THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 724 J.R.]

BETWEEN

JEFF OKUOMOSE ODEH, RHODA ODEH AND

ANGELOU OWEN ODEH (A minor suing by his father and next friend, JEFF OKUOMOSE ODEH)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

RESPONDENT

(No. 3)

JUDGMENT of Mr Justice David Keane delivered on the 4th June 2019

Introduction

1. This is the judicial review of a deportation order against the first applicant, made by the Minister for Justice and Equality ('the Minister') on 15 August 2016, under s. 3(1) of the Immigration Act 1999, as amended ('the Act of 1999').

Background

2. The first applicant ('the father') is a male Nigerian national, born in 1967.

3. The second applicant ('the mother') is a female Nigerian national, born in 1972, who shares a surname with the first applicant, evidently by coincidence, as they are neither related nor married to one another, although it is contended that they are in a stable relationship.

4. The mother claimed asylum on her arrival in the State unaccompanied in June 2002 when she was five months pregnant. The third applicant ('the child') is her son who was born in the State in October 2002 and is, in consequence, an Irish citizen.

5. The mother later withdrew her asylum application and applied for lawful residence in the State under the 'IBC 05' scheme, an administrative residency scheme for parents of Irish citizen children born on the island of Ireland prior to the imposition of a limitation on the acquisition of citizenship in that way by the Irish Nationality and Citizenship Act 2004. The mother's application under the scheme was unsuccessful and she reapplied for asylum. Her asylum application was rejected both at first instance and on appeal, and a deportation order issued against her on 15 December 2009. The Minister revoked that deportation order on 4 March 2010 on humanitarian grounds - focussed on the interests of her Irish citizen child - and granted her permission to live and work in the State for three years. The Minister has since twice renewed that three-year permission and the current one is due to expire on 27 September 2019.

6. The father entered the State unlawfully on an unknown date prior to 28 May 2015, when he applied for permission to reside here on the basis that his removal from the territory of the European Union would lead to a situation in which the child would have to leave that territory in order to accompany him, thereby depriving the child of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a European Union citizen. That is an invocation of what is now known as the *Zambrano* principle; *Gerardo Ruiz Zambrano v Office national de l'emploi* (C-34/09) EU:C:2011: 124 at para. 42.

7. In the course of that application process, and in his grounding affidavit in these proceedings, the father claimed that he entered the State from Northern Ireland on 12 May 2015, having travelled there on a false passport from Nigeria *via* London. Through his solicitors, the father submitted a copy of his Nigerian passport to the Irish Naturalisation and Immigration Service ('INIS') on 28 May 2015. It records on its face that it was issued in Rome on 20 April 2015, a fact for which no explanation has been offered.

8. In a letter to the father's solicitors, dated 15 July 2015, the INIS noted that the child's birth certificate did not identify his father. On 9 November 2015, the child's birth was re-registered to record the father's name as that of his father on his birth certificate.

9. The father acknowledges that he had no contact with the mother or with the child from the time of the mother's arrival in the State in 2002 until his arrival in the State in 2015.

10. A letter from the principal of the child's national school, dated 6 June 2015, states that the child was then at sixth class level in a special class for pupils with autistic spectrum disorder. A letter from the principal of the child's secondary school, dated 9 March 2016, confirms that the child has been attending the autism unit there since September 2015. It appears that no other information concerning the nature or severity of the child's condition has ever been provided.

11. Since his arrival in the State, the father has been relying on the mother for his subsistence and has been playing some limited role in the child's life, although it has been acknowledged for the purpose of the present application that, as the Minister found, he was not at any material time a primary carer for him.

12. Through the INIS, the Minister wrote to the father on 19 May 2016, refusing his application for a residence permission as the parent of an Irish citizen child and notifying him of the proposal to make a deportation order against him. That decision was based upon a six-page examination of the father's file, analysing the circumstances of the father and the child and applying the jurisprudence of the Court of Justice of the European Union ('CJEU') in *Zambrano* and *Dereci v Bundesministerium für Inneres* (C-256/11) EU:C:2011:734 in concluding that the refusal of residence permission to the father would not lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of the child's status as a Union citizen. The basis for that conclusion was that the father was not a primary carer for the child, who had been residing in the State with his mother for many years prior to the father's arrival and could continue to do so after his father's departure.

13. That decision was never challenged.

14. Through his solicitors, the father made a submission against his deportation to the Minister on 15 July 2017. Beyond the bald assertion that the Minister's refusal of permission to remain was 'flawed in fact and in law', that submission was as follows:

> 'Our client is married to the mother of this child and resides in a secure family unit with the child. He resides as a secure family unit with his child. He is fully involved in the life of his child, as evidenced by the letters from his wife and other independent parties. He has the offer of employment open to him in the event that he is permitted to reside and work in the State. He is integrated and established in the State and it is intended that further submissions will follow.'

15. For clarity, several points must be made. First, the father was not married to the mother. Second, the word 'secure' was evidently used in error instead of the word 'stable.' Third, no evidence of the asserted offer of employment was provided. And fourth, no further submissions followed.

16. On 8 August 2016, a departmental official produced a 15-page examination of the applicant's file, culminating in a recommendation in favour of deportation ('the file note'). A deportation order was made on 15 August 2016. That is the order challenged in these proceedings. It was furnished to the applicant under cover of a letter to him from the INIS, dated 29 August 2016. That letter informed the applicant that he was obliged to leave the State by 29 September 2016 and, failing that, to present to the Garda National Immigration Bureau on 5 October 2016.

Procedural history

17. The application is based on an amended statement of grounds, dated 16 December 2016, grounded on an affidavit sworn by the father on 15 September 2016. Humphreys J initially refused to grant leave to apply for judicial review in a decision delivered on 14 November 2016, but on 7 December 2016, in exercise of the jurisdiction recognised in *Re McInerney Homes Ltd & Ors* [2011] IEHC 25, (Unreported, High Court (Clarke J), 21st January, 2011) to revisit the decision before the perfection of the order, decided to grant leave to apply for judicial review on the grounds now set out in the amended statement. The second decision of Humphreys J can be found under the neutral citation [2016] IEHC 654.

18. The Minister's statement of opposition is dated 24 March 2017. It is grounded on an affidavit of Ciaran Colley, an administrative officer in the Minister's department, sworn on 19 July 2017.

The grounds of challenge

19. In accordance with the leave granted by Humphreys J, there are two grounds upon which the applicants seek an order of certiorari quashing the deportation order against the father.

20. The first is that the decision is unfair, unreasonable and disproportionate in not weighing, either properly or at all, the constitutional and European Union law rights of the child against the societal interests and rights of others that are invoked to justify the deportation of the father as necessary – *i.e.* the common good in upholding the integrity of the immigration laws of the State, maintaining effective control of the State's borders, and ensuring the State's economic well-being – in determining that the child could leave the territory of the Union to continue enjoying family life with the father. This ground asserts that this finding involves the child 'having to leave the State and indeed the territory of the Union' and that this consequence has been ignored by the Minister. The ground goes on to assert that the Minister ignored the constitutional rights of the child in reaching that determination.

21. The second is that the decision is unfair, unreasonable and disproportionate either in prioritising the consideration of the applicants' rights under Article 8 of the European Convention on Human Rights ('the Convention') over that of the rights of the family under Article 41 of the Constitution or in wrongly conflating the two.

Analysis

22. The first ground seems to me to be based upon both a false premise and the identification of a false dichotomy between the *Zambrano* principle as a matter of EU law and the factors that govern a consideration of the deportation of the parent of an Irish citizen child under the Constitution, the Convention, statute and case-law, as identified by the Supreme Court in *Oguekwe v Minister for Justice* [2008] 3 IR 795 (at 822-824) ('the *Oguekwe* factors').

23. Under the heading 'Balancing Rights', the author of the file note concluded (in material part):

> 'I have considered that although the family may wish to reside in the State the Minister is not obliged to abide by this wish. I have considered the fact that [the mother] can choose to remain in the State with [the child] or move to Nigeria to keep the family together. In that regard, there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria. Additionally, consideration has been given to the fact that a deportation order would not have the same impact as if [the father] had lived with his son for the first 13 years of the child's life.'

24. Thus, as a matter of fact, if the child left the State after the deportation of the father, it would be a matter of choice, not compulsion; that is, a matter of the mother choosing to leave the State on the child's behalf, rather than of the mother or the child 'having to' do so. To suggest otherwise is to criticise the Minister's decision on the basis of a false premise.

25. Equally, to suggest that the Minister failed to have regard to the constitutional rights of the child is, in my judgment, flatly wrong. After some significant analysis of the rights of the child as an Irish citizen, the relevant portion of the file note concludes:

> 'With regard to [the child's] rights as an Irish citizen, it is accepted that he enjoys rights under Article 40, 41 and 42 of the Constitution. He has the right to reside in the State and be reared and educated with regard to his welfare. He also has a right to the society, care and company of his parents.

These rights are not absolute and must be balanced against those of the State. The State has an undoubted right to control the entry, presence and exit of foreign nationals. This is, of course, subject to the State's obligations under the Constitution and any agreements to which it is a party. The State must consider issues of national security, the maintenance of the common good, public policy, the integrity and consistency of its border controls and fairness to all persons in the State.'

26. As the mother and father are not married, it is difficult to see how Article 41 rights are engaged in this case. Nonetheless, it makes little practical difference, since a child born outside marriage has rights under Article 40.3.1° that fall to be considered in the context of the proposed deportation of a parent: *IRM v Minister for Justice and Equality (No. 2)* [2016] IEHC 478, (Unreported, High Court (Humphreys J), 29th July, 2016); and *KI (A minor) v Minister for Justice, Equality and Law Reform* [2014] IEHC 83, (Unreported, High Court (McDermott J), 21 February 2014.

27. The false dichotomy at the heart of the applicants' argument lies in the failure to distinguish between the consideration of the child's Union citizen rights under the *Zambrano* principle, on the one hand, and the consideration of the mother and child's rights under Article 8 of the Convention and Articles 40.3.1° and 42 of the Constitution as part of the deportation process, on the other. The applicants appear to conflate the question of whether the child would be obliged to leave the territory of the European Union if the father was deported, that is already the subject of an unchallenged decision that he would not, and the quite separate question of whether it would be reasonable for the family to live together in Nigeria if the father is deported there (and should they elect to do so), that falls to be considered as one of the Oguekwe factors relevant to the deportation decision.

28. In this case, the Minister had already determined that the *Zambrano* principle was not engaged because, on the facts presented, there was no basis to conclude that the removal of the father from the territory of the European Union would lead to a situation in which the child would have to leave that territory in order to accompany him, thereby depriving the child of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a European Union citizen. That decision was not challenged.

29. It is by now well established that, in conducting the necessary proportionality analysis regarding the proposed deportation of a parent, the Minister should have regard to the reasonableness of the family living together in the country of origin as one of the *Oguekwe* factors or, by application of the broadly analogous principle in the jurisprudence of the European Court of Human Rights summarised by Lord Phillips in *R. (Mahmood) v Secretary of State for the Home Department* [2001] 1 W.L.R. 840, the Minister should have regard to the presence or absence of insurmountable obstacles to the family living together there.

30. As Clark J observed in *AN v Minister for Justice and Equality* [2013] IEHC 480, (Unreported, High Court, 31st July, 2013) (at para. 49), in holding that the *Zambrano* principle does not preclude the application of the 'insurmountable obstacles' test:

> 'In the view of this Court, the judgment of the CJEU in *Zambrano* and the rights which flow from Article 20 TFEU do not preclude the Minister from considering whether it would be reasonable to expect an EU citizen to relocate outside of the EU to maintain family life with a non-EEA national in the event of his / her deportation. It remains a matter for the Minister to weigh all relevant facts and circumstances in the balance so far as they are known to him and to reach a reasonable and proportionate decision on a case-by-case basis.'

31. In reaching that conclusion, Clark J adopted the following statement of the law by the Court of Appeal for England and Wales in *DH (Jamaica) v Secretary of State for Home Department* [2012] EWCA Civ 1736 (at para. 63):

> '[…] there is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in Dereci, but that is an entirely distinct area of protection.'

32. In light of those authorities, which it is right that I should follow, I reject the first ground of challenge to the deportation order.

33. The second ground of challenge also appears to me to be based on a mistake of fact, i.e. that the decision considered the applicants' Convention rights to the exclusion of their constitutional rights. The file note considers both the Convention jurisprudence and the constitutional rights of the child as part of its analysis.

34. It is perhaps true that, as with so many other similar cases, it is not obvious from the file note in this one that constitutional rights were given appropriate precedence over Convention rights in the order of that analysis. As Hogan J pointed out in *RX & Ors. v Minister for Justice* [2010] IEHC 446 (Unreported, High Court, 10 December, 2010) (at para. 32):

> 'I would pause here to add that the references in asylum and immigration case-law to Article 8 ECHR have become such a common place, that it is perhaps easy to overlook the fact that even in this area, the ECHR merely supplements or enhances the role of the Constitution. Such is made clear by the Long Title to the European Convention of Human Rights Act , and, in any event, the Supreme Court has confirmed that where there is an overlap between constitutional rights and rights deriving from the Convention, it is the former which, generally speaking at least, must be considered first: see, *e.g.*, *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71. The Convention comes into play only where the Constitution does not provide an adequate remedy in its own right.'

35. However, I do not accept that the failure to address the rights at issue in accordance with the appropriate order of precedence between their various sources is, of itself, capable of undermining the Minister's decision to make a deportation order, once the substance of each of those rights was properly considered and weighed in the balance, as there is no reason to doubt that in this case it was.

36. Thus, I reject the second ground of challenge to the deportation order.

37. Finally, in an abstruse way in the their written submissions, but with commendable directness in the argument that Mr Conlon S.C. made on their behalf, the applicants contend that the Minister's proportionality assessment was simply wrong and that the deportation order should be condemned on that basis.

38. The applicants acknowledge that the decision of the Supreme Court in *AO* and *DL v Minister for Justice* [2003] 1 IR 1 remains the controlling authority on the test of proportionality that must be applied in considering the deportation of a parent of Irish citizen child 'for good and sufficient reason, associated with the common good.' The applicants point out that the earlier decision of the Supreme Court in *Fajujonu v Minister for Justice* [1990] 2 IR 151 was not overruled in *AO* and that, in *Oguekwe*, already cited, Denham C.J. observed (at 815) that, while *AO* was an important and relevant precedent, it had to be considered in the light of the facts of that case. While, those submissions are unimpeachable as far as they go, they do not serve to identify any error in principal in the approach adopted by the Minister in this case.

39. Similarly, it is well-settled that judicial review is comprehensive and flexible enough to provide an effective remedy where the vindication of constitutional or Convention rights are in issue: see *ISOF v Minister for Justice* [2010] IEHC 457, (Unreported, High Court (Cooke J), 17th December, 2010) (at para. 10); and *Lofinmakin (a minor) v Minister for Justice, Equality and Law Reform* [2011] IEHC 38, (Unreported, High Court (Cooke J), 1st February, 2011) (at para. 42). Those principles are not in doubt either.

40. Nonetheless the approach to be adopted to challenges to deportation decisions on reasonableness, including proportionality

grounds, is clear. Cooke J explained it in *ISOF v Minister for Justice* [2010] IEHC 386, (Unreported, High Court, 2nd November, 2010), (at para. 12) in the following way:

> 'As counsel for the applicants acknowledged during argument, the High Court has, since the handing down of the judgments in Meadows, pointed out in a number of judgments that in order to substantiate a challenge to a decision of this nature as irrational or unreasonable because of its disproportionality, it is not sufficient merely to disagree with the evaluation made or the balance struck in the File Note. (See for example *S.O. & O.O. v MJELR* (*Unreported, Cooke J. 1 October 2010*.) It is not enough, in the view of the Court, to simply assert that the Minister ought to have given greater weight to some factors or less to others. The onus of establishing the unlawfulness of the decision lies with the applicant. The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be to substitute its own appraisal of the facts, representations and circumstances for that of the Minister. As the Supreme Court made fully clear in the *Meadows* case, the test to be applied in assessing whether an administrative decision of this nature is irrational or unreasonable (including unreasonable by virtue of disproportionality,) remains that established in the *Keegan* and *O'Keefe* cases. Accordingly, the function of the Court is to consider the manner in which the evaluation has been made by the Minister as apparent from the order, the covering letter and the contents of the File Note, and ask itself in paraphrase of the terms formulated by Henchy J.: "Does the conclusion to deport the applicant flow from the premise upon which it is based; or does it, by reason of some flaw or failure in the way in which the balancing exercise was apparently approached, result in a conclusion which "plainly and unambiguously flies in the face of fundamental reason and common sense?"'

41. While, perfectly understandably, the applicants take the view that the Minister gave insufficient weight to the constitutional and Convention rights of the child and excessive weight to the interests of the common good in maintaining the integrity of the immigration system and controlling the State's borders, that is not sufficient. The test they have to meet is one of *Keegan* and *O'Keefe* unreasonableness. In that endeavour, they have failed.

Conclusion

42. The application for judicial review is refused.