Neutral Citation Number: [2010] IEHC 351

THE HIGH COURT

JUDICIAL REVIEW

2010 1264 JR

BETWEEN

DAVID KANGETHE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered 7th day of October, 2010.

1. This is an application made *ex parte* for leave to seek judicial review of the respondent's decision of 6th September, 2010, which refused an application made by the applicant under s. 3 (11) of the Immigration Act 1999 for the revocation of a deportation order which had been made in respect of him on 21st September, 2009, ("the Contested Decision").

2. The applicant arrived in the State from Kenya in January 2007 and was unsuccessful in claiming asylum. An application for subsidiary protection was also refused. The Court notes that this application has been brought based on a grounding affidavit from the applicant and a supporting affidavit from Ms. Peninah Wanjiku who is described as the applicant's partner and to whom he claims to be engaged to marry. Ms. Wanjiku is also from Kenya and was granted asylum in the State and is now an Irish citizen. She has a child who is an Irish citizen of whom the applicant is not the father. The applicant claims, however, that he is regarded as playing a fatherly role by that child and by its mother and that they constitute together a family unit.

3. The Contested Decision was, as usual, supported by a file note containing the analysis of the application made by the Repatriation Unit of the Department for the Minister's recommendation and on which the decision is based. This constitutes, in effect, the statement of the Minister's reasons for the decision. Apart from the background information recorded in the file note, however, the Court has been furnished with virtually no direct evidence on behalf of the applicant as to the basis of the asylum application; the representations made against the Minister's proposal to make a deportation order; or the reasons why those representations were rejected and what humanitarian considerations, if any, were put forward and presumably found not to outweigh the interests of the State which the Minister sought to protect in ordering the deportation.

4. This lack of information is material in this application because the arguments advanced appear to the Court to seek to reopen matters which would logically have been considered by the Minister when making his decision to deport. It is well settled law that the grounds upon which a decision refusing revocation under s. 3 (11) may be challenged are limited. In his judgment of 9th November, 2005, *in Kouaype v. MJELR* [2005] IEHC 380, Clarke J. identified the limited grounds upon which a decision to make the deportation order may be open to challenge:

> (a) Failure to consider whether the prohibition on refoulement applied;
>
> (b) That the Minister could not reasonably come to the view on which the decision to deport was based;
>
> (c) Failure to allow the asylum seeker to make representations by way of humanitarian considerations; and
>
> (d) Failure to consider those representations.

It follows that the circumstances in which a challenge can be made to a subsequent decision to refuse to revoke a deportation order are at least as limited. Such an application necessarily proceeds upon the basis that the deportation order is valid.

5. This Court described the approach that should be taken in its ex tempore judgment of the 17th December, 2009, in the case of *M.A. v. MJELR* where the Court said:

> "When an application to revoke is made to the Minister under s. 3 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 of circumstance had occurred either so far as concerns the applicant or the situation in the country of origin which could bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin. Otherwise … 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 in 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 the 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 by judicial review."
>
> (See also the judgment of this Court in *I. & Anor. v. MJELR* [2009] IEHC 334.)

6. According to the evidence before the Court, including matters in the file note not disputed by the applicant, the applicant was already married in Kenya in 1998 before coming to Ireland and has three children who remain there. As recently as January, 2009, he apparently told the Garda Síochána that he was "working to raise money to send to his wife and children in Kenya".

7. The Contested Decision responds to the application made under s. 3 (11) as made on behalf of the applicant by his solicitors by letter of 27th April, 2010. The material part of that application is as follows:

> "We wish to make the application having regard to the content and criteria set out in your website whereby non-EEA nationals who wish to remain in the State and are in a *de facto* relationship with an Irish national may seek leave to remain in the State where there is evidence of a durable attested relationship of at least two years. In this regard we would point out that our client is in a relationship with Peninah Wanjiku, a Kenyan national who is a recognised refugee and now an Irish citizen. The relationship has existed between our client and Mrs. Wanjiku for the requisite two years and in this regard we would refer you to her letter of 27th September, 2009. We also enclose an undated letter from Mrs. Wanjiku pointing out that they are engaged to be married and she is currently pregnant with their child. It is argued that in the exercise of the Minister's functions in respect of this application regard ought to be given to the rights of the unborn child. The child if born in this State would by virtue of its Irish nationality and citizenship be an Irish citizen. Please note that Ms. Wanjiku has a child from a previous partner and we enclose the bio-data of this child who is an Irish citizen. This raises an obstacle to Ms. Wanjiku and our client enjoying residency together outside Ireland in that she has no entitlement to remove the citizen child from the State without the permission of the biological father."

8. Thus, the essential basis of the application which the Minister had a duty to consider was as follows.

> (a) The applicant had been in a relationship with an Irish citizen for two years;
>
> (b) They are engaged to be married;
>
> (c) Ms. Wanjiku was pregnant and the child when born would be an Irish citizen; and
>
> (d) Ms. Wanjiku has another child by another father and there is an insurmountable obstacle to her joining the applicant in Kenya on deportation without the permission of that child's father.

9. On the assumption that all of these matters are new facts not disclosed to the Minister in the representations made against the deportation proposal, including the existence of the relationship with Ms. Wanjiku which appears to have commenced one and a half years prior to the date of the deportation order in September, 2009, the duty of the Minister was to consider whether they amounted to a change of circumstances which would render the continued implementation of the existing order unlawful. The issue that arises, therefore, is whether the grounds now sought to be raised disclose any arguable case that this refusal to revoke the order was unlawful having regard to the changed circumstances in question. This is an application not covered by s. 5 of the Illegal Immigrants Trafficking Act 2000 so that only an arguable case need be established.

10. In the statement of grounds five grounds are put forward. It is notable that none seeks to allege that the Contested Decision is vitiated by any specific mistake either of fact or law. The grounds are characterised by the common assertion that the decision is "*ultra vires*, arbitrary, irrational, unreasonable and disproportionate" in taking into account irrelevant considerations and/or failing to take account of relevant considerations. The grounds in the arguments emphasised by Counsel at the *ex parte* hearing were directed particularly at the adequacy of the decision's assessment of:

> (a) The applicant's place in the family unit comprised of himself, Ms. Wanjiku and the existing child;
>
> (b) The claim that there is an insurmountable obstacle to that unit relocating together to Kenya because the child could not be removed without the consent of the biological father;
>
> (c) In particular, the rights of the unborn child under the Constitution and the European Convention on Human Rights.

11. It must be borne in mind that any assessment of the legality of the decision in this regard falls to be made by reference to the information made available to the Minister when the decision was made and not by reliance on any new facts or information now sought to be introduced. This is a material consideration in the present case because, in moving the application Counsel sought to counter the doubt expressed in the file note as regards the proposed marriage, based on the fact that the applicant had hitherto maintained that he had a wife and family which he was supporting in Kenya. Counsel informed the Court that, as he put it, "the applicant had been endeavouring to regularise his position in Kenya". This did not seem to involve, however, divorcing his Kenyan wife but obtaining a certificate which purported to confirm that there existed no impediment to his proposed marriage in Kenyan law. The Court pointed out that as Kenyan law appeared to accept polygamous marriages the purported certificate did not necessarily prove his new claim that he had never lawfully been married to the named mother of his three Kenyan children. At any rate, the precise provenance and status of this certificate was wholly unexplained and this entire demarche is new and had never been put to the Minister.

12. Where, as here, the grounds sought to be raised are based on an alleged irrationality, unreasonableness or disproportionality in a narrative decision of this detail, the test in law is that reaffirmed by the Supreme Court in the judgments of 21st January, 2010, in *Meadows v. M.J.E.L.R.* [2010] IESC 2010 namely, the test previously laid down in *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] I.R. 39. A decision is only unlawful on this basis if it is shown not to flow from the premise upon which it is based such that the conclusion reached and given effect to in the decision flies in the face of reason and common sense.

13. Having considered the five grounds proposed to be raised in the light of the oral submissions, the Court is satisfied that no arguable case can be made that this Contested Decision, as explained at length in the twelve pages of the file note, does not flow from its premise or flies in the face of reason and common sense. Each of the new facts and changed circumstances relied upon in the letter of 27th April, 2010, is set out and commented upon in detail in the file note. Explicit consideration is given to the implication of the applicant's relationship with Ms. Wanjiku and her son and it is expressly recognised that this establishes "a family life in the State with an Irish national partner" for the purpose of Article 8 of the European Convention on Human Rights. The claim to the existence of an insurmountable obstacle is also expressly addressed and "it has been established that the applicant's partner would not be able to return to Kenya and establish family life with the applicant there". It is noted, however, that the applicant "has not submitted any documents or information to indicate that he is divorced from his wife in Kenya or that his marriage there has been dissolved therefore the applicant may not be in a position to marry his partner".

14. Based on the state of information then available to the Minister it could not be seriously suggested that this was not a reasonable and logical doubt as to the reality of the proposition that the applicant and Ms. Wanjiku would intend to relocate to Kenya in the event of his deportation but would face an insurmountable obstacle is doing so. It must also be pointed out that the Minister appears to have been given no information to substantiate the proposition that the absence of consent to the relocation of the child by his father would be an insurmountable obstacle. Who is the father in question? Where is he? Is he in Ireland or in Kenya? Has he been asked to consent?

15. Thus, there has in this case, been a careful and detailed consideration of the matters put forward as the basis for revocation of the order. In the absence of any claim that some mistake has been made on any material fact it does not constitute an arguable case as to the illegality of the refusal to merely assert that the balance struck by the Minister is unreasonable or disproportionate. The Minister has considered the changed circumstances put to him and has rejected them for the reasons given. Those reasons are clearly based on the facts and information given to the Minister pertinent to the circumstance of the applicant and his previous and new relationships. Furthermore, the Minister has recognised that Ms. Wanjiku is expecting the applicant's child in November next and that that child will be an Irish citizen.

16. However, as this Court has pointed out in its judgment of 17th December, 2009, in the case of *H.U. & Ors. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 598, the right protected by Article 40.3.3 of the Constitution is the right to life of the unborn child. Insofar as a third party and particularly the natural parent of the unborn child is entitled to assert a constitutional right on its behalf in advance of its birth, the only constitutional right thus justiciable is the right to life, that is, the right to be born. It is only after the birth that the personal rights of the child itself become justiciable in its own right and name. In the judgment of the Court no arguable case can be made that the Minister has a duty to anticipate such personal rights and to consider them in assessing an application to revoke an existing deportation order.

17. Moreover, as the file note correctly points out, even the existence of such personal rights does not require that the State must accept the choice of place of residence made by the child's parents. That is particularly so where, as in this case, the parents decided to conceive the child in full knowledge of the imminent deportation of the father.

18. In effect, this application for leave is based on a misconception. The proposed grounds are predicated on an assumption that the Minister is obliged under s. 3 (11) of the Act to reconsider the decision to deport the applicant. Hence, the grounds are cast in terms of the alleged unreasonableness or disproportionality of a deportation of the applicant having regard to the fact that he is now in a relationship with Ms. Wanjiku, that he claims to be engaged to be married to her and to the fact that she is expecting his child who will be an Irish citizen with constitutional rights. Essentially, the case to be argued takes issue with the Minister's assessment of these facts and circumstances and asserts a disagreement with the balance the Minister has struck in weighing those factors against the interests of the State which the Minister seeks to protect. But the decision to deport the applicant has already been made. A valid order is in existence and is not as such open to challenge. The only issue that can arise in respect of a decision to refuse revocation under s. 3 (11) is whether in the light of the changed circumstances advanced in the application to revoke, the Minister has erred in law or made some material mistake of fact in his decision to refuse revocation. That can only be so if, in the light of the reasons given for the refusal, it is demonstrated that the implementation of the deportation has now become illegal by reason of the changed circumstances.

19. For the reasons already given, the Court is satisfied that no arguable case to that effect has been made out here. It cannot, in the Court's judgment, be arguably maintained with any prospect of success at a substantive hearing that the Minister's reasons for refusal do not flow from the premise on which it is based, namely, the alleged changes of circumstance put to him nor that the refusal flies in the face of reason and common sense. Having regard particularly to the fact that the most important change namely, the conception of the expected child, has occurred after the deportation order was notified and in full knowledge of its implication for the applicant it would, on the contrary, fly in the face of reason and common sense to conclude that the Minister was acting unlawfully in deciding to abide by the existing decision to deport.

20. For all of these reasons the application for leave must be refused.