Neutral Citation: [2017] IEHC 174

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 4 J.R.]

BETWEEN

M. I. (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND M.I.) AND M. I.

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 16th day of March, 2017

Issues

1. This matter came before the Court on 13th March, 2017 where the applicants were seeking an injunction restraining the removal of the second named applicant from the State pursuant to a deportation order of 27th May, 2016 until such time as the within proceedings have been determined. The applicants secured leave by order of 3rd January, 2017 to maintain an application for judicial review seeking certiorari for the purposes of quashing a decision of the first named respondent of 9th December, 2016 which said decision refused to revoke the deportation order of 27th May, 2016 aforesaid.

2. Initially by virtue of the order of 3rd January, 2017 an injunction restraining the implementation of the deportation order was afforded until 16th January, 2017 and subsequently this injunction was continued by agreement with the respondent which agreement has lately lapsed and hence the application to the Court.

Brief background

3. The second named applicant arrived in the State in April, 2005 aged 17 years. Following an incident which occurred in or about 2009 the second named applicant was convicted of an offence and sentenced on 30th January, 2012 to two years in prison with one year suspended. The DPP appealed the sentence and Court of Appeal increased the sentence to a total of five years by order of 23rd September, 2013. The final two years were suspended.

4. Following the initial sentencing but prior to the order of the Court of Appeal the respondent afforded the second named applicant permission to reside in the State for a six month period on or about 7th August, 2013.

5. Following the increase in the sentence aforesaid the respondent looked to revoke the permission held by the second named applicant and subsequently issued the deportation order.

6. Currently the second named applicant lives with a third party and they have a child who was born on 15th November, 2016. Both the partner and the child are Irish citizens. If the second named applicant is deported it is the intention of the partner and the infant child to travel with the second named applicant.

7. The second named applicant is also the father of another child namely H born in 2009.

8. In a decision of the respondent of 12th May, 2016, at p. 22 thereof it is recited that the respondent received a letter from H's mother bearing date 17th January, 2016 where she indicated that the second named applicant and H have a good relationship and the second named applicant takes H every second weekend from Thursday to Sunday.

9. This decision at the same page also refers to a letter from the second named applicant received in January, 2013 stating:-

> "While I was in prison my mother was taking good care of my son. He went to my mother's home….every Thursday to Sunday. My mother…continued supporting him in my behalf."

10. Based on the foregoing therefore it appears that H is currently aged almost 8 years and has enjoyed the company and society of his father between Thursday and Sunday on a weekly basis save for a one year period following the sentence imposed on the second named applicant on 30th January, 2012 and a further two year period following the increase in sentence by the Court of Appeal on 23rd of September, 2013.

11. It is apparent therefore that H's access with his father has been interrupted for a total period of three years by reason of the criminal activity on the part of the second named applicant.

Submissions

12. The applicant relies upon the Supreme Court judgment of the 16th October, 2012 in *Okunade v. The Minister for Justice & Ors.* [2012] 3 I.R. 152 when Clarke J. on behalf of a five member Supreme Court set out at para. 104 the test for consideration as to whether or not to grant an interlocutory injunction, namely that:- "…the court should apply the following considerations:-

> (a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;
>
> (b) the court should consider where the greatest risk of injustice would lie; But in doing so the court should:-
>
> (i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;
>
> (ii) give such weight as may be appropriate to any public interest in the orderly operation of a particular scheme;
>
> (iii) give appropriate weight if any to any additional factors arising on the facts of the individual case which would

heighten the risk to the public interest the specific measure under challenge not the implemented pending resolution of the proceedings

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where the measure may be found to be unlawful

(c) in addition the court should have regard to whether damages are available and or would be an adequate remedy;

(d) subject to the issues arising not involving detailed investigation of facts or complex questions of law the court can place all due weight on the strength or weakness of the applicant's case."

13. The Court went on at para. 110 to identify that the default position is that an applicant will not be entitled to a stay or an injunction.

14. From para. 113 the Court identified an exception to the general rule and that is when deciding what is to happen on a temporary basis a disruption of family life which has been established in Ireland for a significant period of time is a material consideration. All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where after successful conclusion the children might return to Ireland. The Court noted at para. 114 that the constitutional right of an Irish born applicant to the company, care and parentage of its parents within the State was not absolute. On an interlocutory basis the Court has to weight the balance of convenience and consequences for such infant of being deported and at para. 116 the Court indicated that the weight to be attached to any such difficulties will necessarily be dependent on the facts of the case. Such difficulties are not necessarily decisive – they are but one factor to be taken into account. Ultimately the Supreme Court determined the matter on the basis of an assessment as to whether or not there was any sufficient countervailing factors to alter the default position. In this regard the Court felt it could not overlook the fact that one of the applicants is a child and the Court restated that a significant disruption to family life is a countervailing factor which provided it be of sufficient weight can be enough to tip the balance in favour of granting a stay or injunction.

15. Significantly at para. 121 the Court found that deportation albeit on a possibly temporary basis is not compensatable in damages and therefore in a deportation situation a consideration of the balance of justice is required.

16. The respondent argues that the child H is not an applicant in the present situation, is not the subject matter of the deportation order and furthermore pays particular emphasis on the heinous crime of the second named applicant. The respondent also argues that the new infant would not suffer any disruption to his life if the second named applicant was to be deported as he was sufficiently young that it would not cause a disruption. I agree with the respondent in this regard and therefore the fact that the second named applicant's current partner would be willing to travel with the second named applicant and the first named applicant to Nigeria if the second named applicant is to be deported the matter of choice of the partner. The respondent points to ground number six in the statement of grounds to the effect that the respondents' conclusion that the second named applicant's partner may go to reside in Nigeria with the second named applicant is not a valid option, at least in the short term. That statement of grounds is dated 3rd January, 2017 and yet in the grounding affidavit of the second named applicant also the 3rd January, 2017 at para. 12 it is indicated that the second named applicant's partner would go to Nigeria if the second named applicant was deported.

17. Given that leave has been afforded I am satisfied that the applicant has established an arguable case therefore the decision to be made is a matter of balancing the impact of the deportation order being implemented on the applicants and the second named applicant's son H on the one hand and the orderly implementation of measures which are *prima facie* valid on the other. I am not satisfied that I had sufficient information before me at this time to make a determination on the strength or weaknesses of the applicants' case, including because a statement of opposition has not yet been filed.

Conclusion

18. Having considered the matters aforesaid it is clear that the default position is that no injunction should be granted although it is clear that the Supreme Court felt that where an infant child might be deported albeit temporarily this is a matter which will tip the balance in favour of the affording of the injunction.

19. In the instant circumstances:-

(i) There is no question of H being deported;

(ii) It is somewhat ambiguous as to whether or not the second named applicant's partner would travel to Nigeria with the first named applicant if the second named applicant was deported given the conflict and between para. 12 of the grounding affidavit at para. 6 of the grounds in the statement of grounds, although, in my view, in any event if the first named applicant and the partner are to travel with the second named applicant this is a choice which will be made by the parents and the first named applicant is sufficiently young that I am not satisfied that there would be any great disruption to his life whether he remained in Ireland or travelled to Nigeria.

(iii) O'Donnell J. referred to the second named applicant as a serious predatory sexual offender and in addition the second named applicant has prior convictions for assault and dishonesty although it does appear that following his release from prison having been readmitted to prison, as a consequence of the order of the Court of Appeal aforesaid, there is no evidence that the second named applicant came to the adverse attention of the authorities. The behaviour of the second named applicant heightens the risk to the public interest (see generally p.5 of the recommendation of the 22nd November, 2016 and the 4th paragraph of p.7 of that recommendation and paragraph 12(b) thereof).

(iv) By reason of the voluntary behaviour on the part of the second named applicant (committing criminal offences) the second named applicant has already caused a disruption to H's family life over the period for which he was incarcerated from 30th January 2012 and again from October 2013. At p. 22 of the recommendation of the 12th May 2016 reference is made to a letter from the second name applicant to the effect H stayed with his paternal grandmother from Thursday to Sunday while his father was in prison: - "my mother was taking good care of my son". I am satisfied that this demonstrates that in the past while his father was effectively absent from his life, a suitable and satisfactory arrangement/care plan was in place for H and accordingly the implementation of the deportation order pending a conclusion of the applicants within proceedings would have a more reduced impact on H than might otherwise be the case.

20. I am satisfied that H's position has to be considered whether or not he is a party to the proceedings.

21. Based on the foregoing I am not satisfied that the applicant has tendered sufficient evidence to tilt the balance in favour of the making of an injunction and in those circumstances I refuse the order sought.