Neutral Citation: [2016] IEHC 379

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2015 No. 118 J.R.]**

**BETWEEN**

**S.T.E., A.A. AND Z.N.T (A MINOR SUING BY HIS FATHER AND NEXT FRIEND S.T.E.)**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY**

**AND**

**THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of June, 2016**

1. The first named applicant arrived in the State from Cameroon in October 2003, having had three children with two different partners in Cameroon.

2. He applied for asylum, which was refused by the Minister on 14th July, 2005. A deportation order was made on 5th July, 2006, and subsidiary protection was also refused at that time. The deportation order was notified to the first named applicant on 15th September, 2006.

3. The second named applicant arrived in the State from Morocco in September, 2007.

4. In 2008, she was refused asylum and brought judicial review proceedings challenging that refusal [2008 No. 1214 J.R.] (the first judicial review proceedings).

5. The parties met in or about October, 2008.

6. At some stage during that year, the first named applicant unsuccessfully made an application for the revocation of the deportation order.

7. On 22nd March, 2010, the first named applicant launched a judicial review challenging the refusal of asylum and subsidiary protection and the deportation order [2010 No. 529 J.R.] (the second judicial review). This challenge was primarily based on constitutional grounds as it was clearly significantly out of time in terms of s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

8. At some point during 2010, the first named applicant made a second application for revocation of the deportation order under section 3(11). This was also refused.

9. On 12th October, 2011, Cooke J. gave a decision refusing leave in the first judicial review application (*A.A. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 389 (Unreported, High Court, 12th October, 2011).

10. On 6th December, 2011, the Minister decided not to recognise the second named applicant as a refugee and made a proposal to deport her.

11. On 8th December, 2011, the second named applicant applied for subsidiary protection and leave to remain.

12. During early to mid 2012, the parties began an intimate relationship. The second named applicant's affidavit implies that they fell in love at some point prior to that, although the first named applicant is silent about that aspect. I do not think any significance can be attached to the slightly different way in which the parties word the history of their courtship.

13. On 23rd August, 2012, the parties went through a religious ceremony of marriage, not one recognised for legal purposes.

14. The second named applicant withdrew her subsidiary protection application on 8th March, 2013.

15. The third named applicant was born to the parties on 22nd March, 2013.

16. On 21st August, 2013, the second named applicant was granted permission to remain in the State for a period of two years. I am informed on behalf of the State that this impliedly involved the withdrawal of the proposal to deport. The grant of the permission to remain had the effect of requiring the couple to live apart because the second named applicant, being in receipt of permission, was required to move from direct provision to the private rented sector. I was informed that if she accommodated the first named applicant in her private accommodation, she would lose an entitlement to rent supplement. Conversely the first named applicant would also lose his direct provision allowance and medical card if he moved outside of the direct provision accommodation. The net result was that the first named applicant, by virtue of the way the State has approached this matter, lived in Cork since August, 2013, whereas the second named applicant has lived with their child in Midleton.

17. The first named applicant made a third application under s. 3(11) on 15th July, 2014. That submission clearly implies that the applicants are an intact family and refers to "3 family members".

18. In November, 2014, the second judicial review was withdrawn.

19. On 3rd December, 2014, further s. 3(11) submissions were made, which included a letter from a Mr. and Mrs. Michael and Catherine Blaney testifying to the activities of the first named applicant.

20. Following an examination of file dated 3rd February, 2015, the first named applicant was notified that his s. 3(11) application had been refused on 23rd February, 2015.

21. The present proceedings challenging the refusal of the s. 3(11) application were instituted on 4th March, 2015, within time.

22. In August, 2015, the second named applicant was given renewed permission to remain in the State until August, 2017.

23. In or around April, 2016 the first named applicant was afforded alternative accommodation in Dublin. The family remains intact however and I am told that the parents intend to marry and live together if their legal problems are resolved.

**Applications for amendment of pleadings and discovery**
24. During the hearing Mr. Mark de Blacam S.C. (with Mr. Gary O'Halloran B.L.) for the applicant applied for an amendment to, *inter alia*, plead that the first named applicant had essentially been discriminated against the second named applicant, in circumstances where the Minister allowed the mother to remain in Ireland but required the deportation. In fairness to the respondent I should record that this point arose as a result of a discussion between Mr. de Blacam and the court as to the nature of the discrimination allegedly arising, in circumstances where only a general plea of discrimination had been made in the original pleadings in the sense that ground 9 pleaded the treatment of the first named applicant in a different manner from *"others in a like position".* Although this amendment was opposed by Mr. David Conlan Smyth S.C. (with Ms. Kilda Mooney B.L.) for the respondent, I considered that the requirements as set out in *Keegan v. An Garda Síochána Ombudsman Commission* [2015] IESC 68 (Unreported, Supreme Court, 30th July, 2015), as I considered in *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 759 (Unreported, High Court, 27th November, 2015), had been met. There was an explanation for the failure to plead the matter originally, namely oversight by the applicant's legal advisers. In any event, the amendment was, to some extent, a particularisation of the most acute type of discrimination against the first named applicant, in circumstances where a general claim of discrimination against the first named applicant had already been made in the pleadings as initiated, as noted above. Secondly, I was satisfied that there were substantial grounds for the contention contained in the amendment. Thirdly, I was of the view that there was no irremediable prejudice to the respondent. I, therefore, allowed the amendment. This, in my view, is clearly a case where the comment of Posner J. in *Reed v. Illinois* (Case 14-1745, U.S. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9 applies*: "[w]hat is unfair in the present context is to deny, without a good reason, a party's right to press a potentially winning argument".*

25. Mr. de Blacam also applied for discovery of material related to the alleged ministerial policy of giving long-term illegal immigrants permission to remain. I refused this application (which was not in any event formally brought by motion) because it was of an eleventh-hour nature and because the applicants had not demonstrated that they required discovery in order to make any point they wished to make relating to any inference that should be drawn from a ministerial failure to disclose any such policy.

**Should relief be refused as a matter of discretion due to drip-feeding of information by the applicants?**
26. Mr. Conlan Smyth submitted that relief should be refused because of what he called "*drip feeding*" of information to the Minister. He submitted that the Minister was not told in detail of the second named applicant's medical condition ("*functional neurologic disorder*"), or of the first named applicant's therapy qualifications, or of the history of the courtship going back to 2008.

27. While it may well be true that the court has more detail than the Minister, it seems to me that the submission from Mr. and Mrs. Blaney in support of the first named applicant specifically referred both to medical difficulties on the part of the second named applicant and to physical therapy activities on the part of the first named applicant. Any additional detail as to the history of the party's courtship is not hugely material. There are no grounds to refuse relief on this basis.

**Is the refusal invalid because it relies on an "insurmountable obstacle" test?**
28. Mr. de Blacam relies on the decision of MacEochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] 2 I.L.R.M. 302 (a case which I should note is under appeal at time of writing but which in fairness to the applicants I will nonetheless consider) in which he disapproves of an "insurmountable obstacles" test for determining whether a family can relocate, going as far as to say at para. 31 "*there is no such test".*

29. Essentially, this is a semantic issue. There is no "test" to the effect that an applicant must show that it is impossible to overcome a particular obstacle. The test is whether the removal breaches the rights of the applicants. In assessing that issue, the decision-maker can have regard to a "basket" of factors of which the existence or otherwise of insurmountable obstacles is one. Mere reference to insurmountable obstacles in that sort of context is not improper and does not amount to a "test", but rather to a question among other questions.

30. Furthermore the "insurmountable obstacles" question continues to be posed by the European Court of Human Rights in recent cases such as *Omoregie v. Norway* (Application no. 265/07, 31st July, 2008) and *Üner v. Netherlands* [2007] 45 E.H.R.R. 14 (Application no. 46410/99, 18th October, 2006), cited with approval by Clark J. in *Alli v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 45 at para. 98 and *Dos Santos v. Minister for Justice* [2014] IEHC 559 (Unreported, High Court, McDermott J., 19th November, 2014) at paras. 61 to 81.

31. Obviously, I prefer the decisions of the Strasbourg court itself to any alternative approach by the courts of contracting parties such as in *E.B. Kosovo* [2009] 1 A.C. 1159 or *V.W. (Uganda) v. Secretary of the State for the Home Department* [2009] EWCA Civ 5, if those cases do amount to a proposal of an alternative approach. There is no error by reason of the Minister's reference to insurmountable obstacles, in a context which did not make that a pass-or-fail test. It is clear that the applicants are labouring under some confusion in relation to this issue. There is simply no illegality in the Minister referring to insurmountable obstacles, as long as she does not make that question a pass-or-fail test, which she did not. She can ask that question, answer it in the negative, and take that answer into account as part of the overall circumstances, perfectly lawfully.

**Alleged discrimination vis a vis other applicants in comparable situations**
32. Mr. de Blacam says that since about 2014, a significant number of other applicants who have been in the state long-term (by which he means around five years) have been given residence. He says that the first named applicant has been excluded on an irrational and discriminatory basis without published criteria.

33. It is alleged that there has been a significant phenomenon whereby large numbers of persons have been given residency based

merely on the passage of time. It is not admitted that there is a current policy, but it is notable that the Working Group on Improvements to the Protection Process (which reported on 30th June, 2015) recommended the giving of permission to remain, subject to limited conditions, for persons (including those illegal present contrary to a deportation order) who have been in the State for over 5 years. Whether this particular recommendation should be accepted in full could perhaps be regarded as not altogether self-evident as clearly there are clearly contrary considerations relating to the integrity of the system, the rule of law and other legal policy issues, not conspicuously acknowledged in the report, that could be said to lean against it. These are, of course, matters for the Minister to consider, assess and form her own view on.

34. There is something of a conflict in the affidavit evidence as to whether a policy was in place at the time of the first named applicant's application; evidence from a number of solicitors, filed on his behalf, very much suggests it was, whereas the respondent's deponent denies this (affidavit of James Boyle at para. 4). It would have required an application to cross-examine in order to resolve this question in a manner favourable to the applicants, who carry the onus of proof. In the absence of such cross-examination, and in terms of the particular application as constituted before me, I do not think that the applicants have made out an entitlement to relief on this ground. I appreciate that the respondent has an obligation to place her cards face up on the table (*R. v. Lancashire County Council* ex parte *Huddlestone* [1986] 2 All E.R. 941 at p. 945; *Saleem v. Minister For Justice, Equality and Law Reform* [2011] IEHC 55 (Unreported, High Court, Cooke J., 4th February, 2011); *McMahon v. Law Society of Ireland* [2012] IEHC 556 (Hedigan J.)), but I cannot find that she has failed in this obligation unless the denial of the existence of a policy is properly displaced, which it has not been, by reason of the applicants' failure to pursue cross-examination. Their belated attempt to pursue discovery, which I refused, would not have solved this problem. Mr. de Blacam suggested that I should consider granting declaratory relief to address this issue but I would be slow to grant relief that had not been claimed, particularly where the opportunity for amendment had been availed of and no such relief had been sought even at that stage. In any event the factual foundation for such declaratory relief would in any event have required cross-examination for the reasons stated.

**Is the decision invalid by reference to a flawed assessment of the first named applicant's economic prospects?**
35. The Minister's analysis refers morosely to the "*current economic climate*" and concludes that the chances of employment of the first named applicant are "*poor*". The first conclusion regarding the allegedly gloomy economic climate is based on a single article in the *Irish Independent* dated 3rd December, 2014, to the effect that unemployment is at an elevated level. The sackcloth and ashes being donned by the State in this particular decision does not sit particularly easily with the proposition that the economy had been in a continuous state of recovery over recent years.

36. More particularly, there was clearly evidence before the Minister by way of submissions as to the first named applicant's professional abilities and activities, as specifically attested to by the reference from Mr. and Mrs. Blaney. It may be true that the first named applicant did not set out full details of his qualifications but he did in my view put enough material before the Minister to negative any suggestion that he was not a reasonably good candidate for employed activity. He is not an unskilled person lacking in motivation who would struggle in the job market.

37. In my view therefore the combined finding that his prospects of employment are poor and that the current economic climate is not conducive to those employment prospects, as outlined in the decision, is irrational.

38. The question arises however as to whether an invalidity in relation to this part of the decision requires the decision overall to be quashed. In accordance with an approach set out in numerous previous cases (including *I.R. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 353 (Unreported, High Court, Cooke J., 24th July, 2009) para. 11.7; *T.M.A. v. Minister for Justice Equality and Law Reform* [2009] IEHC 606 (Unreported, High Court, Cooke J., 9th December, 2009); *T.M. v. Refugee Appeals Tribunal* [2012] IEHC 284 (Unreported, High Court, McDermott J., 17th July, 2012) (see paras 4.5 and 4.6); *N.E. v. Refugee Appeals Tribunal* [2015] IEHC 8 (Unreported, High Court, Noonan J., 14th January, 2015); *M.U.Z v. Refugee Appeals Tribunal* [2010] IEHC 141 (Unreported, High Court, Edwards J., 12th February, 2010); *T.A. v. Refugee Appeals Tribunal* [2014] IEHC 204 (Unreported, High Court, Mac Eochaidh J., 3rd April, 2014)) such a result follows if the error goes to the "core" of the decision. In the present case I do not consider that it does, because the core of the decision was whether the interests of the immigration system outweighed the family rights of the first named applicant. So while I accept the point made by Mr. de Blacam that the Minister's conclusions under this heading were irrational, I would not quash the decision overall on that ground alone.

**Did the Minister err in granting the mother permission while denying the father such permission?**
39. In the present case, the Minister gave the mother permission to be in the State at a time when, immediately prior to such permission, both parties were present in the State on a precarious and, in fact, unlawful, basis. Furthermore, the Minister was aware that the parties constituted a family unit. Admittedly, the parents are not a "family" in the limited sense in which that term was originally understood, a lifetime ago, at the time of enactment of the Constitution in 1937. But they are a family in the sense in which that term is used in modern Irish society. They certainly have family rights under art. 8 of the ECHR; and the flexibility of living constitutional law should make one slow to accept the proposition that the Constitution should now be construed as less protective of the rights of the individual than international law.

40. Mr. Conlan Smyth very ably makes the point that as both applicants were in a precarious or unlawful position during the time at which family life was engaged in, their art. 8 rights are at best minimal (relying on *Dos Santos v. Minister for Justice* [2013] IEHC 237 (Unreported, High Court, Mac Eochaidh J., 30th May 2013). I would accept the correctness of that submission at a general level.

41. However, the present case presents a specific issue not considered in *Dos Santos, P.O. v. The Minister for Justice and Equality* [2015] IESC 64 (Unreported, Supreme Court, MacMenamin J., 16th July, 2015) or other cases such as *Oguekwe v. Minister for Justice and Equality* [2008] 3 I.R. 795. In the present case, the Minister failed to treat the family unit as a collective entity, and made a decision giving the mother permission to remain, as if that were a unilateral and stand-alone matter, while requiring the father to be expelled from the State.

42. In short, the Minister has failed to rationally treat the family unit collectively. Even if their rights under art. 8 of the ECHR (or Article 40.3 of the Constitution) are not terribly extensive, one thing they do extend to is the right to have significant weight to be attached to the desirability of keeping the family together.

43. In the present case, on the material before me, the Minister simply failed in that duty. A decision was made on permission for the mother in isolation from a decision on the father's situation. Unless there is significant reason to the contrary, the Minister is required to take a holistic view of the position of a family unit, and to decide on the fate of its members in a coherent and collective manner. If some compelling reason was presented as to why one of two equally unlawful parties to a relationship should be allowed stay and the other be required to leave, that would be one thing. Of course, here, no such reason has been put forward. And if one of the parties had a right to be present independently of the Minister's decision, that would also be a different thing. Again, here, neither party had such an entitlement. But to select between two equally precarious parties to a relationship and decide that one can stay

and the other must leave, without compelling justification, is to actively break up the family by State action. Deporting the spouse or partner of a person with a right to remain independently of the Minister's decision (such as an Irish or EU citizen) does not pose such a problem because it is the nature of the situation and the illegality of the other party's presence rather than any ministerial decision as such that gives rise to a parting of the ways.

44. Mr. Conlan Smyth submitted that there is "*no obligation to look at the position of family members when an application comes in*" and that "*the Minister is not obliged to look beyond the four walls of the application unless a matter is specifically known to the Minister",* relying on *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169. First of all, I do not consider that the Baby O. decision is authority for either of those propositions and no specific part of the decision was referred to in this regard. More fundamentally, the two propositions advanced by Mr. Conlan Smyth are, in fact, quite different. At one level, I accept the submission that the Minister is not obliged to give consideration to matters she is not aware of. To use Mr. Conlan Smyth's example, she is not obliged to inquire into the immigration status of a child's *"first cousin or nanny"* if there is no reason to do so.

45. But here we are dealing with a nuclear family, albeit not based on marriage. The Minister was aware that she was dealing with two parents and a child. Under those circumstances, it is simply not open to the Minister to make an atomised, blinkered decision in relation to one individual member of such a family group. While I would not suggest that there is an obligation to do so in relation to wider members of an extended family, the Minister must consider the position of an individual member of a nuclear family, married or not, in the context of a position of other members. To fail to do so is potentially irrational, in breach of the substantive rights of the family members concerned, and discriminatory.

46. That does not, of course, mean that the Minister is obliged at all costs to facilitate the family remaining together in Ireland. As emphasised above, where, for example, a person who has no entitlement to be in the State (other than perhaps a precarious one) enters into a relationship with a citizen or a person who has such an entitlement, it will normally be the case that no right to remain in the State will arise by virtue of such a relationship, even if the parties marry. No rational immigration system could confer immunity from deportation on an illegal immigrant in such circumstances.

47. However, the present case presents a very different situation. Both parties were in a precarious or unlawful position. Had they both been deported, it seems to me at least reasonably possible that they could have continued family life together in Morocco (assuming that the father could have gained admission to that country). However, the State has now intervened by its own action to make this significantly less likely, by giving permission to the mother to stay, when there is no legal obligation to do so. That, coupled with the deportation of the first named applicant, will, it seems to me, be likely to have the practical effect of breaking up the family, even if the option of everyone moving to Morocco is still theoretically open.

48. In my view, it is both irrational and contrary to the substantive rights of the applicants individually and collectively under art. 8 of the ECHR and Article 40.3 of the Constitution for the State to actively break up a family by giving permission to remain to one member of an illegal or precariously couple and refusing such permission to the other partner, without compelling justification. No clear objective justification, let alone a compelling justification, has been shown for so doing. Had both parties been deported, the issue of irrationality, discrimination, and substantive breach of rights would not have arisen. But for the reasons explained, I conclude that the manner in which the Minister approached this matter is fundamentally flawed for a range of separate but related reasons:

(i) the Minister wrongly failed to consider the applicants holistically as a family unit in terms of their collective fate;

(ii) the Minister failed to have due regard to the desirability of enabling the applicants to remain together;

(iii) the Minister irrationally gave permission to one parent to be in the State while refusing it to the other parent;

(iv) such unjustified discrimination as between the parents contravened art. 14 of the ECHR (taken in conjunction with art. 8) and Article 40.1 of the Constitution; and

(v) the Minister's decision affirming the deportation order contravened the substantive rights of the applicants under art. 8 of the ECHR and Articles 40.3 and 42A of the Constitution.

**Order**

49. For the foregoing reasons, I will order that:-

(i) an order of *certiorari* do issue removing for the purpose of being quashed the decision of the respondent dated 23rd February, 2015, refusing to revoke the deportation order herein;

(ii) that the s. 3(11) application be remitted back to the respondent for fresh consideration in accordance with the judgment of the court;

(iii) that the injunction restraining the deportation of the first named applicant do continue until such time as the s. 3(11) application is lawfully determined in accordance with the judgment of the court; and

(iv) that, as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to these proceedings, the matter be adjourned to a date to be fixed for the purposes of any consequential applications.