THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 787 J.R.]

BETWEEN

O.A.B. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

THE ATTORNEY GENERAL AND THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of February, 2018

1. The applicant arrived in the State in 2007 as a fourteen year old unaccompanied minor. He then remained in the care of the State under s. 4 of the Child Care Act 1991 for the following four years in a number of different direct provision accommodations. In June, 2008 he applied for asylum. That application was rejected by the Refugee Applications Commissioner, and an appeal was rejected by the Refugee Appeals Tribunal in October, 2008. A proposal to deport the applicant was made on 6th January, 2009 to which the applicant responded with submissions on 27th January, 2009.

2. On 19th June, 2009, the applicant had a daughter at the time when he was aged sixteen years. The daughter now resides with the mother in Tallaght. In October, 2010, when the applicant was seventeen, he was involved in an incident of violent disorder and assault in Temple Bar in Dublin.

3. In December, 2010, the applicant turned eighteen. The applicant moved to different direct provision accommodation in Waterford in early 2011, at which point he says it became more difficult for him to maintain contact with his daughter, although he appears to have done so occasionally thereafter.

4. In March, 2011 he applied for leave to remain on the basis of the Court of Justice judgment in Case C-34/09 *Ruiz Zambrano*. In mid-2015, aged 24, he left direct provision and became homeless. As a result he appears to have had no contact with his daughter for the following two years.

5. In January, 2014, he pleaded guilty in the Circuit Court to assault causing harm, violent disorder and possession of stolen property in relation to the Temple Bar incident. In April, 2014, he received a two year suspended sentence and 240 hours of community service in relation to those pleas.

6. On 26th June, 2014, the *Zambrano* application was refused. In May, 2015, an application for subsidiary protection was refused. Thus, from that point onwards his presence in the State was unlawful for all purposes under the Immigration Act 2004. On 21st August, 2015, the Minister issued notice of intention to deport the applicant accordingly.

7. The applicant accumulated further offences between 2015 and 2016 in the District Court. In correspondence relating to the applicant's accommodation situation, the INIS wrote to the applicant's solicitors on the 15th February, 2016, noting that the applicant was involved in "*numerous violent incidents*" in direct provision and had not responded to warnings or modified his behaviour in that regard.

8. On 25th August, 2017 a deportation order was made. Rather than challenge that order, the applicant applied on 4th October, 2017 for revocation of the order under s. 3(11) of the Immigration Act 1999. He now belatedly challenges the deportation order, having been granted leave on 19th October, 2017.

9. In the period of four months between September and December, 2017, the applicant made contact with his daughter and appears to have seen her four times in that period, twice since the making of a deportation order against him on the 25th August, 2017. He has also recently sourced accommodation through a church in Naas and is working on a community service placement. He has been charged with failure to produce a passport on 22nd January, 2018, which charge is pending.

10. I had heard helpful submissions from Ms. Rosario Boyle S.C. (with Mr. Alan D.P. Brady B.L.) for the applicant and Ms. Eilis Brennan B.L. for the respondent.

The status of the applicant

11. The applicant never had a positive permission to be in the State other than the automatic and precarious one that arises by operation of law on making a protection claim. He was here for one year as a minor, then for seven years as a protection seeker pursuing applications that failed on all counts. Since then he has been unlawfully present and under the shadow of deportation. At all times he was an unsettled migrant for the purposes of the ECHR case law. Therefore the circumstances in which deportation would breach his art. 8 rights are very exceptional. That point is reinforced by the ECHR jurisprudence that is referenced in numerous parts of the Minister's decision including *Ajayi v. the United Kingdom* (Application no. 27663/95, European Court of Human Rights, 22nd June, 1999). That is consistent with the decision of the Supreme Court in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164 where the court upheld a decision to deport an eight year old child who knew no other country but the State, as well as the child's mother, on the basis that the Minister made a valid decision that did not require a proportionality analysis under art. 8. Of particular relevance is the judgment of Charleton J. at paras. 86 and 87 where, referencing *Butt v. Norway* (Application no. 47017/09, European Court of Human Rights, 4th December, 2012), he states that "*a state party to the ECHR is entitled to control the entry of non-citizens into its territory and their residence there*" and accepted that "*immigration policy considerations would be undermined unless children were generally identified with the conduct of their parents*"; going on at para. 87 to the effect that "*the*

often claimed separate rights of children are, save for extraordinary circumstances, dependant on the approach of the parent who claims on their behalf and on their own behalf through that child". The position therefore is that the applicant has a child in the State, has only had occasional contact with that child recently, which seems to have occurred mainly over the past few months, has never lived with that child, had no contact for a two year period up until relatively recently, and has met the child four times over the four months at the end of 2017, twice since the making of the deportation order. There are clearly no wholly exceptional family circumstances for the purposes of the art. 8 jurisprudence.

Submissions of the applicant

12. A huge number of arguments were launched in this case. These blend into each other, as Ms. Boyle somewhat unsettlingly submitted at the outset of her oral presentation, but insofar as I can disentangle them there seem to be 22 of them. The position adopted seems to be on the basis of throwing as much as you can on the wall and see what will stick, reminiscent of the forensic hoopla referred to by Cooke J. in *Lofinmakin (a minor) & Ors v. Minister for Justice & Ors* [2011] IEHC 38 (Unreported, High Court, 1st February, 2011). *Wilson v. Security Associates Inc*. (No. 12 EDA 2016, Superior Court of Pennsylvania, 18th July, 2017) was another case in which 22 arguments were advanced, inspiring Platt J. *per curiam* at n20 to cite "*the well-known maxim that an appellate brief containing ten or twelve points raises a presumption that none of them have any merit"* (*United States v. Hart*, 693 F.2d 286 (3d Cir. 1982), *per* Aldisert J.). One does not even have to go that far in order to take the view that "*Scattershot argument is ineffective*" (Scalia J. and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul, 2008) p. 220): see *per* O'Donnell J. in *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38 at para. 10 and *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 paras. 28, 59, 79, 82.

13. Few stones were left unturned by the diligence of the applicant's lawyers in a 32 page written submission, or by the very thorough oral submissions. I will now deal with the specific points in order:

(i). It is suggested that the impugned decision fails a proportionality threshold. This was the first of many iterations and reformulations of the proportionality point of the kind of which MacMenamin J. disapproved in *Babington v. Minister for Justice and Equality* [2012] IESC 65 (Unreported, Supreme Court, 18th December 2012). However it seems clear to me that *Meadows v. Minister for Justice* [2010] IESC 3 [2010] 2 I.R. 701 is not a licence for a merits-based review. Reliance was placed on *A.M.S. v. Minister for Justice* [2014] IESC 65 [2015] 1 I.L.R.M. 170, but that was a decision in a very specialised context: the statutory right to family reunification of a recognised refugee. The applicant is not entitled to artificially put himself into some bespoke, tailor-made group of his own construction that warrants special consideration. The Minister is clearly entitled to take the view that proportionality considerations favour the deportation of the applicant on the basis that the public interest outweighs such family rights as he is entitled to assert. The point is answered in *S.O. v. Minister for Justice and Equality* [2010] IEHC 343 (Unreported, High Court, 1st November, 2010) by Cooke J: "*Unless the balance struck as proportional by the Minister is fundamentally at variance with reason and common sense, his decision cannot be struck down as unlawful*" (para. 53). In *Kouaype v. The Minister for Justice Equality and Law Reform & Anor.* [2005] IEHC 380 [2011] 2 I.R. 1, Clarke J. comes to the same point from a different angle by saying that it would require very special circumstances to review a decision under s. 3 unless there was a failure to give an opportunity to make submissions or failure to consider the submissions. It is certainly not for the court to quash the decision on the basis of its own views of proportionality, save for a clearly demonstrated illegality, a point I sought to make in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 [2016] 7 JIC 2924 (Unreported, High Court, 29th July, 2016). Dunne J. in *Falvey v. Minister for Justice* [2009] IEHC 528 (Unreported, High Court, 4th December, 2009) referred to the right to maintain control of the State's borders as "*something which the respondent is entitled to do".* I also specifically referred in *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474 [2016] 7 JIC 2930 (Unreported, High Court, 29th July, 2016) at para. 40, and Wang *v. Minister for Justice and Equality* [2017] IEHC 652 [2017] 10 JIC 0608 (Unreported, High Court, 6th October, 2017) para. 14 to the point that the weighing of the effect of criminal convictions is primarily a matter for the Minister, as indeed is the weighing of any matters that go to the proportionality assessment. This weighing is subject to a review by the court as to legality, if illegality can be clearly demonstrated; which is not the case here.

(ii). A related point is made that the applicant should be allowed to stay here for a limited period of time specified by him. It is not for an applicant to dictate whether and how he should be allowed to stay in the State. It seems to me an impudent if not insolent argument for an illegal immigrant to suggest that the Minister is under some obligation to take seriously a suggestion by such a person that he or she should be permitted to stay in the State on his own terms.

(iii). At para. 30 of the submissions, the applicant suggests that the deportation has the potential to affect the child's right to reside in the European Union. That is not a point this applicant can make. He was refused permission to reside on the basis of *Zambrano*; that refusal was not challenged. In any event, even if he can make the point, it has no factual basis whatsoever as there is nothing to suggest that the child's mother proposes to leave the State with the child.

(iv). It is submitted the decision is unlawful because the child has a right to the care and custody of her father under Article 42A of the Constitution. An attempt is made to rely on *Chigaru v. Minister for Justice and Equality* [2015] IECA 167 (Unreported, Court of Appeal, 27th July, 2015), but that decision relates to interlocutory considerations only. The key authority on the subject is *P.O.*, and of particular relevance is the passage from the judgment of Charleton J. to which I have referred. The judgment of MacMenamin J. is to similar effect. Even the applicant accepts that "*their relationship has drifted somewhat in recent years*" but they now have ongoing contact. It seems to me the claim of substantive breach of family rights, whether formulated under the Article 42A of the Constitution, art. 7 of the EU Charter or art. 8 of the ECHR, can be dealt with simply by saying that it is lawfully open to the Minister to find that such considerations are outweighed by the public interest in the deportation of this applicant (see O*.O.A. v Minister for Justice and Equality* at para. 37 and *Wang v. Minister for Justice and Equality*). In any event, the deportation of the applicant does not necessarily end the relationship with his daughter. The relationship can continue by telephonic or other electronic means or by meet-ups in third countries, on holiday periods and so on, or indeed she can come to Nigeria to visit him.

(v). It is suggested that the Minister incorrectly relied on the maintenance of the integrity of the State and treated the applicant "*as if*" he was a failed asylum seeker. The problem with this submission is that the applicant *is* a failed asylum seeker. The words "*as if he were"* in para. 37 of the applicant's written submission are totally misconceived. He is also an aged-out minor but the weight of that is a matter for the Minister to consider. Again, it seems to me to be an exercise in arrogance for an applicant to attempt to dictate and define the group to which he must be assigned by the Minister. The fact that he is an aged-out minor was of course well known to the Minister and noted in the analysis.

(vi). It is submitted that the delay in removing the applicant renders the decision disproportionate, relying on *E.B. (Kosovo) v. Secretary of State for Home Department* [2008] UKHL 41 [2009] 1 A.C. 1159. However, turning to the supplemental affidavit of James Boyle on behalf of the Minister it is clear that there was a two-year delay on the part of

the applicant in responding to information relating to the *Zambrano* application and there were further delays in relation to the s. 3 process in that the respondent was awaiting representations by the applicant. At no stage was the applicant given any reason to believe that he had a right to remain in the State.

(vii). It is submitted that the Minister's analysis of the economic well-being of the State assumes that the applicant's convictions will be a problem for his employment prospects. Ms. Boyle says that the applicant can decline to disclose the convictions under s. 258(4) of the Children Act 2001. However, there is no finding in the decision that he would always have to disclose the convictions, just that his prospects "*may be limited*" as a result. That is clearly the case. Non-disclosure in any event is not absolute. Furthermore, it only applies if there is a three-year clean period by virtue of s. 258(1)(c). The applicant has recently been convicted on 14th September, 2017 for criminal damage, so we are a long way from the applicant having an entitlement to non-disclosure.

(viii). It is submitted that the respondent did not give any indication of the cost to the State of "*permitting a cohort of persons in a similar position to the applicant to remain here"*. Again it is not for the applicant to dictate how he is to be dealt with; or for the court to chip away at the Minister's entitlement to formulate executive policy.

(ix). It is submitted the Minister had regard to a series of news articles which referred to one man almost dying with serious head injuries in the Temple Bar incident and did not clarify that the applicant was not convicted of the assault on that particular victim. There is no finding in the analysis that the applicant beat anyone such that they almost died. The submissions made by the applicant were taken into account. It is clear that the applicant was convicted of violent crime and the decision refers to the correct conviction. It refers to an article that four men "*are due to be sentenced for a series of attacks in Temple Bar that almost cost one man his life. Four others were hurt when the gang went on a violent rampage in October 2010*". That simply puts the conviction in context. There is no right to have the most favourable construction put on matters from the applicant's point of view, a point that unfortunately permeates many of the submissions made on behalf of the applicant in this case. The reference to the violent rampage is consistent with the applicant's conviction for violent disorder, not simply for assault. It seems to me that Minister does not overstate the seriousness of the criminal offending behaviour.

(x). It is submitted that the analysis fails to comply with the jurisprudence in *Boultif v. Switzerland* (Application no. 54273/00, European Court of Human Rights, 2nd August 2001). However, that case and related cases pertained to settled migrants, as did *A.A. v. the United Kingdom* (Application no. 8000/08, European Court of Human Rights, 20 September 2011). Those cases required consideration of a number of matters such as the nature and seriousness of the offence, length of the stay, time elapsed, conduct of the applicant, family ties with the host country and with the country of destination. As it happens, it seems to me that pretty much all of these matters were considered by the Minister but the fundamental point remains that in the case of unsettled migrants the Minister is not required to refrain from deporting on the grounds of breach of art. 8 except in very exceptional circumstances; the jurisprudence regarding settled migrants does not apply; and the decision here was well within the Minister's discretion (see e.g. *Üner v. the Netherlands* (Application no. 46410/00, European Court of Human Rights, 18th October 2006)).

(xi). The applicant submits that there is an alleged positive obligation under art. 8 to refrain from deporting. The applicant said that he now has support from his church and has developed an interest in restarting his relationship with his daughter. No doubt these are good things but nowhere near the level where any positive obligation arises to permit him to stay here. Even the judgment in *Nunez v. Norway* (Application no. 55597/09, European Court of Human Rights, 28th June 2011) describes itself as being "*exceptional*". There is a huge difference between the daily custody of a parent, as in *Nunez*, giving rise to a potential duty under art. 8; and only occasional contact with a child, seemingly in the nature of about once a month, for what appeared to be short periods sustained over a period of only about four months, as in this case.

(xii). The applicant claims his difficulties in direct provision created positive obligations under art. 8. It seems that a certain amount of these difficulties were self-inflicted ultimately in the sense that he eventually turned down accommodation. But in any event, his accommodation difficulties are nowhere near the threshold required to make deportation unlawful by reference to art. 8.

(xiii). Complaint is made that the period of deportation is of indefinite duration. That has already been dealt with by the Supreme Court in *Sivsivadze v. Minister for Justice* [2015] IESC 53 [2016] 2 I.R. 403 [2015] 2 I.L.R.M. 73. It seems to be further argued that the decision-maker did not refer to the fact that the deportation order is indefinite. That is self-evidently an unsustainable submission in the sense that it is obvious that that point was known to the Minister.

(xiv). It is submitted that it is irrational to say that the daughter can reside in the State in the *Zambrano* related part of the decision, but that it would be open to the mother to relocate to Nigeria when considering insurmountable obstacles. There is very clearly no contradiction between these two points of view. Whether she moves or not is up to the remaining parent. If she wants to relocate she can but as it happens, she does not. Those two propositions are clearly not inconsistent.

(xv). It is submitted there was no engagement by the author of the analysis with the applicant's lack of ties with his country of origin. However, the lack of ties is noted. No further engagement is necessary.

(xvi). It is submitted that the conclusion that deportation would not be disproportionate does not follow from the premises and nor does the finding that there are substantial reasons in the common good and therefore the decision is irrational. However, it is incorrect to say that that conclusion does not follow from the premises. That is the Minister's assessment; and it seems to me to be a lawful one.

(xvii). It is said in the analysis that the applicant came to the country at fifteen but in fact he was fourteen. It is submitted that this is a material difference. However, it is not a material difference. The correct age is in fact recorded in the examination of file. There are two passing references to the age of the applicant being fifteen rather than fourteen, but absolutely nothing turns on this.

(xviii). It is submitted that the errors of fact taken together are material. It seems to me there are no material errors of fact, so this point does not arise.

(xix). It is submitted that the Minister's decision was disproportionate in the sense of *N.M. (D.R.C.) v. Minister for Justice*

and Equality [2016] IECA 217 [2016] 2 I.L.R.M. 369. However *N.M.* does not make new law in relation to proportionality and does not purport to do so. It is for the Minister in the first place to assess whether deportation is disproportionate and for the applicant to demonstrate to the court that there is an illegality in the sense of a disproportionate interference with constitutional or equivalent rights, which this applicant has failed to do. The court is not making its own assessment *de novo*.

(xx). It is submitted that interference with family rights requires "*substantial justification if it is to be proportionate*". However, that is not so. The applicant is an illegal immigrant and an unsettled migrant. He bears the onus to show that the decision is invalid and has failed to do so. It is a matter for the Minister to weigh the applicant's family life and family rights against the public interest in the deportation of the applicant and the Minister has come down in favour of the latter. The applicant has not shown this to be unlawful or demonstrated that there are very exceptional circumstances in that regard rendering the decision a nullity.

(xxi). The allegation is made that judicial review does not provide an effective remedy. That issue has already been determined in *N.M. (D.R.C.)* and no new argument of substance has been made. There is no basis in *Ndidi. v. the United Kingdom* (Application no. 41215/14, European Court of Human Rights, 14th September, 2017) (citing *Hamesevic v. Denmark* (Application no. 25748/15, European Court of Human Rights, 16th May, 2017) para. 43 and *Alam. v. Denmark* (Application no. 33809/15, European Court of Human Rights, 6th June, 2017) para. 35) to conclude otherwise. The complaint is made at para. 96 of the submissions that "*some independent court or tribunal must be empowered to carry out a proportionality assessment*". It is a misunderstanding to say that *N.M. (D.R.C.)* requires the court to carry out a proportionality assessment. The court should determine whether it has been demonstrated by the applicant that the decision is invalid by reason of it being clearly disproportional. That is not the same thing as considering the issue *de novo*. Such invalidity has not been so demonstrated here.

(xxii). The complaint is made that the absence of an independent body that can look at the up-to-date facts is acute in a context such as that presented here. That is answered by *Efe v. Minister for Justice and Equality* [2011] IEHC 214 [2011] 2 I.R. 798 [2011] 2 I.L.R.M. 411. The applicant can make a s. 3(11) application, and indeed has done so. Of course, that does not prevent his deportation in the meantime, but if a court were to decide that he has a right to be here he can be brought back.

Order

14. Apart from the foregoing, the application is out of time. It seems on the face of it that there is no basis to extend time in the sense that the applicant should have challenged the deportation order within 28 days rather than proceed by way of a s. 3(11) application (and indeed given that that application was itself made outside the 28 day period, I might add that it appears it may have been made only to take the bare look off the delay involved, and to provide an (unsustainable) ostensible basis for an application for leave thereafter) but it is not necessary to deal with that because the application fails in terms of its substance.

15. So the order will be that the application be dismissed on the merits.