Neutral Citation Number: [2010] IEHC 305

THE HIGH COURT

JUDICIAL REVIEW

2010 659 JR

BETWEEN

E. Z. T. (A MINOR) AND OTHERS

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

ATTORNEY GENERAL AND HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Cooke delivered the 23rd day of July, 2010.

1. The Court has decided to grant leave to seek judicial review in this case but in respect of one specific ground limited to the alleged interference with the constitutional rights of the first, second and third named applicants, the three Irish citizen children. The Court will therefore confine itself to explaining briefly why it considers that substantial grounds have not been made out in respect of the broader challenges sought to be made to the legality of the Minister's decision to deport the fifth named applicant, Mr. T., ("the father").

2. It is clear to the Court that were it not for the presence as applicants in the proceeding of the three Irish citizen children, no substantial ground could be raised as to the illegality of the assessment made by the Minister of the impact of a deportation on the rights to respect for private life of Mr. T. or on the right to respect for family life of Mr. T. and the fourth named applicant, Ms. Z. J. and the three children, the first second and third named applicants.

3. In the examination of file note signed off by the Repatriation Unit of the Department on 23rd March, 2010 and approved by superior officers by way of recommendation to the Minister on 31st March, 2010, all the matters required to be taken into consideration have been examined, commented upon and an appraisal made. These include the statutory considerations of s. 3, subs. 6 of the Immigration Act 1999, the possible application of the two statutory prohibitions against refoulement and the assessment of the rights of the applicants under the European Convention on Human Rights Article 8. A substantial reason for deportation has been identified as required by the judgments of the Supreme Court in the *Dimbo* and *Oguekwe* cases namely, the interest of the State associated with the common good in upholding the integrity of the asylum and immigration procedures of the State.

4. The file note analyses at length the personal circumstances and history of the applicants and expressly attempts to weigh their rights and interests against those of the State before concluding that those of the State should prevail. No serious argument could be made that the Minister did not have a basis for considering as a substantial in this case, the stated interest of maintaining the integrity of the asylum and immigration systems. Mr. T. entered the State in October, 1999 and claimed asylum but was informed that his claim was manifestly unfounded. An appeal was later rejected, following a further substantive hearing, by letter of 26th October, 2000. On 28th September, 2001, he married a French national and in October, 2001, he attempted to withdraw from the asylum process on the basis that he had become entitled to residence as the husband of an E.U. citizen. On that basis he was granted residence for five years in February, 2002. In fact the marriage was short-lived and his wife left the State during 2002 and appears never to have returned. He says that he last met her in London in December, 2003 but as recently as September, 2008, he was instructing solicitors to seek renewal of his residency on the basis of that marriage following the expiry of the five year permission. The fact of his marriage breakdown and the wife's departure had not been disclosed. With the cessation of his right of residence the applicant's entitlement to work ended but he has continued in employment since.

5. In the second half of 2002, the father commenced a relationship with the fourth named applicant, a Chinese national who was in the State on a student visa. The first, second and third named applicants were born to them in the State respectively on 8th January, 2004, 18th August, 2006 and 22nd August, 2008. In the same letter of 27th September, 2008 in which the solicitor sought renewal of the E.U. residency, a request was also made to consider Mr. T.'s entitlement to residence as father of three Irish born children under the IBC 05 Scheme although at the time that had expired. Clearly therefore, the Minister had substantial reasons for considering that the asylum and immigration procedures of the State were being misused if not blatantly abused when entry to the State had been obtained on the basis of an unfounded asylum application and its consequences were sought to be avoided by the false assertion of a continued entitlement based on a marriage to an EC citizen whose departure from the State was not disclosed.

6. It is also clear that this is a case in which no substantial ground for quashing the deportation order could be made out by reference to the assessment made of the impact of deportation on the rights protected by Article 8 of the Convention. It is well settled in the case law of the European Court of Human Rights in relation to that article that in these situations the Contracting States have no obligation to respect a choice of matrimonial residence made by non-nationals. Whether the exclusion or expulsion of a family member constitutes an unlawful interference with a right to respect for family life depends upon a variety of factors which go to the nature of the family ties involved and the quality, duration and permanence of the settled residence of the family members in the Contracting State. The position was put as follows in the case of *Narenji Haghighi v. Netherlands* (2009) 49 EHRR SE8 in a recent judgment of 2009 of the European Court.

> "In a case which concerns family life as well as immigration the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of family living in the country of origin of one or more of them, whether there are factors of immigration control such as breaches of immigration law or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious."

7. Many of these considerations are clearly relevant in the present case. The fourth and fifth named applicants are not married. Mr. T. is married to someone else. Although now here over ten years, Mr. T.'s presence has always been temporary and precarious since his wife departed in 2002. When they embarked on their relationship in 2002, neither the fourth nor fifth named applicant had any expectation of long term settled residence in the State. Neither has any settled connection with the State apart from the citizenship of the three children. Not only are the fourth and fifth named applicants not married they do not in fact live together; the fourth named applicant supporting herself by claiming various social welfare allowances including those of a single parent which she would forfeit if they did in fact cohabit.

8. In the judgment of the Court the family life in question has not been shown to have the characteristics and qualities which attract the protection of Article 8 such that deportation would interfere with it unlawfully having regard to the history of Mr. T.'s presence in the State and the substantial reasons relied upon by the Minister.

9. The Court is also satisfied that no ground of substance is raised by the complaint of a breach of fair procedures in the reliance placed on what Mr. T. is stated to have said to Garda Neville in his flat on 12th November, 2009. He is claimed to have said that he did not live with the fourth named applicant because she would lose allowances if they did live together. The significance of this factor lies not in whether the applicant did or did not make that admission but in the underlying facts that they do not cohabit and that the allowances are in fact claimed and received. This is a factor which goes to the good faith of the applicants and their attitude towards residence in the State as well as to the basis and quality of their claim to having family life in the State.

10. Different considerations however may arise when the impact of the deportation is evaluated in the context of the constitutional rights of the three citizen children. As the Court has decided to grant leave on this basis it will very briefly indicate why it considers a substantial ground can be said to arise. As the case law of the Supreme Court over recent years on this issue has already clearly established, the Irish citizen child has a constitutional right to the care society and support of its parents and an entitlement to be reared and educated by them. The citizen children cannot be deported although their parents are entitled to choose to bring them with them in the event of a deportation. These are matters which the Minister must enquire into and weigh in the balance when considering the proportionality of deporting a parent as against the impact of the pursuit of the State's legitimate aim.

11. This assessment has been made in the file note and it may well be that on a full substantive hearing the Minister's assessment will be found to be reasonable, balanced and proportionate. However, in the particular circumstances of these applicants there are a number of factors which might be argued to attract particular consideration and perhaps added weight in the balancing exercise in order to achieve a proportionate result:

> The fact that the three children are young and there is a mother with no means of support other than social welfare;
>
> The fact that two of the children have particular medical conditions demanding at least for the immediate future medical treatment and daily parental support and care;
>
> The fact that Mr. T. while doing so illegally at the moment does have full time employment and could probably be expected to retain it if his position was legalised so that he would thus be able to provide both practical care and financial support.

12. The Court will therefore grant leave to seek an order of *certiorari* to quash the deportation order upon a single ground as follows:

> " The Minister's conclusion that the interests of the State should prevail over the interests and constitutional rights of the three Irish citizen applicants is unlawful as disproportionate and unreasonable in that the Minister has wrongly:
>
> (1) Failed to give due weight to certain factors namely:
>
> (a) their very young age and their dependence upon both parents by reason of the medical conditions of the second and third named applicants;
>
> (b) the fact that the fifth named applicant has been present in their lives since their births;
>
> (c) the fact that the fifth named applicant if allowed leave to remain even in the short term could be expected to contribute, continue in full time employment and to contribute both practical care and financial support to the children; and
>
> (2) Given undue weight to negative certain considerations namely, the facts that the parents live apart, that the father's current employment is unlawful and to the history of his asylum proceeding and previous EU-based residence permission."

13. The Court will leave to the substantive hearing any procedural issue that may arise in respect of that ground including, for example, the standard of proof to be applied to the applicants in establishing the Minister's conclusion is unlawful by reason of disproportionality.