Neutral Citation [2016] IEHC 468

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 528 J.R.]

BETWEEN

O.O.A. AND O.P.O.O.O.A.A. (A MINOR SUING BY HER FATHER AND NEXT FRIEND O.O.A.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of July, 2016

1. The first named applicant came to Ireland on 28th December, 2006, and claimed asylum. The claim was rejected by the Refugee Applications Commissioner on 3rd January, 2007.

2. He married Ms. A.A. on 4th July, 2007, and the second named applicant was born to the parties to the marriage on 2nd December, 2007. Ms. A.A. is a British citizen, and the first named applicant applied for residence on the basis of asserting EU Treaty rights. This application was first refused on 24th October, 2008 and a second application was refused on 5th October, 2010. An appeal of this second decision was refused on 17th May, 2011.

3. On 20th February, 2012, a further application for residence based on the Zambrano decision (Case C-34/09, *Ruiz Zambrano v. Office National de l'Emploi*, Court of Justice of the European Union, 8th March, 2011) was refused.

4. On 23rd December, 2013, a deportation order was made against the first named applicant, which was not challenged.

5. Shortly thereafter, in February, 2014, and in a context where the relationship between the couple had broken down, the applicant applied to the District Court for access to the second named applicant, and simultaneously made an application for revocation of the deportation order.

6. On 19th March, 2014, a consent order was made by the District Court, granting the first named applicant access for two hours every second Friday, together with provision for the payment of maintenance.

7. The application for revocation of the deportation order under s. 3 (11) of the Immigration Act 1999 was refused on 22nd July, 2014. The present proceedings, challenging that refusal, were instituted on 5th September, 2014.

8. The Employment Permits (Amendment) Act, 2014 did not commence until 1st October, 2014, which has the effect that the present application is not covered by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended by the 2014 Act.

Is the applicant entitled to argue that he is entitled "to make a straightforward application to stay in the State because of his relationship with his son"?

9. In her very able submissions, Ms. Sunniva McDonagh S.C. (with Mr. Ian Whelan B.L.) for the applicants complains that the first named applicant has no procedure whereby his family rights can be recognised outside of the deportation process, and relies on the decision of Barr J. in *Luximon v. Minister for Justice and Equality* [2015] IEHC 227 (Unreported, High Court, 20th March, 2015) (currently under appeal to the Court of Appeal). Mr. Dermot Manning B.L. for the respondent has objected that this particular claim is not pleaded. Despite that objection, there was no application for an amendment of the pleadings on behalf of the applicants. In those circumstances, this argument cannot be advanced, because I consider that it does indeed fall outside the scope of the pleadings.

10. In any event, if I were entitled to consider this claim, I do not consider that the first named applicant is entitled to a procedure of the type claimed: see the decision of Hardiman J. in *Hussein v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 10th November, 2015). That decision strikes a different note from that of Barr J. in *Luximon* and indeed from my own decision in *Li v. Minister for Justice, Equality and Law Reform (No. 1)* [2015] IEHC 638 (Unreported, High Court, 21st October, 2015) on this point. Apart from obligations to consider rationality and natural justice, there are no statutory constraints on the Minister's power under s. 4(7) of the Immigration Act 2004 (*Hussein,* para. 14).

Is the decision invalid because it is disproportionate or fails to fairly balance the competing rights involved?

11. Ms. McDonagh submits that the rights of the child were not identified properly in the decision, particularly the right to the society of his father. It is submitted that there was a failure to give due weight to these rights, having regard to the rupture in the relationship that would be effected by the deportation.

12. Furthermore, it is submitted that the decision must be proportionate, and the present decision is said not to be.

13. The difficulty for the applicant is that he is not a settled migrant. In those circumstances, and in accordance with *C.I. v. Minister for Justice and Equality* [2015] IECA 192 (Unreported, Court of Appeal, 12th July, 2015) *per* Finlay Geoghegan J. (Ryan P. and Peart J. concurring) at para. 41, it would take "*wholly exceptional*" circumstances to engage art. 8 rights for persons with no permission to reside in the State. There is no compelling reason to take the view that Article 41 confers a greater right on the first named applicant, even recognising the somewhat stronger language of Article 41 as compared with art. 8.

14. An assessment of whether the right of the child to the society of his or her parent is properly counterbalanced by the legitimate entitlement of the State to operate an orderly immigration control system, is primarily a matter for the Minister. The court must

attach "*significant weight*" to a decision which is *prima facie* valid, and which embodies the Minister's balancing exercise in that regard (see *Okunade v. Minister for Justice and Equality* [2012] IESC 49 (Unreported, Supreme Court, 16th October, 2012) *per* Clarke J. (Denham C.J., Hardiman, Fennelly and O'Donnell JJ. concurring) at para. 10.2; see also, *Sivsivadze v. Minister for Justice and Equality* [2015] IESC 53 (Unreported, Supreme Court, Murray J., 23rd June, 2015); and *Z.H. (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166 per Lady Hale at para. 33).

15. The applicants' submission, (relying inter *alia on Beoku-Betts v. Secretary of State for the Home Department* [2008] 3 W.H.R. 166 *per* Lady Hale at para. 168) overstates the obligation to give priority to family rights in the balancing exercise the Minister must undertake.

16. A rational immigration system would become impossible if illegal immigrants were able to evade removal from the State merely by having children. Admittedly, the first named applicant has done more than merely beget the second named applicant, as he also has an entitlement to two hours access per fortnight with him (although there was curiously no evidence whatsoever as to the extent to which the access had been taken up). I will assume in favour of the first named applicant that the fact that the application for access was made simultaneously with the application to revoke the deportation order was purely co-incidental and not an indication that the access application is merely a stratagem, adopted on legal advice, to defeat a lawful and unchallenged deportation order.

17. As MacMenamin J. (Laffoy and Charleton JJ. concurring) said in *P.O. v. Minister for Justice* [2014] IESC 64 (Unreported, Supreme Court, 29th January, 2014) at para. 30, *"[t]here is a clear public interest in the orderly operation of the asylum system"*. Likewise, Clark J. in *Alli v. Minister for Justice* [2009] IEHC 594 (Unreported, High Court, 2nd December 2009) referred at para. 100 to *"the legitimate aim of the State to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-national persons in the State".*

18. The case made by the applicants essentially raises, yet again, the question as to who is running the immigration system, the Minister for Justice and Equality or the courts? For the court to quash this decision, in the name of its own view as to the requirements of proportionality, would amount to a usurpation of the constitutional function of the executive power of the State, and a substitution, for the Minister's view, of the court's "two cents" as to how the immigration system should be managed, whether that opinion is well informed or (much more likely) not, and whether driven by sentimentality, conscious or unconscious attitudes to migration, anarchic revelry at the prospect of people "*vot[ing] with their feet*" (as quoted in *B.L. (Nepal) v. Refugee Appeals Tribunal* [2015] IEHC 489 (Unreported, High Court, 28th July, 2015) *per* Eagar J. at para. 7), or some other undefined and probably ill-informed, or at least entirely subjective and unaccountable, criterion.

19. It is at one level fair comment to say that the deportation of an individual, who will thereby be separated from his or her spouse or child, is experiencing their "*hours of deepest need*" (*X.A. v. Minister for Justice and Equality* [2011] IEHC 397 (Unreported, High Court, 25th October, 2011) per Hogan J. at para. 33). I accept for the purposes of this judgment that the first named applicant's interest in his child is genuine, and I am not treating it as the legal stratagem that, on one view, it appears to be. I accept that, therefore, he comes to the court with a genuine plea made *de profundis*. It is one thing to acknowledge that but quite another thing to say that, because such a cry from the depths is made by a person who has no entitlement to be in the State, that there must be a judicial willingness to require the Minister to retain such a person within the State, at least *de facto*, by (repeatedly if necessary) quashing any refusal to give him permission to remain. The primary audience for the applicant's plea is the Minister. The court can only intervene if a clear illegality has been shown in the Minister's analysis. Simply because one possesses a hammer does not carry with it an obligation to view every problem as a nail. Many applicants whose presence in Ireland is wholly unlawful may have to find solutions to family contact in relocation as a group, or if that is not available, in telephones, skype, or periodic meetings in third countries, rather than assume that the court must usurp the executive function and fashion legal doctrines out of whole cloth to address their problems.

20. To quash a proportionality analysis because of the court's view as to whether a particular applicant should remain in the State is to stumble blindly into an area where the court simply does not belong. A court knows nothing of the implications of permitting particular categories of persons to remain, and whether those similarly situated to a given applicant number in the dozens or the thousands. That is to say nothing of the demographic implications of family reunification and the like and the downstream ramifications for social services, all of which must be paid for by somebody. The Minister is not simply better placed to make such decisions – the court is just not equipped to make those decisions at any level whatever.

21. A ministerial decision that the interests of the immigration control system proportionately outweigh the private and family rights of an applicant under art. 8 or Article 41, whether by reference to the relationship with a spouse, partner or child, is, like any immigration decision, a *prima facie* valid exercise of the executive power of the State, and should not be quashed in the absence of a clear illegality. No such clear illegality has been shown in this case.

22. Consider the approach taken, for example, in *Ford v. Minister for Justice and Equality* [2015] IEHC 720 (Unreported, High Court, 19th November, 2015) *per* Eagar J. at para. 60, where a balancing exercise was quashed because the Minister "*did not pay sufficient attention to, or consider appropriately Article 41 of the Constitution*". What is a decision maker to do with a command of that kind? It is one thing to say that the decision maker did not consider a matter at all. At least that specifies a definite step which can be rectified. But how do you overcome a difficultly that you did indeed consider something but "*did not pay sufficient attention*" to it? What do you do the next time? The balancing exercise involves taking the view that consideration X outweighs consideration Y. The court informs the decision maker that he or she has not given sufficient weight to Y. That, in substance, is telling the decision maker to come back with a different decision that consideration Y outweighs consideration X. It is hard to see what else someone faced with such a decision could rationally do. Unless a clearly articulated illegality has been identified, an approach of this kind appears to run the risk of being close to a usurpation of the function of an elected Minister by a court with not only no mandate to make such decisions but also no knowledge or expertise as to the downstream ramifications of such a decision.

23. In *G.O. v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 19, Birmingham J. in considering similar issues said that a person cannot come to the State on a false basis, as indicated by making an unsubstantiated asylum claim, and then arrange his or her family affairs so as to frustrate the enforcement of immigration control. A similar point applies to the first named applicant.

24. Is there a clear illegality in the present case which would render the decision disproportionate? I do not think so. Matters might be different if, for example, the first named applicant was a settled migrant; or if the Minister wrongly discriminated as between equally precariously situated parents, allowing one to stay and compelling the other to leave; or if the first named applicant enjoyed significantly more substantial access to his child, such as (to take a very rough rule of thumb) for a third or more of overnights. Such a significant level of involvement would attract correspondingly significant weight in a balancing exercise. Here, the level of access at two hours a fortnight does not reach the level where the decision could be said to be clearly in the category of the unreasonably disproportionate.

Did the Minister misinterpret EU law by failing to appreciate that the deportation would impair the EU law rights of the second named applicant?
25. Ms. McDonagh submits that, under paras. 66 and 74 of *Zambrano*, the deportation of a person on whom an EU national is dependent may impair the EU law rights to free movement under art. 20 of the TFEU of the EU citizen concerned, and that dependency may be legal, financial or emotional.

26. It is interesting to note that Hailbronner and Thym comment in *EU Immigration and Asylum Law* (2nd ed., 2016) at p. 286 that "*the implications of [Zambrano] were watered down considerably in follow-up rulings*" at least insofar as it applied to nationals of the country concerned, citing Case C-256/11, *Dereci v. Bundesministerium für Inneres,* Grand Chamber of the Court of Justice of the European Union, 15th November, 2011, and Joined Cases C-356/11, *O & S v. Maahanmuuttovirasto* and C-357/11, *Maahanmuuttovirasto v. L*, Court of Justice of the European Union, 6th December, 2012.

27. While there is modest evidence of dependency in this case, it seems to me to fall well short of the level of dependency that would, in practice, have the effect of impairing the EU law rights of the second named applicant (*O. & S. and L.*, para 56). In any event, those rights are not threatened because the second named applicant remains in the custody of his mother, who obviously has an entitlement to remain in the State. There is nothing to suggest that any rights of the second named applicant under the EU treaties will in fact be jeopardized by the deportation (see: *A.O. v. Minister for Justice and Equality (No. 3)* [2012] IEHC 104 (Unreported, High Court, Hogan J., 3rd April, 2012) at para. 22; *Gilani v. Minister for Justice and Equality* [2012] IEHC 193 (Unreported, High Court, Cooke J., 14th May, 2012) at para. 20; E*.O. v. Minister for Justice and Equality* [2014] IEHC 30 (Unreported, High Court, Clark J., 30th January, 2014); and *J.S. v. Minister for Justice and Equality* [2014] IEHC 195 (Unreported, High Court, McDermott J., 28th March, 2014)). It does not seem to me that this deportation will in any way threaten the second named applicant's rights under art. 20 of the TFEU.

28. Thus in *Nicolas v. Minister for Justice and Equality* [2014] IEHC 526, (Unreported, High Court, 11th November, 2014), Mac Eochaidh J. (relying on Case C-40/11, *Yoshikazu Iida v. Stadt Ulm,* Court of Justice of the European Union, 8th November, 2012) held that an applicant must "*demonstrate how a refusal of the application will prevent the exercise of a Treaty right by a Union citizen or will interfere with the exercise of that right*" (para. 33). The present applicants have not satisfied this test.

29. Admittedly, the UK has now voted to leave the EU, but the termination of any EU law rights of the mother will also terminate any derivative rights of the child, so no *breach* of such rights will arise.

Did the Minister fail to treat the best interests of the child as a primary consideration?
30. Ms. McDonagh submits that, by virtue of art. 8 of the ECHR, the Minister is required to treat the best interests of a child as a primary consideration, and that not only was this not done, but the Minister failed to indicate what those best interests were. As is usual in cases of this kind, it was emphasised that the child was "*innocent of the transgressions of the father*". However this boilerplate truism is simply not relevant. Indeed at best it is a piece of rhetoric rather than a legal test. To contend that a child must continue to enjoy the society of a father (even on such a limited basis as ordered by the District Court here) irrespective of the father's legal status is logically equivalent to conferring an immunity from deportation on a person who manages to produce a child who is entitled to reside in the State. No rational immigration system could survive a rule with such perverse incentives or such a gaping hole at its core. It is one thing to say that the deportation of the first named applicant will be unfortunate for his child. It is quite another to say that it is unlawful. To make the latter finding simply substitutes the court's view of the appropriate balancing exercise for that of the Minister. I go back to the question: who is running the immigration system, the Minister or the courts?

31. At one point, Mr. Manning appeared to suggest that, because the relationship between the first named applicant and his wife had broken down, it should be assumed that the best interests of the child would not be affected by the removal of the first named applicant. This is self-evidently a completely untenable proposition. The best interests of a child are presumptively to be found in facilitating him or her in enjoying the society of both parents. Indeed, in the absence of factors to the contrary, best interests would also presumptively militate in favour of normal and reasonable access to grandparents, relatives, and persons, particularly those in loco parentis, with whom the child has developed a positive relationship.

32. However, the essence of the Minister's decision in the present case was not that, all other things being equal, it was better for the child to have his father deported. Such a finding would not be compatible with the fact that there is in existence an order for access from the District Court (see *A.O. (No. 3)*).

33. The essence of the decision was that such family rights as the applicants enjoyed were outweighed by the importance of giving effect to the immigration control system in this case (see *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 *per* Denham J. at 817 (para. 65); *B.S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 417 (Unreported, High Court, Clark J., 13th October, 2011) at paras. 25 to 28; and *E.A. v. Minister for Justice and Equality* [2012] IEHC 371 (Unreported, High Court, Hogan J., 7th September, 2012)).

34. That is a matter for the judgment of the Minister. The court can only intervene if the Minister's decision is clearly unlawful. In this case it is not. No conflict with the principles of *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 or *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 has been demonstrated.

35. It is notable that the applicant's submission dated 5th February, 2014 did not raise best interests as an issue.

36. The applicants have, I think fairly, taken issue in written submissions with the vagueness of the statement of opposition on this point, which largely consists of denials of the applicants' case and not a positive statement of the respondent's case (see *Saleem v. Minister for Justice* [2011] IEHC 55; *O.S.J.L. v Minister for Justice, Equality and Law Reform* (Cooke J., 1st February, 2011); *R. v. Lancashire County Council* ex parte *Huddleston* [1986] 2 All E.R. 941 and O. 84 r. 22(5): *"It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed)".* It would have been more appropriate if the statement of opposition had been somewhat more specific on this point.

37. The situation seems to me to be that the best interests of the child are a primary consideration, although not necessarily decisive, not by virtue of Art. 42A.4 of the Constitution (which does not apply) but by reason of the Strasbourg jurisprudence on art. 8. Those best interests clearly militate in favour of the father's continued presence in the State. However the Minister has in substance decided that those interests are outweighed by the importance of the integrity and consistency of the asylum and immigration system. That balancing exercise has not been shown to be unlawful.

38. One could legitimately quibble with the wording of the decision insofar as some of the foregoing is not made clear. But the Minister's analysis is not to be reduced to a box-ticking exercise whereby a particular formula must be used. Reading the decision in the round, it is clear that the child's interests were considered, and held to be outweighed by the requirements of the immigration system. That approach was reasonably open to the Minister. A finding that best interests can be outweighed is compatible with a finding that they are a primary consideration, because the latter does not preclude the former.

39. Mac Eochaidh J. in *Gorry v. Minister for Justice and Equality* [2014] IEHC 29 (Unreported, High Court, 30th January, 2014) and Noonan J. in *Khan v. Minister for Justice and Equality* [2014] IEHC 533 (Unreported, High Court, 14th November, 2014) recognised that family rights can be outweighed in the deportation context by countervailing considerations. Indeed, in *P.S. v. Minister for Justice, Equality & Law Reform* [2011] IEHC 92 (Unreported, High Court, 23rd March, 2011), Hogan J. said at para. 23 that the circumstances in which the interests of immigration control may have to yield to Article 41 rights may perhaps "*unusual and exceptional*".

40. In *Jeunesse v. Netherlands* (Application no. 12738/10, European Court of Human Rights, 3rd October, 2014) at para 109 (citing *Neulinger and Shuruk v. Switzerland* (G.C.) (Application no. 41615/07) para. 135 and *X. v. Latvia* (G.C.) (Application no. 27853/09) para. 96), it was said that the best interests of the child were "*of paramount importance*". However, this phrase cannot be taken in isolation because it is immediately qualified by the court to the extent that "*alone, they cannot be decisive*" but must be attended by "*significant weight*". This necessarily implies that they can be outweighed, as the Minister lawfully found in this case. It has not been demonstrated that she failed to afford due and significant weight to those rights.

Order

41. For the foregoing reasons I will order:

(i) that the application be dismissed and

(ii) that the respondent be discharged from any undertaking not to deport the first named applicant with effect from the oral pronouncement of the judgment of the court.