Neutral Citation Number: [2008] IEHC 325

THE HIGH COURT

2008 992 J.R.

BETWEEN

**O.O. (AN INFANT, SUING BY HIS MOTHER AND NEXT FRIEND C.O.),
O.E.O. (AN INFANT, SUING BY HER MOTHER AND NEXT FRIEND C.O.), O.D.O. (AN INFANT, SUING BY HIS MOTHER AND NEXT FRIEND C.O.),
C. O. AND E. J.**

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice John Hedigan delivered on the 22nd day of October, 2008

1. The applicants are seeking leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister") not to revoke a deportation order in respect of the fifth named applicant (E.J.). The applicants are also seeking interlocutory relief.

Factual background

2. E.J. is a national of Nigeria. She is the mother of the fourth named applicant and the grandmother of the first, second and third named applicants ("the applicant children"). The first named applicant is a national of Nigeria who has been resident in the State since 2000. His sister and brother - the second and the third named applicants - are Irish citizens who were born in the State in 2001 and 2004, respectively. The fourth named applicant, who is a national of Nigeria, is the applicant children's mother and E.J.'s daughter. She was granted temporary leave to remain in the State in 2001, under the IBC-05 scheme.

3. The children's father left the family in December 2005. Some two months later, E.J. came from Nigeria to help care for her grandchildren. It is said that her presence has allowed her daughter (the children's mother) to take on the role of breadwinner for the family. It is said that E.J. acts as a carer in a parenting capacity to her grandchildren and has formed a tight family bond with them. It is submitted that her deportation would mean that her grandchildren would be deprived of her care and company as their mother (her daughter) has stated that she does not intend to return to Nigeria with the children, even if E.J. is deported.

Procedural background

4. E.J. applied unsuccessfully for asylum upon arriving in the State. Throughout the asylum process, she stated that she had no problem with anyone in Nigeria and that she came to Ireland to mind her grandchildren. Her file was analysed under s. 3 of the Immigration Act 1999, and s. 5 of the Refugee Act 1996, and a deportation order was signed in May, 2006. Representations that were made on her behalf seeking leave to remain – which made reference to her domestic circumstances – were received only after that date. Her file was analysed again, taking the representations into account. Thereafter, the deportation order was affirmed.

5. On 4th September, 2006, an application to permit E.J. to remain in the State was made by letter to the Minister on behalf of the Irish-born applicant children. No reply was received to that letter and proceedings were commenced, alleging that the Minister failed to consider the children's application and seeking an injunction to restrain the deportation of E.J. until that application was considered. No challenge was made in those proceedings as to the validity of the deportation order. The proceedings were compromised on the understanding *inter alia* that E.J. could apply for revocation of the deportation order, and an application for revocation was duly made in the form of three letters dated 25th April, 1st May, and 13th June, 2008. A number of letters of recommendation, a report on lone-parent families, a medical report with respect to the children's mother and some country of origin information were enclosed with those three letters in support of the application for revocation.

The impugned decision

6. On 17th June, 2008, an officer of the Minister's Department analysed the file under s. 3(11) of the Immigration Act 1999. The officer expressly refers to the family life that exists between E.J., her daughter and her grandchildren, and she considers E.J.'s rights under Articles 3 and 8 of the European Convention on Human Rights. She notes that the children's mother was aware when E.J. began to care for the children that E.J.'s position was precarious and that she had no legal status in the State. When addressing the proportionality of the deportation, she refers to the 'insurmountable obstacle' test set out by the United Kingdom Court of Appeal in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840. The officer observes that the family could relocate to Nigeria and live as a family unit there. She gives consideration to the educational situation of the Irish citizen children and to the possibility of their mother being subjected to FGM in Nigeria. Reference is made to country of origin information on Nigeria and it is noted that during the asylum process, E.J. gave no indication of a fear of persecution. Ultimately, the officer concludes that the deportation would be proportionate to the legitimate aim of maintaining control over State borders and operating a regulated immigration system.

7. A more senior officer endorsed the above conclusions and recommendations on 16th July, 2008, and the Minister's decision to affirm the deportation order was notified to the applicants by letter dated 20th August, 2008. It is arising out of that decision that the within proceedings were initiated.

The applicant's submissions

8. The primary complaints made by the applicants in respect of the Minister's decision may be summarised as follows:-

a. Failure to expressly consider the constitutional rights of the children;

b. Failure to apply the appropriate proportionality test.

(a) Consideration of the children's constitutional rights

9. The applicants say that the requirements set out in *Oguekwe v. the Minister for Justice, Equality and Law Reform* [2007] IEHC 345 and [2008] IESC 25, apply to the present case on the facts, and that it was therefore incumbent upon the Minister to give express consideration to the impact of the proposed deportation on the welfare of the Irish-born applicant children.

10. In *G.O. & Others v. the Minister for Justice, Equality and Law Reform* [2008] IEHC 190, a case displaying facts that closely resemble the present case, Birmingham J. distinguished the case of *Oguekwe*. The applicants seek to distinguish the decision in *G.O. &*

Others from the present case on the basis *inter alia* that it did not relate to constitutional rights but, rather, Convention rights.

(b) The appropriate proportionality test
11. The applicants submit that the 'insurmountable obstacle' test set out in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, is not appropriate in cases involving the constitutional rights of Irish citizens. The applicants submit that the proportionality test is, instead, as set out in the decision of Denham J. in the Supreme Court in *Oguekwe* [2008] IESC 25. A similar argument is made as to the use by Birmingham J. in *G.O. & Others* [2008] I.E.H.C. 190 of the proportionality test set out by Lord Bingham in *R. (Razgar) v. the Secretary of State for the Home Department* [2004] 2 A.C. 368. Ultimately, it is suggested that both *Mahmood* and *Razgar* apply exceptionality principles which do not apply in cases where there is a potential breach of fundamental rights of Irish citizens.

The respondent's submissions
12. The respondent submits that account was taken of all relevant considerations. It is contended that as set out in *G.O. & Others* [2008] IEHC 190, the requirements set out in *Oguekwe* do not apply where the proposed deportation is that of a grandmother of an Irish citizen child.

13. In relation to proportionality, the respondent points out that the decision in *G.O. & Others* [2008] IEHC 190, has not been appealed. Reliance is placed *on Irish Trust Bank Ltd v. Central Bank of Ireland* [1974-1975] I.L.R.M. 50, where Parke J. held that a court may depart from a decision of a court of equal jurisdiction, only where insufficient authority was cited or incorrect submissions advanced, where the judge disregarded or misunderstood an important element of the case or the arguments submitted, or authorities cited, or where the judgment departs from the proper standard to be adopted in judicial determination. The respondent submits that the applicant has not shown any reason to depart from the *G.O. & Others* decision.

The Court's assessment
14. Although this is a leave application, s. 5 of the Illegal Immigrants (Trafficking) Act 2000, does not apply. The threshold to be reached by the applicants is, therefore, as set out in *G v. DPP & Anor* [1994] 1 I.R. 374, namely, that the applicants make out a *prima facie* case and satisfy the court that the facts averred to, support a stateable ground for the relief sought and that on those facts an arguable case can be made that the applicant is entitled to the relief sought.

The scope for review
15. In *G.O. & Others* [2008] IEHC 190, Birmingham J. noted that by the time the application for revocation was made; numerous other applications had been made and considered. He relied on the decision of O'Neill J. in *Dada v. The Minister for Justice, Equality and Law Reform* [2006] IEHC 140, who was also dealing with a challenge to a refusal of an application for revocation. O'Neill J. commented that the decision sought to be challenged came at the end or at the last potential stage of an elaborate and lengthy process of enquiry and he continued as follows:-

> "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. Likewise the extent of review of the later phase is undoubtedly more restrictive than in the earlier phase. In the case of *Baby O v. the Minister for Justice Equality and Law Reform* [2002] 2 I.R. 129, it was held that an applicant seeking to oppose a deportation order relying upon the prohibition on refoulement under either section 5 of the Refugee Act, 1996, or section 4 of the Criminal Justice (UN) Convention on Torture Act, 2000, was merely entitled to have his representations considered and was not entitled to a discursive reserved judgment. The scope for review by this court of a decision to revoke a deportation order under section 3(11) is, if anything more restricted still."

16. I would concur – as did Birmingham J. in *G.O. & Others* – with the view that the scope for review of a decision not to revoke a deportation order is considerably more limited than the scope for review of a decision taken earlier in the process.

17. The applicants suggest that this standard does not apply in the within proceedings as the validity of the deportation order has not been challenged *per se*. In my view, however, when it comes to the review of a decision of the Minister not to revoke a deportation order, the scope of review must necessarily be very narrow indeed. I accept that this case differs slightly from that of Dada, where a challenge to the deportation order had been fully considered before the application for revocation came before the Minister. Nevertheless, in this case the application for revocation did come at a late stage of the process; E.J.'s entire file had already been considered not once but twice before the deportation order was made and her circumstances had not changed since that analysis was carried out. The scope for review of the decision must,therefore, be restricted.

(a) Consideration of the children's constitutional rights
18. There is no doubt that the Irish citizen children in the present case have rights under the Constitution. I do not accept, however, that the obligation to expressly consider such rights as set out by the Superior Courts in *Oguekwe* and *Dimbo* apply where the proposed deportation relates not to a parent but, rather, to a grandmother. As this Court noted in *Ogunniyi & Others v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Hedigan J., 9th October, 2008), the facts of *Oguekwe* and *Dimbo* related to the proposed deportation of the father of an Irish-born citizen. The child in question had the choice of returning to Nigeria with his father or remaining in Ireland without the care and company of his father. There was a clear risk of an interference with the Irish citizen child's constitutional right to reside in the State and it was therefore incumbent on the Minister to expressly consider the child's welfare and best interests. Such a risk also arose in the cases of *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 and *Fajujonu v. The Minister for Justice, Equality and Law Reform* [1990] 2 I.R. 150, upon which the applicants seek to rely. No such risk arose in *Ogunniyi*; no such risk arose in *G.O. & Others* [2008] IEHC 190, where Birmingham J. distinguished *Oguekwe* and *Dimbo*; and no such risk arises in the present case. It is clear in the present case that there is no prospect of the applicant children returning to Nigeria if their grandmother is deported. Their mother is lawfully resident in Ireland and she has categorically stated that even if E.J. is deported, she will not return to Nigeria. In any event, there is no risk whatever to the applicant children's right to reside in the State.

19. In my opinion, the impugned decision provides a comprehensive and careful analysis of the rights of the applicant children, and has carefully balanced those rights against the interest of the State in controlling immigration. As this Court has noted on several previous occasions, it does not follow from the fact that something is not expressly referred to in a decision that it has not been considered. In this regard, I concur with the statement made by Dunne J., following a review of the leading cases on the subject in *Sanni v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 398, that:-

> "[…] it is not necessary for the Minister to spell out specifically that he has considered the impact of the making of an order in circumstances where on the stated facts it must be abundantly clear that there would be an impact."

20. It goes without saying that it is abundantly clear on the facts of the present case that the proposed deportation of E.J. might impact upon the applicant children. In the circumstances, it is my view that the Minister did not err by making no reference to the children's constitutional rights, which in any event would be very limited in nature given the nature of the familial link involved.

(b) The appropriate proportionality test
21. In *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, Lord Phillips M.R. in the United Kingdom Court of Appeal held as follows:-

> "(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations. […]
>
> (3) Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
>
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled."

22. This was cited with approval by the Supreme Court in this jurisdiction in *Cirpaci v. The Minister for Justice, Equality and Law Reform* [2005] IESC 42. In that case, Fennelly J. found that the above passage is a "very useful summary" as to how Contracting States are to balance competing interests.

23. I have already found that *Oguekwe* applies only where the proposed deportation relates to the parent of an Irish citizen, where that citizen's right to reside in the State is at risk. In the circumstances, I cannot accept that the reference made to *Mahmood* by the analysing officer in the present case was inappropriate in the context of the assessment of the proportionality of deportation under Article 8 of the Convention. The respondent can balance the possible problems for the fourth named applicant and the children in returning to, in this case Nigeria, against the right of the State to control the entry and deportation of foreign nationals. The applicants would need to establish very serious problems involving the return to the country of origin – not far removed from the insurmountable obstacle standard of *Mahmood* – in order to outweigh the State's right of control in relation to the entry and deportation of foreign nationals.

The relevance of the extant deportation order
24. In my view, a deportation order should be executed as swiftly as possible, in the interests of all concerned. It is well established that where the validity of a deportation order has not been challenged, the Minister is entitled to rely on it and enforce it. As noted by Hardiman J. in *P, B and L v. The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164:-

> "The applicants had been entitled, in each case, to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that they were not entitled to asylum, their position in the State naturally falls to be considered afresh, at the respondent's discretion. There was no other legal basis on which they could then be entitled to remain in the State other than as a result of a consideration of section 3(6) of the Act of 1999."

25. In other words, once the requirements of s. 3 of the Immigration Act 1999, have been complied with, a failed asylum seeker no longer has any legal entitlement to remain the State and is *prima facie* liable to deportation (see e.g. *Akujobi v. the Minister for Justice, Equality and Law Reform* [2007] IEHC 19).

Conclusion
26. I accept that Mrs. E.J. is a much-loved member of the applicants' family and I am sympathetic to their desire for her to remain in their company. I would note, however, that the papers show that there was no credible basis for her asylum application and no application was made to bring her to the State on the basis of a work permit. There is very little doubt in my mind but that E.J. came to Ireland to take care of her grandchildren, and not as a result of any fear of persecution. I acknowledge that E.J. was honest and did not seek to deceive the authorities but such candour is to be expected as a matter of course from all persons who seek the protection of the State. In the circumstances, I concur with the following statement of Birmingham J. in *G.O. & Others* [2008] IEHC 190:-

> "I cannot accept that it is open to individuals to arrive in the State on what is essentially a false basis, as indicated by the rejection of their claim to asylum status, and then proceed to so organise their family affairs as to frustrate the operation of the immigration system."

27. In conclusion, I am not satisfied that substantial grounds have been established and accordingly, I must refuse leave and the interim injunction must be discharged.