at para. 178 proposed an answer to the questions posed in that case which would have provided greater flexibility, namely to suggest that arts.20 and 21 of the TFEU would not "*preclude a member state from refusing to grant a derived right of residence to an ascendant relative of a citizen of the Union who is a national of the Member State concerned and who has not yet exercised rights of free movement, provided that that decision complies with the principle of proportionality*". However the court went for a somewhat firmer version of the EU law rights involved although that was at some risk of a possible difference in approach between EU law and the ECHR. It may be for future case law to determine how that difference in approach can be reconciled. However where one parent is to be left behind in the EU, *Zambrano* does not apply for all practical purposes. If from an art.8 point of view there are no insurmountable obstacles to relocation that parent then has a choice as to whether to relocate or not. The exercise of that choice does not breach EU law. It is not a negation or a breach of EU law rights if the reason the children do not or cannot exercise those rights is if they are removed by a voluntary act of a parent who is not compulsorily removed.

The alleged failure to properly consider the ECHR, in particular art.8, and in particular by reference to insurmountable obstacles.
6. By way of general comment the family rights of the applicants and other family members are considered, both under the constitution and the ECHR. Those rights are clearly not absolute. Here they were found to be outweighed by other considerations. Such an approach is lawfully open to the Minister unless that weighing process is thoroughly unreasonable or unlawful. Here it clearly was not unreasonable having regard to the father's offending behaviour. Article 8 was expressly considered in the analysis.

7. The analysis cites the definition of insurmountable obstacles in *Boultif v. Switzerland* (Application No. 54273/00, European Court of Human Rights, 2nd August, 2001) and states that this is the "test" as to whether family life can be established elsewhere. Referring to the House of Lords decision in *R. v. Secretary of State for the Home Department* ex parte *Razgar* [2004] UKHL 27, the Minister states that regard should be paid to whether there are insurmountable obstacles. The reference to "*regard*" makes it clear that insurmountable obstacles or otherwise is a factor in a basket of factors rather than a single pass or fail test; and the use of the word "*test*" does not in and of itself make the reference to insurmountable obstacles a pass or fail threshold in some impermissible sense. Mr. FitzGerald complained that the Minister treated insurmountable obstacles as a paramount test but it is important not to get caught up in semantics. The key point is that the Minister assessed the question of best interests and family rights including those under the Constitution and art.8 in the light of all the circumstances and was entitled to regard the lack of insurmountable obstacles as a significant factor. It is manifestly clear from the case law that reference to insurmountable obstacles is permissible and does not render a decision invalid unless perhaps it is viewed as the only criterion in a sort of pass or fail manner which is not the case here. That case law includes *S.T.E. v. Minister for Justice and Equality* [2016] 6 JIC 2410, [2016] IEHC 379 (under appeal), *Alli and Alli v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 45, *Nunez v. Norway* (Application No. 55597/09, European Court of Human Rights, 28th June, 2011), and *P.O. v. Minister for Justice & Equality* [2015] IESC 64 *per* MacMenamin J. at para. 25 and *per* Charleton J. at para. 34.

8. The applicant's submissions referred to the decision of Mac Eochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] IEHC 29 (under appeal) relating to the "prima facie *right*" of an Irish citizen to have their non-national spouse reside with them, by virtue of Article 41 of the Constitution (para. 44). However, the position has been clarified and developed in subsequent case law (see *Khan and Anor. v. Minister for Justice & Equality* [2014] IEHC 533, *Forde and Anor. v. Minister for Justice & Equality* [2015] IEHC 720 (under appeal) and *ABM & Anor v. The Minister for Justice and Equality* [2016] IEHC 489 (under appeal)). In any event the Minister accepted that while there were some difficulties with the children relocating, they were of an adaptable age. It seems to me no illegality has been made out under this heading.

The alleged failure to consider difficulties with the children moving to China.
9. While the respondent's submissions suggested that the applicant was in default for not submitting an affidavit of laws as to the impact of nationality law and the situation, in fact the prohibition on dual nationality is accepted in the analysis at p. 20. Article 8 of the nationality law (adopted at the third session of the Fifth National People's Congress and promulgated by order number 8 of the chairman of the standing committee of the National People's Congress effective as of 10th September, 1980) is quoted in the analysis. From that it is clear that an Irish citizen would lose such citizenship on acquiring Chinese citizenship. It is also submitted that one cannot renounce Irish citizenship until the age of eighteen (which submission I would be inclined to accept). Even taking that to be so it seems to me that that is of limited relevance to this case because there is no intention to renounce such citizenship.

10. Assuming then that if the family moved to China that the children would remain as Irish citizens, it is by no means clear that just by not being a Chinese citizen they would be prevented from living there. There are obviously many countries that do not allow dual nationality; that does not and could not mean that there cannot be deportation to those countries. There would have to be clear evidence that children would not be accommodated even if they were of that country's heritage and even if the parents were nationals of such countries.

11. It seems on the face of it unlikely that the Chinese would prevent their own citizens from bringing an Irish citizen child who is of Chinese heritage with them but certainly the applicant has not established that that situation is likely. The mother's affidavit indicated certain alleged difficulties with moving the children, including the fact that the country is unfamiliar, that they spent their lives in Ireland, attended schools here, have limited knowledge of mandarin, and would find it difficult to live in China, and so on. Those factors certainly make it inconvenient to move, as the Minister acknowledged, but are very far short of amounting to insurmountable obstacles. In any event it is not proposed to move them to China so these issues do not really arise. I appreciate that the basis of the actual decision was that there were no insurmountable obstacles but I might observe that even if there were such obstacles that does not mean that deportation is impermissible. Those obstacles are simply a factor for the Minister to consider and balance against other considerations, albeit certainly an important factor. Serious offending would be such a counter balancing public interest consideration.

The allegation of possible future prosecution in China including an allegation regarding the death penalty.
12. This matter was considered by the decision maker who concluded that, having regard to material before the Minister, the evidence did not sufficiently establish a risk that the father would be re-prosecuted if returned to China. The Minister's analysis is condemned as speculation by the applicants but that is a criticism that is always open to any attempt to predict the future. It is not the law that any risk to an applicant however remote or theoretical is enough to preclude deportation. There must be substantial grounds to believe in a real risk of *refoulement* or other internationally prohibited mistreatment. The Minister determined that was not the case and that has not been shown to be unlawful. The analysis relied on the decision in *J.C. v. Secretary of State for the Home Department* [2008] UKAIT 00036 of the 14th May, 2008, which notes that such double punishment in China of an offence committed elsewhere is extremely rare. At para. 273 (17) the Tribunal said that "*absent particular aggravating factors, the risk falls well below the level required to engage international protection under the Refugee Convention, the ECHR, or humanitarian protection*". At sub para. 18 the Tribunal said "*merely to have committed a crime overseas, been sentenced and punished for it will not be enough to entail a prosecution under* [Chinese law]".

13. At sub para. 19 the Tribunal said that while the risk of prosecution or re-prosecution will be a question of fact in individual cases it is more likely where one of a number of aggravating factors apply including where "*there has been a substantial amount of adverse publicity within China about a case*", or where "*the proposed defendant has significantly embarrassed the Chinese authorities by their actions overseas*" or "*where the offence is unusually serious*" (see also *Y.F. v. Secretary of State for the Home Department* [2011] UKUT 32). The Minister's conclusion was that the offences were not *unusually* serious and thus were not aggravating factors. An issue arose as to the extent to which the Chinese knew about the offence and one can assume that this is at least a possibility given the factors publicised in Ireland. However Mr. FitzGerald's argument is that there must be some basis for saying that the Chinese authorities are unaware of the offence. That seems to me to reverse the onus of proof. It is up to the applicant to show that there are substantial grounds for a real risk that the deportation would result in double punishment. He has not done that so there is no obligation on the State to dispel any such doubts. The test is not that the offence receives publicity but that there are aggravating factors such as the substantial amount of adverse publicity within China or embarrassment to the Chinese authorities. More or less any criminal conviction in Ireland or in any Council of Europe member state can receive publicity given the obligation in art.6 of the ECHR (and in our case, under the Constitution) for the hearing of cases in public.

The complaint that undue emphasis was placed on convictions.
14. The next complaint is the allegation that undue emphasis is placed on the criminal convictions. However as I said in *P.S.M. v. Minister for Justice, Equality and Law Reform* [2016] 7 JIC 2930, [2016] IEHC 474, how the balance is to be struck in considering such matters is primarily a matter for the Minister. As stated at para. 40, serious offending requires serious consequences. This is not

a case where deportation automatically followed from any criminal conviction whatsoever. All circumstances were considered including the seriousness of the offence.

Order
15. Accordingly the order is

(i). that the application be dismissed; and

(ii). that the State be released from its undertaking not to deport the third named applicant.