Neutral Citation Number: [2011] IEHC 328

THE HIGH COURT

2008 1433 JR

BETWEEN

PETER EZENWAKA (AND BY ORDER, MOREEN EZENWAKA)

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 21st July, 2011

1. One of the most difficult issues in the sphere of public law is the extent to which the State can be made liable for the mistakes of its officials. This is one such case. The first applicant is a Nigerian national who was disabled as a result of the Biafran conflict in the late 1960s. Mr. Ezenwaka came to Ireland in 2000 when he sought asylum. While he was refused asylum status on 22nd November, 2004, he was subsequently granted residency in the State by virtue of an Irish born child, Samuel Ezenwaka, under the administrative scheme known as the IBC 05 scheme. He has been residing here lawfully since that date and, his disability notwithstanding, he is currently employed part-time as a security officer at a petrol station and he is also in receipt of disability allowance.

2. Samuel's mother is an Irish national with whom Mr. Ezenwaka had a relationship. The parties were never married and the relationship has long since broken up. The Irish national has since re-married.

3. The second applicant is the wife of the first applicant. She is also Nigerian and lives there with their two children, who are also Nigerian citizens. The couples' two children, Peter and Moreen, are also the half brother and half sister of Samuel, but they have never met. Mr. Ezenwaka had returned once to Nigeria to see his wife and children and was naturally desirous of being reunited with them. In August, 2006 he applied to our Embassy in Abuja for a family re-unification visa, but this was refused.

4. In April, 2008 Mr. Ezenwaka re-applied for a visa. In a well-written letter he explained that he was now employed and he also gave details with regard to his disability. While he enclosed the details of his children's birth certificates, he did not, however, spell out the fact that the mother of his Irish born child was not his wife. At all events, it is not in dispute but that the appropriate type "D" visa permitting for family re-unification was granted by the Embassy in June, 2008.

5. There is also no doubt but that the Ezenwakas significantly altered their position on the strength of this case. Ms. Ezenwaka gave up her job, sold her car and moved out of her family accommodation in anticipation of a permanent move to Ireland. The Ezenwakas purchased tickets for a flight from Lagos to Dublin via Istanbul for the sum of approximately €1,635. In effect, acting on the strength of this visa, the Ezenwakas sought a new life in Ireland and aimed to move here permanently from Nigeria.

6. When Ms. Ezenwaka and her two children arrived in Dublin Airport on 28th July, 2008, they presented their Irish visas to the immigration officials. Having examined the documents, the relevant immigration officials formed the view that the visas had been issued in error and that Mr. Ezenwaka was not entitled to seek family unification based on the existence of an Irish citizen child whom he had fathered by another lady who was not his wife. Contact was made with the appropriate officials in the Department of Justice who explained that IBC 05 policy did not cover that situation.

7. In the event, therefore, Ms. Ezenwaka and her children were not permitted to land. They were accordingly obliged to return to Nigeria where they presently remain. The immigration notice was issued pursuant to s. 4(3)(j) of the Immigration Act 2004 ("the 2004 Act") on the ground that their admission into the State would be contrary to public policy. This is an issue to which I will presently return. There is no doubt but that this entire episode was deeply disappointing - perhaps even traumatic - for the Ezenwakas. Certainly, it is not difficult to imagine the acute anguish and hardship which the family must have endured by agreeing to leave Nigeria permanently and to make the long journey to Ireland via Turkey, only to find that they are the victims of the unfortunate bureaucratic misunderstanding.

8. In the event, Mr. Ezenwaka approached a local priest, Fr. Gerry Campbell, to take up his case with the Minister for Justice, Equality and Law Reform (Mr. Dermot Ahern TD). Mr. Ahern responded by letter to Fr. Campbell on 25th August, 2008, which letter fairly set out the Department's position:-

> "It is fair to say that there was a misunderstanding on the full extent of the new approach described...above between the IBC 05 Unit in my Department and the Visa Office in Nigeria and visas were granted to Ms. Ezenwaka and her children based on this misunderstanding. In a nutshell, the new approach to allowing overseas-based parents and siblings join an IBC is for single, immediate family units only and does not extend to second and subsequent families and the visa office was not sufficiently aware of this 'immediate family only' aspect."

The status of a visa

9. As the Ezenwakas were Nigerian nationals coming from a state which was not visa exempt, they were required to have an Irish visa before they could lawfully land: see s. 4(3)(e) of the 2004 Act. As it happens, there is no specific definition of a visa in the 2004 Act, but the definition of this term contained in s.1 of the Immigration Act 2003, can nonetheless be applied by analogy, even though it must be recalled that both items of legislation are distinct and separate and no provision is made for collective interpretation:-

> " 'Irish visa' means an endorsement made on a passport or travel document other than an Irish passport or Irish travel document for the purposes of indicating that the holder thereof is authorised to land in the State subject to

any other conditions of landing being fulfilled."

10. It is true, of course, that as Clarke J. noted *in VI v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 42, the holder of an Irish visa does not have an automatic right to enter the State, since a visa is simply ([2007] 4 I.R. 42 at 52):-

> "a permission to land and amounts to a form of pre-clearance to that end. A permission to remain in the State is given by an immigration officer under the Immigration Acts and, subject to its terms, allows the recipient to remain in the State for whatever period and, subject to whatever conditions, as may be properly attached to that permission."

11. *VI* is a case with, in some respects, a striking similarity to the present one. Here Ms. I. was granted asylum status in Ireland. She then sought permission for her husband and other immediate family members to join her under s. 18 of the Refugee Act 1996.As Clarke J. subsequently found, the I. family and their legal advisers "were (albeit innocently and unintentionally) misled into a reasonable belief" that the proper way to apply for such a permission was to apply for a visa through the Embassy in Bucharest and that this misunderstanding had been caused by a letter written on behalf of the Minister which certainly gave that impression. The applicants succeeded in establishing that this conferred on them a legitimate expectation - subject to certain important qualifications in relation to the operation of the statutory conditions - in respect of their entitlement to a re-unification visa and I will return to this issue later.

The decision to refuse

12. Returning now to the position of Ezenwakas, it is clear that, as the holders of Irish visas, they had a legitimate expectation that they would be permitted to land, subject to "other conditions of landing being fulfilled". As we know, they were not permitted to do so since contact between the immigration officials and the Department had established that the visas had been issued in error and that it was considered that to permit them to remain in the State would be contrary to public policy. Permission was refused, therefore, by reference to s. 4(3)(j) of the 2004 Act. This provides that:-

> "an immigration officer may, on behalf of the Minister, refuse to give a permission to a [non-national presenting for entry into the State] if the officer is satisfied—
>
> ...(j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy...."

13. The first issue which arises for consideration is the meaning of the phrase "public policy". The reference to public policy must here be understood in the statutory context in which it occurs: see, *e.g.,* the classic comments of Henchy J. in *Dillon v. Minister for Posts and Telegraphs*, Supreme Court, 3rd June, 1981. The very fact that the reference to "public policy" is juxtaposed beside the words "national security" means that the former words take on their traditional and somewhat more restricted meaning in the sphere of immigration law. In that context, the words "public policy" do not simply mean contrary to existing Government policy, but rather connote a situation where that the *personal conduct* of the immigrant poses a real and immediate threat to fundamental policy interests of the State. In that sense, the concept of public policy at issue here is but another variant of the concept national security, albeit wider and somewhat more flexible in its scope and reach than national security properly so called.

14. As the Court of Justice observed in Case C-482/01 *Orfanopoulous* [2004] ECR 1-5257 with respect to the principle of public policy in immigration matters:-

> "66. Concerning measures of public policy..., in order to be justified, they must be based exclusively on the personal conduct of the individual concerned. ... Previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in *Bouchereau*, the concept of public policy pre-supposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."

15. It is true that these comments were made in the context of a derogation on public policy grounds from the free movement provision of Article (ex Article 39(3) EC). In that respect, it may be acknowledged that the concept of public policy in that context would have to be interpreted with an exactness and strictness that might not necessarily be applicable in the case of a refusal under the 2004 Act. At the same time, any decision to refuse admission to the State on s. 4(3)(j) grounds must be based on the personal conduct of the non-national concerned.

16. A good example in this context is provided by the decision of the English Court of Appeal in *R. (Farrakhan) v. Home Secretary* [2002] Q.B. 1391. In this case a well-known radical preacher was refused entry into the United Kingdom because, as Lord Phillips M.R. put it, the Home Secretary had formed the view that this would be contrary to public policy in view of "the risk that because of his notorious opinions a visit by Mr Farrakhan to this country might provoke disorder". While Mr. Farrakhan may not have committed any criminal offences, the concept of public policy was broad enough to deny him entry by reason of the risk posed to British fundamental interests.

17. The present case is very different. While it is true that the Government was fully entitled as a matter of policy to restrict the operation of the IBC Scheme and to take the view that the admission of the Ezenwakas did not come within the scope of that policy, the concept of public policy in the context in which that phrase appears in s. 4(3)(j) is a very different one. Neither Ms. Ezenwaka nor her children pose a threat to Irish public policy in that particular sense of the term.

18. For that reason, therefore, the decision to refuse permission to land based on s. 4(3)(j) was unlawful. The immigration officer clearly believed that it was sufficient that their admission would be contrary to Government policy, but, as I have explained, that this *in and of itself* does not *necessarily* mean that the public policy provisions of s. 4(3)(j) are thereby engaged.

Fixed policy considerations

19. While the Minister was fully entitled to have a policy view regarding the operation of the IBC scheme, this policy could not have been operated in a manner which excluded the possibility of exceptions for special cases. So far as the immigration officials were concerned, the fact that the Minister had taken the view that the visas had been issued in error was dispositive. The Ezenwakas were given no effective opportunity to address the possibility that an exception should have been made in their case by reason of their special - and, one hopes, unique - circumstances. After all, Ms. Ezenwaka and the two children had significantly altered their circumstances in reliance on a solemn representation made by the State that they would, in principle, be allowed entry. Yet the State itself refused them entry, not because of any action or inaction on the part of the Ezenwakas, but because there had been a

misunderstanding between the Department and the Embassy in Abuja.

20. This is a classic example of where a legitimate policy has been operated in an unduly rigid or inflexible manner. The application of this principle is well illustrated by the Supreme Court's decision in *McCarron v. Kearney* [2010] IESC 28. Here one of the applicants had been refused permission to import a heavy calibre rifle in the State on the basis that this was contrary to established policy. Fennelly J. held that the decision was unlawful for a number of reasons, one which was that it represented the application of a fixed policy position:-

> "The second problem with the Minister's decision is that it clearly does communicate a rigid inflexible policy. The Minister offered the applicant no opportunity to address the possibility of any exception to the policy or the merits of the particular firearm."

21. The same can essentially be said of the present case. A legitimate policy - that an IBC family reunification visa would be issued only where the other spouse was also the other parent of the Irish born child - was rigidly applied and the Ezenwakas were given no real opportunity to argue that an exception should have been made for them given that this mistake was not of their making.

22. It follows that I would also hold that the decision to refuse entry was unlawful on this ground as well.

Legitimate expectations

23. There remains the issue of legitimate expectations. It is abundantly clear from cases such as *Fakih v. Minister for Justice* [1993] 2 I.R. 406 and *VI* that these principles apply in the context of visa and immigration matters. In *VI* Clarke J. approved the following comprehensive statement of McKechnie J. in *Keogh v. Criminal Assets Bureau*, High Court, 20th December, 2002:-

> "(a) The existence of a legitimate expectation that a benefit will be conferred does not, on its own, give rise to any legal or equitable right to the benefit itself which can be enforced by an order of Mandamus or otherwise. However, in cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, an equitable right to the benefit may arise from the application of the principles of promissory estoppel to which effect will be given by the appropriate court order.
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> (b) In cases involving the exercise of a discretionary power, the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct, is a conditional one, namely that a benefit will be conferred provided that, at the time the Minister considers it, it is a proper exercise of the statutory power, in the light of current policy, to grant it. Such a conditional expectation cannot give rise to an enforceable right should it later be refused by the Minister in the public interest.
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> (c) In cases involving the exercise of a discretionary statutory power in which an explicit assurance has been given which gives rise to an expectation that a benefit will be conferred, no enforceable, equitable or legal right to the benefit can arise. No promissory estoppel can arise because the Minister cannot stop himself or his successors from exercising the discretionary power in the manner prescribed by parliament at the time it is being exercised."

24. In *VI* Clarke J., having approved these principles, went on to observe ([2007] 4 I.R. 47 at 58) that:-

> "It is therefore clear (from cases such as *Fakih*) that a legitimate expectation can exist as to the process to be followed in the consideration of conferring a benefit. Furthermore it would appear that legitimate expectation may extend to the substance of the matter provided that the issue does not involve the exercise of statutory discretionary powers."

25. Clarke J. went on to hold that the family had a legitimate expectation that they would all be treated as members of Ms. I's family for s. 18 purposes. The Minister was, in other words, effectively estopped from revisiting the question of whether the applicants were, in fact, members of her family, since, in view of the official's letter, they had acquired a legitimate expectation that ([2007] 4 I.R. 47 at 59):-

> "(a) an application for permission under s. 18 would be dealt with by means of same being originated by a visa application to the Irish Honorary Consul in Bucharest and;
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> (b) that such an application would be treated as being an application under the section so that the result of the visa application would be taken to be the result of the application under the section."

26. While these representations as to the procedures to be followed with regard to the processing of s. 18 applications were enforceable, the same could not be said with regard to the substantive feature of the exercise of a statutory discretion, As Clarke J. explained ([2007] 4 I.R. 47 at 60):-

> "I am not satisfied, therefore, that any enforceable legitimate expectation can arise in relation to that aspect of the Minister's decision which would require him to consider whether there are national security or public policy issues which might legitimately lead to a refusal to grant permission. On the other hand I am satisfied that an enforceable legitimate expectation has arisen in respect of that aspect of the determination which involves a decision that the person in respect of whom the application is made is a "member of the family" of the refugee. On the basis of the December letter the applicants were entitled to assume that the decision on the visa application was the decision on the s. 18 application. The visa application was successful. They are, therefore, in my view, entitled, by means of the doctrine of legitimate expectation, to prevent the Minister from revisiting any aspect of the decision save to the extent that the relevant aspect of the Minister's decision involves the exercise of a statutory discretion."

27. It is true that the present case does not involve the exercise of a statutory discretion, since what is at issue involves an administrative scheme governing the exercise of the executive power of the State under Article 28.2 of the Constitution, namely, to decide what non-nationals should be admitted to the State. But even in the case of a non-statutory administrative scheme which might otherwise confer a legitimate expectation to secure a substantive benefit, the Minister is entitled to change his mind if there are objective reasons to justify a change of position. Thus, for example, in *Curran v. Minister for Education* [2009] IEHC 378, [2009] 4 I.R. 300, Dunne J. held that the Minister was entitled abruptly to terminate a non-statutory retirement scheme for secondary teachers in view of the sharply worsening financial situation. In effect, it was held that the Minister was entitled to treat this unforeseen change in circumstances as trumping the applicant's substantive legitimate expectation that their applications for early retirement would, at least in principle, be treated favourably.

28. The same principle also applies here. While the Ezenwakas might well have acquired a legitimate expectation that they would be admitted to the State on a permanent basis, the Minister would be entitled to have regard to a change of circumstances - namely, the administrative error - so as to deny them that right. Put another way, the Ezenwakas are not entitled to permanent residence *simply* by virtue of an administrative error or misunderstanding. As Peter Gibson L.J. observed for the English Court of Appeal in *Rowland v. Environmental Agency* [2004] 3 W.L.R. 249, 272:-

> "Where the Court is satisfied that the public body made the representation by mistake, the court should be slow to fix the public body permanently with the consequences of that mistake."

29. But nor does it follow either that the Ezenwakas' legitimate expectation to residency can be defeated simply by the expedient of pleading administrative error. To some extent, therefore, there are competing interests at stake which cannot fully be reconciled. There is, on the one hand, the Minister's policy interests in controlling immigration which should not be defeated by reason of a simple misunderstanding. On the other, there is the question of fairness to the Ezenwakas and ensuring that they are not the innocent victims of an error which was not of their making.

30. Because the Minister never had the opportunity of approaching this case in the way which is now suggested, I propose to remit the matter to him for fresh re-consideration. In effect, he will be required to balance the competing interests in the matter which I have outlined.

Conclusions

31. In summary, therefore, I propose to rule as follows:-

> A. The decision of the immigration officials to refuse entry into the State will be quashed, since it was based on an incorrect interpretation of the term "public policy" in s. 4(3)(j) of the 2004 Act.
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> B. That decision was also invalid, since it was premised on the application of a fixed policy position which did not take account of the special and virtually unique position of the Ezenwakas.
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> C. While the Ezenwakas are not entitled to assert a legitimate expectation to permanent residence in the State for the reasons I have just described, having regard to the fact that admission to the State was refused by reason of the application of a fixed policy position, I will direct that the Minister must re-consider any fresh application made by the Ezenwakas for admission to the State in the light of the findings in this judgment.
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> D. While this decision on any fresh application will be exclusively a matter for the Minister, he will be required essentially to consider whether any exceptions to the existing policy should be made for the Ezenwakas in the light of the hardships they have suffered and the implications (if any) the making of any exception might have for the fair and consistent application of the scheme for other cases.