Neutral Citation Number: [2011] IEHC 148

THE HIGH COURT

JUDICIAL REVIEW

2008 1435 JR

BETWEEN:

E. I., O.I., & R. E. I.

(MINORS SUING THROUGH THEIR MOTHER AND NEXT FRIEND F. I.)

F.I. AND A. I.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MR JUSTICE E. SMYTH, delivered on the 4th day of February 2011

1. This is an application for leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ('the Minister'), dated 3 September 2009, to reject an application under s.3(11) of the Immigration Act, 1999 to revoke a deportation order made in respect of the fifth applicant. The hearing took place on 11 - 12 January 2011. Mr. Saul Woolfson B.L. appeared for the applicants and Mr. Patrick O'Reilly B.L. appeared for the respondent.

Factual Background

2. The fifth applicant, a national of Nigeria, is the father of the first three applicants and husband of the fourth applicant, the children's mother. Each of the children is an Irish citizen and their mother, also a Nigerian national, has been granted long term residency in the State as the parent of citizen children. In 2002, the fifth applicant was granted permission to remain in the State for twelve months as the father of an Irish citizen. On 2 July 2003, he was arrested and detained in custody pursuant to an extradition warrant in respect of sentencing for an offence committed in Germany prior to his arrival in Ireland. He remained in custody until he was extradited to Germany in 2004. During his time in custody, his wife and children maintained contact with him through visits and regular telephone calls. On completion of his sentence in Germany, he travelled to Nigeria and unsuccessfully applied for a visa to Ireland. He returned to Ireland illegally in 2006. On 17 October 2008, the Minister notified the fifth applicant of his intention to make a deportation order in his respect.

3. The fifth applicant made an application pursuant to s.3(11) of the Immigration Act 1999 to have the deportation order revoked. The application set out the circumstances of the family unit and submitted a medical report, dated 29 October 2009, explaining that the fourth applicant suffers from Hepatitis Auto Immune. The application also included previously unconsidered country of origin information and a detailed report, dated 14 November 2008, advising of disability, emotional and behavioural difficulties of the first applicant. In correspondence supplementing the application, the applicants' solicitor submitted further country of origin information and a series of reports and documents outlining the difficulties experienced by the first applicant and the role of his father in his upbringing. These included a report from Barnardos, from July 2009, advising of the first applicant's progress and recommending that his home environment remains consistent and that he was benefiting from the support and commitment of both of his parents; a letter from the fourth applicant to the Minister dated 26 June 2009 explaining the effect of her own illness; a letter from the principal of the first applicant's school and; a letter from the Lucena Clinic confirming that the first applicant was waitlisted for assessment. By letter dated 7 September 2009, the Minister informed the fifth applicant that the application to revoke the deportation order had been rejected. It is this decision that is the subject of the present application.

Submissions

4. The applicants first submitted that the respondent breached the applicants' rights by misdirecting himself as to, and/or misunderstanding, the constitutional rights of the family based upon marriage under Articles 41 and 42 of the Constitution. It was submitted that the respondent did not consider, apply, or refer to, the constitutional presumption that the best interests of the child are found within the marital family, as emphasised by the Supreme Court in *N v Health Service Executive* [2006] IESC 60. The applicants claim that the respondent did not acknowledge the pivotal role of the father within the family and, in fact, drew unreasonable conclusions minimising his role and concluding his presence in the State is not necessary to provide care and support to his family. These conclusions included the respondent's reliance on periods the fifth applicant was in custody to conclude that, if he is deported, disruption of family life will have less of an impact than if he had not been absent previously; that due to this previous absence, his deportation would not have the same impact on his eldest son, the first applicant, that it would have if he had been present continually; that the family 'existed' without the fifth applicant's presence in the State and; that the fourth applicant will have access to the medical system and family support services in the State such that it is not necessary for her husband to be allowed reside here. Counsel on behalf of the applicants submitted that it is clear from *Oguekwe v MJELR* [2008] IESC 25 and *Dimbo v MJELR* [2008] IESC 26 that where the couple with citizen children are a married couple, the constitutional rights flowing from that status under Article 41 must be given distinct, meaningful consideration. It was argued that the respondent fundamentally failed to consider properly the constitutional rights of the married couple and the interference or likely interference in the marriage and the constitutional rights of the married couple consequent on a decision to proceed with deportation.

5. The applicants further submitted that in its consideration, the respondent failed to conduct a fair and balanced analysis of the personal rights of the Irish citizen children under Article 40.3 of the Constitution. It was claimed that the consideration of the

applicants' constitutional rights was cursory in nature. The applicants argued that following *Oguekwe*, there was an obligation on the respondent to consider the children's welfare and to determine what was in their best interests before weighing their rights against the rights of the State. It was claimed that there was a failure to conduct a fair and proper inquiry in light of the imperative of protecting the Article 40.3 rights of the citizen children. In particular, the respondent failed to consider the personal, welfare and education rights of the first applicant if he followed his father to Nigeria in light of his medical difficulties as outlined in the reports submitted to the Minister. It was argued that this was an 'exceptional case' within the meaning of *Oguekwe*, such that the Minister was required to carry out a more detailed analysis of the conditions in the country of return. The applicants had submitted significant amounts of country of origin information describing conditions in Nigeria. It was submitted that the respondent failed to consider this information properly or adequately, engaged in unfair and selective reliance of the country of origin information, failed to have regard to the actual situation in Nigeria as opposed to its legal rights and conventions, and reached conclusions that were unreasonable and not supported by country information.

6. The applicants submitted that the respondent reached conclusions that were so unreasonable that no reasonable decision-maker could have justifiably reached them, in breach of the principles in *Meadows v MJELR* [2010] IESC 3. The conclusions were at variance with country of origin information and based upon an illogical and misdirected understanding of the rights, interests and factual matrix of the applicant family.

7. Finally, the applicants submitted that the respondent erred in law and/or applied an incorrect test and criteria in considering the rights of the family under Article 8 of the European Convention on Human Rights and that the conclusions reached regarding these rights are unreasonable. It was submitted that the effect of *Oguekwe*, *Dimbo* and *Meadows* was that the respondent should have considered whether it was reasonable for the applicants to relocate to Nigeria with the fifth applicant and not whether there would be insurmountable obstacles to relocation.

8. The respondent submitted, at the outset, that as the impugned decision was one made pursuant to s.3(11) of the Immigration Act 1999, the grounds upon which it could be challenged are limited (*I. v MJELR* (Unreported, High Court, 23 November 2010) and *M.A. v MJELR* (Unreported, High Court, 17 December 2009)).

9. Counsel on behalf of the respondent submitted that the Minister at all times complied with the principles set out in *Oguekwe*. The respondent denied that he was obliged, in expressly considering the constitutional rights of the Irish citizen children, to refer expressly to constitutional provisions affording such protection. It was submitted that the respondent duly and properly considered the rights of the citizen children protected by Articles 41 and 42 of the Constitution throughout the consideration of the application to revoke. The respondent rejected the relevance of the judgment of the Supreme Court in *N v HSE*, arguing that it was directed at its own unique factual context and was not applicable in the instant case.

10. The respondent emphasised that constitutional rights are not absolute thus, the Minister was entitled to consider the periods of, and reasons for, the absence of the fifth applicant. It was submitted that the non-absolute nature of constitutional rights applied equally to rights under Article 41. The respondent argued that the Minister had considered the marriage of the fourth and fifth applicants and was not required to give separate and distinct consideration to it. The respondent submitted that country of origin information relevant to the first applicant was considered correctly.

11. Finally, the respondent stated that the decision was in line with settled jurisprudence in relation to the correct test to apply when considering the relocation of the applicants and that the decision was reasonable and proportionate in line with Meadows.

The Court's Assessment

12. In this case, I have some sympathy for the predicament in which the applicant family finds itself. It is clear that the first named applicant has emotional, behavioural and learning difficulties which have required attention and for which he is presently receiving special care. Likewise, his mother suffers from auto-immune hepatitis; her health is poor, and according to a medical report, the outcome for her is uncertain.

13. The information about the plight of the applicant family, to which I have already referred, is supportive of the submission made on behalf of the applicants; that this is a stable family unit within which the father plays a significant role in providing help and assistance-particularly for his son, the first named applicant, and also for his wife the fourth named applicant who has her own medical problems. It is noted that, the first named applicant had spent almost eight years in Ireland at the time the decision in respect of the Section 3(11) application was taken. Indeed, the children have never lived in their parents' country of origin, Nigeria. The fourth named applicant has been lawfully resident in Ireland since 2002 and is a long term lawful resident until 2015.

14. Notwithstanding, that these circumstances and the representations made in respect of them, may have given rise to genuine concerns for the predicament of this family, it has to be borne in mind that despite the very real Constitutional and Convention rights enjoyed by the citizen children, nevertheless, it does not necessarily flow from the rights of the citizen children that the family and non-national parents of Irish citizen children have a corresponding right to reside in Ireland. As Denham J. stated at p. 62 in *A.O and .D.L. v. The Minister for Justice* [2003] 1 I.R. 1:

> "If the respondent is satisfied for good and sufficient reason that the common good requires that the residents of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain a family unit the child who is an Irish citizen must also leave the State, then that is an Order he is entitled to make".

That is because the constitutional rights of the Irish citizen child are not absolute, and where there is a substantial reason, associated with the common good, the Minister may make an Order to deport a foreign national who is a parent of an Irish born child."

15. In this case, the fifth named applicant is a person who is unlawfully in the State and is presently the subject of a valid order for his deportation. The substantial reason identified in the respondent's consideration of the application for revocation of his deportation pursuant to Section 3(11) of the Immigration Act, 1999 is the prior serious criminal conviction of the fifth named applicant combined with his flouting of the immigration laws of the State. The respondent states that there is no less restrictive process other than deportation to uphold the integrity of the immigration system or to achieve the legitimate aim of preventing disorder or crime.

16. In considering an application to revoke a deportation order, the issue before the Minister is not whether there is a substantial reason for the making of a deportation order, but whether the matters brought to his attention in the application warrant it being changed.

17. I am mindful that in considering this application seeking to challenge a refusal to revoke an extant and valid deportation order, it is settled law that the grounds upon which such a challenge can be mounted are extremely limited. The legal position is summarised in a

judgment of Cooke J. of the 17th December, 2009 in *M.A. v. The Minister for Justice, Equality and Law Reform*:-

> "When an application to revoke is made to the Minister under Section 3(11) 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 has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin - - - 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 and replies or enter any debate with the applicant or the applicant's legal representatives or even perhaps to supply extensive narrative statement of his reasons for refusal. Once it is clear to the court that the Minister has properly discharged those two functions, a decision to revoke a valid order of deportation will not be interfered with".

18. In a further judgment of Cooke J. in Irfan *v. The Minister for Justice Equality and Law Reform* 23rd November, 2010 he stated:-

> "In effect the power of the Minister under Section 3(11) to revoke an order exists in order to permit the Minister to accommodate circumstances which have arisen since the making of the order and which give rise to a material change such that it becomes either illegal (by reason of the intervention of one of the prohibitions on refoulement) or inappropriate on humanitarian grounds or otherwise to implement the valid order."

19. Many of these cases give rise to humanitarian considerations. In the course of his judgment in the Meadows case, the Chief Justice stated that in considering the so-called 'humanitarian' grounds the Minister has been conferred with a broad discretion. The Minister has to balance, "on the one hand, the personal circumstances and other matters referred to in ss. 6 of s. 3 and the common good, public policy including the integrity of the asylum system, on the other." As Cooke J. says, "this is all the more so in the case of an application to revoke a deportation order" (*Hurley v Minister for Justice*, Unreported, High Court, 23 November 2010).

20. In this case the issue of refoulement does not arise. Therefore, it falls to the Minister to consider the changed circumstances of the children and family, and other factors outlined in the applicants' representations and affidavits.

21. In carrying out a fair and proper inquiry into these matters (which the Minister is obliged to do) the Minister should have regard for relevant Constitutional and Convention rights, and in this case, to the helpful guidance to be found in the Supreme Court decisions in *Oguekwe v. MJELR* [2008] IESC 25 and *Dimbo v. MJELR* [2008] IESC 26 and also in *Meadows v. The Minister, Equality and Law Reform* (Unreported, Supreme Court, 21st January 2010).

Consideration of the respondent's decision refusing revocation of the deportation order

22. In affirming the deportation order in respect of the fifth named applicant, the Minister had before him a memorandum or analysis prepared by an Executive Officer of the Repatriation Unit and dated 11th August 2009. The memorandum is headed "consideration of application for revocation of deportation order pursuant to Section 3(11) of the Immigration Act 1999."

23. I have perused this analysis, and my impression of it is that it reflects quite a detailed consideration of the relevant representations about the family circumstances - particularly in relation to the first and fourth named applicants, and of the country of origin information furnished to the respondents. Likewise, relevant Constitutional and Convention rights are recorded and have obviously been considered. This analysis could certainly not be described as falling into the category of merely 'cursory' observations.

24. What really emerges from the arguments and submissions in this case, is not so much a criticism that relevant matters were not considered by the respondent (although the applicants do not concede that point), but that conclusions reached by the respondent are manifestly unreasonable and illogical, and at variance with common sense.

25. For instance, just some examples to which Mr. Woolfson for the applicants drew attention. Mr. Woolfson, referred, in particular to the respondent's conclusion from country of origin information that disabled citizens of Nigeria are guaranteed treatment as equals to other Nigerians, and that there are law and avenues of recourse to ensure that people like the first named applicant or his family do not suffer discrimination in areas such as education, health, rehabilitation, etc, because of their disability. However, it is not clear what weight the respondent gave to the US State Department country report on Human Rights Practices 2008, in Nigeria which is cited in the analysis, and which stated that "there are no laws which prohibit discrimination against persons with physical and mental disabilities in employment, education access to healthcare or the provision of other state services. There are no laws requiring physical accessibility for persons with disabilities. - - -

Persons with disabilities faced social stigma, exploitation and discrimination, and were often regarded by their own families as a source of shame. Children with disabilities who could not contribute to family income were seen as a liability, and in some cases were severely neglected."

On the other hand, the same report also referred to vocational training centres for people with disabilities, and some other self-supporting assistance for persons with disabilities which is also available. However, it seems from the paragraph cited that this qualification may only apply to physically incapacitated individuals rather than to persons such as the first named applicant with behavioural and emotional problems.

26. Another example, to which Mr. Woolfson has drawn attention, is the conclusion, that because of their respective ages, the first second and third named applicants are of an adaptable age to relocate to Nigeria.

27. Adaptability, may be a relevant consideration in some cases, for example, if the child is an infant then such a consideration will not arise, but is a child with the emotional, behavioural and learning difficulties, for whom special care and education in Ireland is proving helpful, in the same category as a child without these disabilities? Furthermore, in view of the conflicting country of origin information, and its possible implications for the welfare and education of the first named applicant, it may be relevant to consider, and indeed, I think that it is arguable, whether adaptability, at least in the circumstances of this case, should encompass broader considerations than just the age of the child.

28. Mr. Woolfson also drew attention to the respondent's conclusion that because the children only had the company of their father, for what is described by the respondent as a relatively short time, that therefore the disruption of their family life would not have the same impact as if they had been living together for a much longer time. When that conclusion is examined in the light of the factual matrix of this case, it is clear, that apart from the father's enforced absences, he has lived with the family for four and a half years since the birth of the children; he is part of a stable family unit, and if the information is correct, he has a central role in the care and

welfare of his family – particularly the first and fourth named applicants – whose personal circumstances are challenging, to say the least.

29. Of course, the duration of residence is a relevant factor to be considered, but on the facts of this particular case, and each case must be judged on its own facts, then the converse of the respondent's conclusion is arguable as well.

30. In the course of her judgment in *Oguekwe*, Denham J. set out a list of non-exhaustive factors for consideration by the Minister when making a decision as to the deportation of the parent of an Irish born citizen child. In emphasising, *inter alia*, that the Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision, Denham J. affirmed the finding of Finlay Geoghegan J. in the High Court in the same case, that the consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development and opportunities.

31. In the course of her judgment in the High Court, Finlay Geoghegan J. said:-

> "As a matter of common sense, unless the factual matters considered are such as to give the respondent an understanding, of what in reality in most cases will be the lesser educational and other development opportunities for the citizen child in the country to which his parents are being deported, how can the respondent form a view (as appears to be required by the decision in *A.O. and D.L. v. Minister for Justice*) that having regard to the identified grave and substantial reason and the child's constitutionally protected personal rights the decision to deport is proportional or reasonable".

32. Mr. Woolfson contended that the Minister's considerations were not in accord with these principles. Mr. Woolfson also submitted that this is an exceptional case. Mr. O'Reilly for the respondent conceded that it was at least, an unusual case. Neither counsel proffered a definition of what may, or may not, constitute "exceptional".

33. However, there is some guidance in recent case law. In *JO'B. v. The Residential Institutions Redress Board*, (Unreported, High Court, Judgment of O'Keeffe J. of 24th June, 2009,) The High Court considered the refusal of the Redress Board to allow a late application for redress under the provisions of Section 8(2) of the Residential Institutions Redress Act of 2002, on the grounds that there were no exceptional circumstances within the meaning of that section. There is no definition of "exceptional" circumstances included in the 2002 Act. However, O'Keeffe J. in the course of his judgment referred to the approach taken by the Board and referred to their approach to a possible definition or understanding of the term:-

> "However, some guidance is to be found in the Oxford English Dictionarie's definition of "exceptional circumstances" as being "of the nature of, or forming an exception; out of the ordinary course, unusual, special".
>
> …
>
> "In essence, the Board considers that "exceptional" means something out of the ordinary, circumstances must be unusual, probably quite unusual, but not necessarily highly unusual. The definitions outlined provide a useful framework from which it is clear that it would be inappropriate for the Board to apply a test of uniqueness in these cases."

This approach to a definition was accepted by both the applicant and respondent in the case and it was an approach from which O'Keeffe J. did not demur. It should be noted, that as this case was not opened to the court or addressed by counsel, my remarks in relation to it are purely obiter.

34. However, the significance of whether a case is "exceptional", or not, may arise in the context of the remarks of Denham J. in the course of her judgment in *Oguekwe*, to the effect that; ordinarily, the Minister only has to consider in a general fashion the situation in the country where the child's parent may be deported, but this general approach does not exclude a more detailed analysis in an exceptional case. In the course of her judgment, Denham J. stated:

> "I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. This general approach does not exclude a more detailed analysis in an exceptional case."

35. It seems to me, that it is at least arguable in view of the framework of definitions of "exceptional," to which I have already referred above, that the circumstances pertaining in this case may well come within that category, with the consequence that the Minister is obliged to consider whether a more detailed analysis is required. That is a matter for the discretion of the Minister which will depend on the facts of the individual case.

Conclusion

36. It is agreed that the test to be adopted in an application for leave against a refusal to revoke a deportation order is the test expanded in *G. v. D.P.P.* [1994] 1 I.R. 374, whether the applicants have an arguable case. They do not have to satisfy the Court that they have substantial grounds. In considering the position of the Minister in this case, the Court is mindful that this is not an appeal against the merits of the case, but rather a consideration of the lawfulness of the decision actually made. In the course of his judgment of 1 October 2010, in *S.O. and Ors v MJELR* [2010] IEHC 343, Cooke J. stated: -

> "It is at least necessary to demonstrate the existence of some specific factor which was material to the balancing exercise made which is demonstrably wrong or absent; or to identify some consideration which has been relied upon as material and which is irrelevant or has been improperly considered."

While Cooke J., in that case was considering whether a substantial ground for the grant of leave had been made out, his remarks are helpful guidance also in the consideration of whether an arguable case has been made out in the instant case.

37. This is an application for leave. I am reasonably satisfied that in view of the matters referred to in this judgment and the principles and case law cited by counsel for the applicant and the respondent, that it is appropriate to grant leave in this case. It should be noted however, that the fact that leave is being granted is not to be regarded as an indication that at the end of a substantive hearing, the applicants will succeed. It may be, that in the course of such a hearing, the respondent will be able to satisfy the court as to the lawfulness of his decision refusing the application to revoke the deportation order in this case.

38. Leave will therefore be granted to apply for the reliefs sought at paragraphs D. E. and F. of the amended statement of grounds. It seems to me that it may be appropriate to seek further relief along the following lines, namely, a declaration that:-

> That the findings in the respondent's memorandum of analysis dated the 11th August 2009 in respect of the first named applicant, failed to consider whether because of the first named applicant's particular circumstances his was an exceptional case, and that if so, the respondent should have carried out a more detailed analysis into the educational facilities and other conditions available in the country of return.

These reliefs may be sought on the following grounds:-

> 1. The conclusion reached in balancing the impact of the deportation upon the rights, interest and welfare of the first, second, and third named applicants as Irish citizens and family members is disproportionate and unreasonable in law having regard to the particular circumstances of the first named applicant; the role of the father within the family unit, and the needs of the fourth named applicant within the said family unit and conditions in the country of origin and whether in the light of same, it is reasonable to expect the first, second, third and fourth named applicants to relocate to Nigeria;
>
> 2. The failure of the respondent to consider whether the circumstances of the first named applicant are exceptional, and if so, whether a more detailed analysis of the educational and development opportunities that would be available to the child in the country of return is required.