THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 70 J.R.]

IN THE MATTER OF THE ILLEGAL IMMIGRANTS

(TRAFFICKING) ACT (2000) AS AMENDED

BETWEEN

O.O. (A MINOR SUING BY HER

FATHER AND NEXT FRIEND R.O.)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 26th day of July, 2017

Issues

1. The applicant herein applied to Mac Eochaidh J. for leave to maintain judicial review proceedings for the purposes of quashing a decision of the respondent to issue a proposal to deport the applicant on or about 5th January 2015 together with an application for *mandamus* compelling the respondent to consider the applicant's application for confirmation of her entitlement to reside in the State together with other consequential relief including an extension of time.

2. By order of 3rd March 2015 the applicant was directed to maintain the application on notice to the respondent.

3. The matter was listed for hearing before the Court on 12th July 2017 without any further order in respect of leave and accordingly the matter proceeded as a telescoped hearing.

4. At the commencement of the hearing the applicant advised that portion of the relief and grounds were not being pursued given that the respondent had filed a statement of opposition together with an amended statement of opposition wherein it was made clear that the infant's entitlement to reside in the jurisdiction could not be based upon her father's Stamp 4 permission, given that this permission specifically states that it is confined to the father and no legitimate expectation arises in favour of any other person because of same. Further, at the opening of the hearing the applicant effectively abandoned the assertion that there was an ordinary practice of the respondent to provide that minor children under the age of sixteen, whose parents have been granted permission to remain in the State, are entitled to avail of the same permission. This asserted practice has been denied on behalf of respondent and the applicant acknowledges that she cannot advance this assertion further.

5. By reason of the foregoing therefore the applicant advises that the real issues to be determined are:

> (1) In referring to the common good in the letter of proposal to deport of 5th January 2015 pursuant to the provisions of s. 3(2) (i) of the Immigration Act 1999 (the 1999 Act) the respondent had expressed a derogatory opinion of the applicant and there is no basis for such opinion which is therefore unreasonable and/or irrational.
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> (2) Under the provisions of s. 3 of 1999 Act aforesaid at the time of issue of a proposal to deport the Minister must have an intention to deport.

6. The respondent denies both grounds aforesaid and further suggests that even if the Court had any lingering doubt, nevertheless, by reason of the discretion vested in the Court an order of *certiorari* should not be afforded as no prejudice is occasioned to the applicant because of the issue of the proposal to deport.

Brief Background

7. According to the grounding affidavit of the applicant's mother, she came to Ireland in January 2011 and subsequently applied for asylum on 1st October 2013. The infant plaintiff was born in Ireland on 20th October 2013. The mother was eight months pregnant when she sought asylum and the Office of the Refugee Applications Commissioner wrote to her on 9th January 2014 reminding her that she may seek asylum for her newborn child if that child has no legal status in the State. Previously, when invited to include the child in the application for asylum during the currency of the asylum oral hearing the mother declined to do so.

8. Notwithstanding that the infant resides with her mother, her father is next friend in these proceedings. The father entered the State illegally in 2007 and did not apply for any protection. He subsequently entered into a relationship with a German national and they have a son born on 4th December 2010. Thereafter, the father was afforded permission to reside in the State and this permission extended further on 28th November 2014.

9. On 22nd April 2014, solicitors on behalf of the mother sought clarification that the infant was entitled to reside in the State because of the permission afforded to her father. The ultimate response afforded by the State was a letter of 26th September 2014 wherein the Irish Naturalisation and Immigration Service (INIS) replied that it could not provide the confirmation of the nature sought. It was pointed out that the mother's position in the State remained to be determined and when same had been decided the INIS would proceed to examine any outstanding matters including the position of the infant applicant. Solicitors for the mother wrote again by letter of 28th October 2015 indicating that the infant's position could be determined independently of its mother and by reference to the position of the father. The solicitors continued to maintain that the infant has a legal right to reside in the State.

10. The next communication from the INIS was a letter of 5th January 2015 which comprises a proposal to deport the infant. The reason for the proposal was that the infant has remained in the State without the permission of the Minister for Justice, Equality and Law Reform and accordingly the infant was a person whose deportation would, in the opinion of the Minister, be conducive to the

common good. Various options were afforded to the infant none of which were availed of. In a letter of 12th January 2015 the mother's solicitors again wrote to the INIS indicating that in their view the proposal to deport was in error and reiterated that the infant was entitled to reside in the State because of the permission available to her father. It was indicated that if confirmation was not available within fourteen days that the proposal is withdrawn and the child is entitled to reside in the State, relief would be sought.

11. The final correspondence prior to the institution of proceedings was a letter from the INIS of 28th January 2015 which stated that the position of the infant was intrinsically linked to the mother, the infant lives with the mother and no decision could reasonably be made in respect of the infant without regard to the mother's circumstances. It was indicated that in advance of determining the mother's protection application detaching the infant's immigration case from the mother's case would be unwise. It was clarified that the infant plaintiff received the notification of proposal to deport because she has no valid basis to remain in the State and she continues to have no valid basis to remain. However, a negative decision would not be made in her case other than in circumstances where a similarly negative decision is being made in her mother's case.

Submissions

12. The applicant asserts that by issuing a proposal to deport this imputes that the child made a decision to remain without permission and comprises a derogatory opinion of the child and given the age of the child is irrational.

13. The making of deportation orders is dealt with in s. 3 of 1999 Act. It provides that where the Minister proposes to make a deportation order he or she shall notify the person concerned in writing of such proposal and the reasons for it (see s. 3(3) (a)).

14. Under s. 3(2) (i), subsequent to enumerating further categories of persons who might be deported it is provided that a person might be deported whose deportation would in the opinion of the Minister be conducive to the common good.

15. In s. 3(6) (j) of the 1999 Act it is provided that one of the matters which the Minister must have regard to in determining whether to make a deportation order is the common good.

16. The applicant refers to the judgment of Hardiman J. in *F.P. v. Minister for Justice, Equality and Law Reform* [2002] I.R. 164, in particular the penultimate paragraph of page 174 of that judgment. Given that this paragraph is central to the applicant's application it is convenient to set it out:

> "In this context, it is important to reiterate that the "common good" in this context has already been held to include the control of aliens, in The Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360 and the authorities referred to therein. That, in my view, is the context in which the phrase "the common good" occurs in s. 3(6) (j) of the Act of 1999. I agree with the observations of the trial judge in relation to the different context in which the phrase is used in s. 3(2) (i). It follows from this that the invocation of "the common good" in subs. (6) does not require or imply any opinion derogatory to the individual whose case is being considered. It simply entitles the respondent to have regard to the State's policy in relation to the control of aliens who are not, on the facts of their individual cases, entitled to asylum."

17. The applicant argues that the clear meaning of this paragraph is that the use of the phrase "the common good" in s. 3(2) (i) does impute a slur on the applicant's character. The applicant further asserts that notwithstanding that the case involved an application to quash deportation orders (as opposed to a proposal to deport) , nevertheless, the comment of Hardiman J. in the para. aforesaid was not obiter and comprises a clear statement that s. 3(2) (i) in referring to the common good was derogatory of a particular applicant or recipient of the proposal letter.

18. The respondent disputes such an interpretation of Hardiman J.'s comment and further asserts that if such an interpretation is accurate, nevertheless, it was clearly obiter.

19. The applicant was invited to advise the Court of any further jurisprudence where the understanding of Hardiman J.'s comment on the part of the applicant was confirmed by other courts, but was unable to find such jurisprudence.

20. The applicant was invited to identify any other statutory enactment which contained in a particular section a phrase which held different meanings depending on which subsection one was looking at and the applicant was unable to identify any such legislation.

21. The respondent also relies on the judgment of Laffoy J. of 27th May 2004 in the matter of *Gritto v. the Minister for Justice, Equality and Law Reform* [2005] IEHC 75 where at para. 17 of that judgment Laffoy J. was dealing with the proposal to make a deportation order on the basis that the recipient was a person whose deportation would in its opinion of the Minister be conducive to the common good and thereafter at p. 20 the Court indicated that the applicant's true status within the State was correctly set out in the letter of proposal to deport of 18th July 2003.

22. It is noted that in the matter of *F.P.* the Court was not concerned with the letter of proposal to deport although there is a para. dealing with the proposal to deport prior to dealing with the consideration of the representations made as a decision on those representations. It is under this latter heading that the comments relied upon by the applicant are set out. There is no further reference in the judgment to s 3(2)(i).

23. I cannot accept that by making reference to different contexts within s. 3 the Court was indicating that "the common good" had diametrically different meanings. Furthermore, it is of course the case that the Court was not dealing with an issue arising under s. 3(2) (i) and therefore insofar as the Court may have commented on the meaning of the common good in that particular subs. (which I cannot see) such a comment was indeed obiter.

24. I am satisfied that the matter of *Gritto* is instructive. In that case the applicants had applied for asylum however they withdrew their asylum applications prior to same having been considered. The letter of proposal issued to them was under s. 3(2) (i) just as an in the instant matter. At p. 30 of the judgment Laffoy J. indicates that the respondents' submissions did not address the distinction drawn by both the High Court and the Supreme Court in *F.P.* between the context in which the phrase "the common good" occurs in s. 3(6) (j) and s. 3 (2)(i) of the 1999 Act.

25. The Court indicated that there is a reference to the common good in relation to the opinion formed by the Minister intending to show that the applicants were within one of the categories specified in s. 3(2) of the 1999 Act. The Court indicated that it was difficult to infer that it was designed to elicit representations as to the Minister's consideration under subs. 6 of the same section. The Court indicated that the respondent may deport a person who falls within a certain category and thereafter the onus shifts that the perspective deportee to make submissions.

26. In the Court's conclusion which commences at page 32 of the judgment it was stated that the legal basis on which a person falls into any of the categories set out in subs. 2 is entitled to remain in the State and to have an application to remain on humanitarian grounds processed and adjudicated on has been definitively determined by the Supreme Court in *F.P.* The Court indicated that the applicants in that case were brought within one of those categories namely s. 3(2) (i). Material to the instant matter is the following:

> "There is no specific challenge to the formation of that opinion in these proceedings. In any event, it is reasonable to infer that the common good would not be served if a person who voluntarily withdraws his or her application for asylum could avoid being subject to the deportation process provided for in s. 3, whereas a person who has unsuccessfully gone through the asylum process could not."

27. Having regard to the foregoing I am satisfied that:

> (a) at the time of issue of the deportation order the infant applicant did not have any permission to reside in the State;
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> (b) Prior to the issue of the proposal to deport the applicant's mother for her own reason chose not to include the applicant within her protection application and the applicant's father's permission did not extend to the applicant as is apparent from the content of the permission afforded to the father;
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> (c) Hardiman J. in *F.P.* in the para. relied upon by the applicant merely stated that "the common good" appeared in two different contexts within s. 3 and that is a correct appraisal as under s. 3(2) (i) the phrase is relied upon by the Minister to identify a category of persons who might be served with a deportation order however in s. 3(6) (j) the phrase arises as one of the matters which the Minister is obligated to consider in or about determining whether or not to make the deportation order;
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> (d) I cannot accept that the phrase in s. 3(6) (j) does not involve any slur on an applicant's character whereas it does in the context of s. 3(2) (i) – rather I am of the view that if the phrase does not involve any derogatory meaning of an applicant within the context of s. 3(6) (j) neither does it involve a derogatory meaning of the applicant within the context of s. 3(2) (i) and similar to the case in the *Gritto* matter it does seem reasonable to infer that the common good would not be served if a party is in the State without permission and without any protection application but can avoid the process of deportation provided for in s. 3 whereas all other persons without permission and without an extant protection application could not.

28. The applicant asserts that the scheme provided for by s. 3 of 1999 Act is such that prior to Minister issuing a proposal to deport the Minister must have had an intention to deport. The respondent in turn argues that such status would be contrary to the scheme provided for in s. 3 as it would appear to bypass the obligatory matters to be considered by the Minister in s. 3(6) prior to the issue of a deportation order.

29. In my view, in the proposal to deport the applicant under s. 3(2) (i) of the 1999 Act, the Minister was identifying to the applicant that she was a person in respect of whom a deportation order could be made.

30. As was confirmed by the Supreme Court in *Bode v. the Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 663 it is in the interests of the common good of the State that it has the power to control the entry residency and exit of foreign nationals which power is an aspect of the executive power to protect the integrity of the State, and accordingly the fact that the Minister held an opinion that the applicant residing in the State without permission might in the Minister's view be deported in the interests of the common good, is neither irrational nor unreasonable.

31. The applicant argued that it is not understood why the Minister would issue a proposal to deport the infant applicant in circumstances where there is no immediate intention to deport however similarly it is not understood why the infant's mother did not associate the infant with her protection application or indeed why neither the infant's parents made representation following the proposal to deport, however, none of these difficulties have any real impact on the issues under consideration.

32. Insofar as the asserted prejudice is concerned the applicant alleges:

> (1) Reference to the common good in the letter of proposal to deport is a slur on the applicant and she is obliged to challenge same.
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> (2) The letter to deport requires the applicant in a specific period of time to elect to leave voluntarily and accordingly as this time has passed the applicant is now prejudiced as this option is no longer available to her.

33. The respondent counters in respect of these arguments:

> (1) the reference to the common good in s. 3(2) (i) does not involve a slur on the character of the applicant and
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> (2) by the provisions of s. 3(4) (b) of the 1999 Act it is clear that a person may leave the State before the Minister makes a decision in writing.

34. I am satisfied that having regard to the provisions of s. 3(4) (b) a person who is served with a proposal to deport is entitled to leave the State before the Minister makes a decision on the deportation order and this exit from the State would not therefore be on foot of a deportation order and accordingly would remain voluntarily.

Conclusion

35. I am satisfied that following the decision the Supreme Court in *Bode* the control of entry, residency and exit of foreign nationals from the State is in the interests of the common good and accordingly I do not find that a non national in the State without permission as being a party in respect of whom a deportation order might be made in the interests of the common good is unreasonable or irrational and I am satisfied that it does not involve a slur on the applicant's character. Accordingly, there is no basis to grant an order of *certiorari* in respect of the letter of proposal to deport of 5th January 2015.

36. Even if it is the case *certiorari* might be afforded given at the time of issue of the proposal to deport letter the respondent had no immediate intention of deporting the applicant, nevertheless, *certiorari* should not be granted on this ground by reason of the fact that I am satisfied that no prejudice has been occasioned to the applicant by the issue of the proposal to deport and same has not altered in any manner whatsoever the applicant's status within the State.

37. In this regard, it is important to review the proposal to deport in context, namely;

(1) the now abandoned assertion that the infant had permission based on the father's permission, an assertion denied by the respondent since the letter of 26th September 2014;

(2) the refusal of the mother to have the applicant's position included in her asylum claim

(3) the clarifications by the respondent as to how the respondent will deal with the applicant in the letters of 26th September 2014 and 28th January 2015;

(4) the fact that the proposal to deport letter afforded the applicant an opportunity to raise representations to remain independently of the mother's asylum application or the father's existing permission (see para 26 hereof and pg. 140 of *F.P.* where Hardiman J. identified an obligation on the respondent, once submissions were made within the statutory period, to take into account those representations).

38. For the reasons aforesaid, the applicant's application for judicial review is refused.