Neutral Citation Number: [2006] IEHC 344

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 151 J.R.]

BETWEEN

GEORGE DIMBO (SUING BY HIS MOTHER AND NEXT FRIEND IFEDINMA DIMBO), IFEDENMA DIMBO AND ETHELBERT DIMBO

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Supplementary judgment of Ms. Justice Finlay Geoghegan delivered the 14th day of November, 2006.

Related proceedings and judgment
1. This judgment is supplementary to the judgments given today in *Deborah Bode & Ors. v. Minister for Justice, Equality and Law Reform & Ors* [2006] No. 102 J.R. ("the Bode judgment") and *Oguekwe v. Minister for Justice, Equality and Law Reform* [2005] No. 1271 J.R. ("the Oguekwe judgment"). These proceedings are one of the four sets of proceedings heard contemporaneously with the Bode proceedings and considered in the Bode judgment.

ICB/05 Issues
2. In these proceedings the first named applicant was born in Ireland on 6th May, 1996 and is a citizen of Ireland. His mother is the second named applicant and his father the third named applicant. The second and third named applicants are married to each other. The second and third named applicants are nationals of Nigeria.

3. The second and third named applicants made applications under the IBC/05 Scheme which were refused on 16th August, 2005 by reason of their failure to establish continuous residency in the State since the birth of the first named applicant.

4. The reliefs sought by the applicants include orders of *certiorari* of the decisions of the 16th August, 2006, to refuse their IBC/05 applications. Whilst there are significant factual differences between the applicants in the Bode proceedings and those in these proceedings, insofar as the analysis and conclusions in relation to the alleged breach of the citizen child's rights under Article 40.3. of the Constitution are concerned, there is no substantive difference between the position of the first named applicant herein as a citizen child and his mother and father as IBC/05 applicants from those of the citizen child and his father in the Bode proceeding, such as to distinguish them in anyway from the conclusions I reached in the Bode judgment in relation to the breach of the citizen child's rights under Article 40.3 of the Constitution.

5. In the Bode judgment, the conclusion in the analysis relating to Article 8 of the European Convention on Human Rights ('the Convention'), that the citizen child had a private life in the State which demanded respect from the respondent, was based in part on the fact that the citizen child had lived in the State since birth.

6. The first named applicant herein has not lived continuously in the State since birth. In August, 2005, he was nine years old. As it appears from the facts set out later in August, 2005, he had spent approximately three and a half years in the State. Most recently he had been in the State since February, 2005. He had been attending a school in Co. Meath which he had previously attended when he had been in the State in 2003. On the evidence in these proceedings I am satisfied that the first named applicant had, by August, 2005, re-established a private life in the State which demanded respect from the respondent. It is clear that he actively participated in his school and school related activities, in which relationships had been formed in this period.

7. I am also satisfied, on the evidence presented, that the applicant has discharged an onus of establishing that the refusal of his parent's application under IBC/05 without a consideration of his rights for those reasons set out in the Bode judgment were in breach of Article 8 of the Convention.

9. Accordingly, *prima facie* by reason of the conclusions reached in the Bode judgment, the applicants herein are entitled to orders of *certiorari* quashing the decisions of the respondent dated 16th August, 2005 in respect of the second and third named applicants as sought at paragraph 4(c) of the statement of grounds. Nevertheless, counsel for the respondent submits, that by reason of untruths stated by the second named applicant in relation to her period of residency in this country, particularly in the first affidavit sworn in these proceedings, that those reliefs should be refused.

10. The granting of reliefs by way of judicial review is a matter of discretion. Even where the illegality of a decision is determined it does not follow that the court is bound to grant an order of *certiorari*. There may be exceptional circumstances in which the court will refuse to exercise its discretion in favour of granting such relief.

11. The swearing by an applicant of a false affidavit is undoubtedly potentially such an exceptional circumstance. It is an extremely serious matter and one which might well disentitle an applicant to a relief to which he or she might otherwise be entitled. However, I have decided on the facts herein that I should not exercise my discretion to refuse to all three applicants the relief sought, namely the order of *certiorari* quashing the decisions of the respondent dated 16th August, 2005 in respect of the second and third named applicants.

12. My reason for so deciding is that, as appears from the Bode judgment, the primary ground upon which I have determined that the decision taken by the respondent on those dates under the IBC/05 Scheme were invalid, is by reason of a breach of the first named applicant's rights guaranteed by Article 40.3 of the Constitution and by reason of a breach of the respondent's obligations under s. 3 of the European Convention on Human Rights Act of 2003, having regard to the State's obligations under Article 8 of the Convention in relation to the first named applicant's right to respect for his private life. Accordingly, notwithstanding the very serious breach by the second named applicant of her obligations to this court and having regard to the apology tendered, it does not appear to me that I should deprive, in particular the first named applicant, of relief in relation to a matter which is of concern to him and which I have determined by reason of a breach of his rights guaranteed by Article 40.3 of the Constitution and Article 8 of the Convention.

Other reliefs
13. In addition to the relief sought in respect of the decision under IBC/05, the applicants seek orders of *certiorari* quashing two decisions made on behalf of the respondent on 1st February, 2006 to affirm deportation orders made in respect of the second and

third named applicants. Those deportation orders were made on 28th June, 2004. The statement of grounds also seeks an order of *certiorari* of those deportation orders; however this was not pursued as part of the oral hearing. There is an obvious difficulty in relation to the time which has elapsed between the date upon which those orders are deemed to have been served and the issue of the notice of motion seeking leave herein in February, 2006.

Relevant background facts

14. The immigration history of both Mrs. Dimbo and Mr. Dimbo in the State is lengthy and not all of it relevant to the issues which the court has to consider on this aspect of the application. In summary, Mrs. Dimbo had first come to the State in 1995 on a student visa. She was a student at University College Cork. Her son, George, was born in the State on 6th May, 1996. On 29th September, 1997 she was granted leave to remain on the basis of her citizen child. She and her child left the State in 1998 and returned to Nigeria.

15. She appears to have returned to the State with her son at the end of 2002, and sought to have her earlier granted residency extended. This was refused.

16. Mr. Dimbo is stated to have visited the State while his wife was a student. He then came on a visitor's visa in early 2003. Mr. and Mrs. Dimbo and their son lived in the State from that date until January, 2004. Mrs. Dimbo has now lately admitted that they left the State in January, 2004. They subsequently returned to the State with their son in February, 2005.

17. On their return in 2002/2003, applications were made to renew Mrs. Dimbo's residency based on their citizen child and Mr. Dimbo made an application for residency based on the citizen child at that time. These were not determined and a notice of intention to deport served in August, 2003. Representations seeking leave to remain were made and subsequently deportation orders were made in June, 2004, after the applicants had left the State.

18. Mrs. Dimbo maintains that at all times they were acting in the best interests of their son. She states they believe that it is in his interests that he grows up in Ireland. She asserts that they were driven by economic necessity to return to Nigeria.

19. In the summer of 2005 Mr. and Mrs. Dimbo also applied for asylum. They state they did this to obtain the relevant benefits. Nothing turns on this in relation to the decision now under consideration, save that it explains to some extent how it came about.

20. Following the refusal of their asylum application by the Refugee Applications Commissioner, their solicitor confirmed to the Department that they were not intending to appeal to the Refugee Appeals Tribunal. There then issued a number of letters of which the relevant one is of 17th October, 2005. In this letter it was indicated that the 2004 deportation order remained in place and that the respondent was then of the view that it should be enforced, but that in advance of giving an instruction to that effect, he was giving a final opportunity to submit written representations as to why the deportation should not then be effected.

21. In response to this request submissions were made on behalf of Mr. and Mrs. Dimbo and their son by the solicitor then acting for them by letter of 24th October, 2005. Supporting documentation was also included.

22. An examination of the files of Mr. and Mrs. Dimbo was then carried out on 8th November, 2005, firstly by a Clerical Officer and then on the same day, by an Executive Officer. The examinations of Mrs. Dimbo's file were the ones referred to in the submission. The conclusion of the executive officer at the end of the recommendation was:

> "Therefore, on the basis of the foregoing, I recommend that the Minister, having also had regard to section 3(1) of the European Convention on Human Rights Act, 2003 in making his decision reaffirmed the previously issued deportation order in respect of Ms. Ifedinma Dimbo dated 28th June, 2004."

23. The recommendation was subsequently considered by an Assistant Principal initially on 11th November, 2005, who confirmed this recommendation.

24. In November, 2005 George Dimbo, the first named applicant, wrote three letters to the Minister telling of his progress at school, expressing his wish to remain in Ireland and essentially asking that the Minister permit his parents to remain in Ireland.

25. Subsequently, it appears that the first of these letters, was considered by the same Assistant Principal who formed the view that there was nothing in that letter which would "warrant the Minister to alter his decision to sign the deportation order". Accordingly, the Assistant Principal made the decision to affirm the deportation order of the Minister.

26. There is no evidence before the court that the respondent personally considered the recommendation to reaffirm the deportation order. However, nothing turns on this; the decision of the official is accepted by both parties as the decision of the respondent. The letter of 1st February, 2006 informing Mrs. Dimbo of the decision encloses the 2004 deportation order and "a copy of the Minister's further considerations".

27. In the course of submissions before me it was, I believe, the common belief that those further considerations were the Clerical Officer's examination of the file of 8th November, 2005, the Executive Officer's examination of the same date and the considerations given to the file by the Assistant Principal on 11th and 21st November, 2005.

28. Furthermore, in the submissions made, no reliance was placed by either side on the fact that the considerations given in November, 2005 were considerations as to whether or not to reaffirm the deportation orders of 2004. The submissions were made as if this were a consideration by the respondent under s. 3 of the Immigration Act of 1999, 'the Act', as to whether or not to make a deportation order. Apart from the precise wording at the end of the recommendation this is the way in which it appears to have been approached by the relevant officials.

29. Accordingly, I propose considering the relevant decision as a decision of the Minister to reaffirm the deportation orders on the basis of the considerations set out in the examinations of file of 8th November, 2005 together with the Assistant Principal's additional considerations.

Challenge to validity of decision to affirm deportation orders

30. The applicants rely on multiple grounds to challenge the decisions to reaffirm the deportation orders. The principal grounds relied on were:

1. The decision to deport was taken in breach of the first named applicant's rights as a citizen under Article 40.3 of the

Constitution in that

(i) It failed to give due consideration to the facts and factors relating to the personal rights including the right to remain in the State and the welfare rights of the first named applicant; and

(ii) It failed to identify a grave and substantial reason favouring deportation.

2. The decision is invalid in that the respondent failed to take into account relevant considerations including the change in the citizenship laws and the IBC/05 Scheme and the positive decisions made thereunder.

3. The decision to deport is in breach of the respondent's obligations under s. 3 of the European Convention on Human Rights Act 2003 as it was not taken in a manner compatible with the State's obligations under Article 8 of the Convention.

31. Other grounds were also advanced which are not necessary to consider.

Applicable law

32. For the reasons already stated, as a matter of fact, both parties treated these decisions as if they were decisions being made by the respondent as to whether or not to exercise his discretion under s. 3 of the Act of 1999 to make or not to make deportation orders in respect of the second and third named respondents. Accordingly, the applicable law, save in relation to the challenge made at paragraph 2 above, is as set out in the judgment delivered herein today in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2005] No. 1271 J.R.

33. It is not disputed on behalf of the respondent, that in accordance with the well-established principles of administrative law, that the respondent is bound to have regard to relevant considerations in taking the decision as whether or not to reaffirm the deportation orders. Whether the matters alleged to be relevant are so, depend upon the factual circumstances of the decision and will be considered in relation to the decision taken.

Conclusions on validity of decision taken

34. As already stated, submissions were made by reference to the decision taken in respect of Mrs. Dimbo. The considerations leading to the decision and reasons for the decision are set out in the examination on file of the Clerical Officer of the 8th November, 2005, the further examination and recommendation of the same date of the Executive Officer and the further consideration and recommendation of the Assistant Principal Officer of the 21st November, 2005.

35. The actual decision was communicated to the first named respondent by letter on the 1st February, 2006, which having referred to the representations made on behalf of the applicant stated:

> "The representations have been considered under Section 3(6) of the Immigration Act, 1999, as amended and Section 5 of the Refugee Act, 1996, as amended (Prohibition of Refoulement). The outcome of these considerations is that the Minister's earlier decision to make a deportation order remains unchanged as there is nothing contained therein, that would cause the Minister to alter his decision. Enclosed is a copy of the deportation order and a copy of the Minister's further considerations."

36. I have carefully considered each of the above documents and have firstly concluded that the decision taken was in breach of the first named applicant's rights, in that it failed to give due consideration to the facts and factors relating to the constitutionally protected personal rights of the first named applicant.

37. Even if one were to consider this only in relation to the personal right of the first named applicant to live in Ireland and not to consider the additional welfare rights, I would reach the same conclusion. In the two examinations on file the only reference to the citizen child is a standard statement in identical form to that in the examination on file in the Oguekwe proceedings that the child is a citizen of Ireland; is not or could never be subject to deportation and that it is presumed that if the Minister agrees to deport the parent that she will preserve the family unit by taking the child with her thereby preserving the child's right to the care and protection of his family under Article 41 of the Constitution.

38. Detailed representations had been made as to the child's schooling. He was by November 2005 nine and a half years old and in fourth class in a Dublin school and demonstrated to be fully participating and achieving.

39. The first named applicant wrote a letter dated 12th November 2005 directly to the respondent requesting that his family not be deported.

40. There is no factual consideration of the circumstances of a nine year old citizen boy at school in the State, who has a right to live in the State and does not wish to leave the State.

41. Furthermore, there is no consideration of the factual matters relating to the right of the first named applicant to be educated and reared with due regard to his welfare as I have concluded is necessary to comply with the State's guarantee of his rights under Article 40.3 of the Constitution.

42. The documents do not expressly identify any interest in the common good which or grave and substantial reason which is stated to require deportation as required by the decision in *A.O. and D.L. v. The Minister for Justice* 1 I.R. [2003] 1.

43. However, the examination on file in considering the matters set out at s. 3(6)(j) of the Act of 1999 under the head of the common good states:

> "It is in the interest of the common good to uphold the integrity of the asylum and immigration procedures in the State."

44. Such a reason may satisfy the requirements of *A.O. and D.L. v. The Minister for Justice* 1 I.R. [2003] 1. In his judgment Hardiman J. stated at p. 164:

> "In my view, the need to preserve respect for the asylum and immigration system (including the Dublin Convention) is a generally applicable open-ended administrative reason capable of satisfying the test in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151. When this reason is given it must, of course, be considered in the light of the facts of each individual

> case – a set of facts such as those in *Fajujonu v. Minister for Justice* might lead to a different conclusion than the facts of another case. Equally, the consideration of individual cases should as far as possible be consistent one with the other. The detailed exercise required in each individual case is a function of the executive, to be discharged with reference to the finding of the relevant statutory bodies and with the advice of the civil service. The courts have no appellate role in this process. Their role is solely to ensure that all decisions are taken by the proper bodies and in a proper manner. The element of discretion in any such decision has been conferred, not on the judiciary, but on the executive which is democratically accountable for it."

45. In November 2005, the IBC/05 Scheme and the decisions taken thereunder formed part of the then immigration procedures in the State. They were were directly relevant to the applicants who were persons to whom the scheme was addressed. The scheme marked a significant change in the approach to non-national parents of citizen children. The generous approach and general policy of granting permission to remain including to many "who would have been very unlikely to have been granted permission under an individual case-by-case analysis" is fully explained in the affidavit of Ms Hynes filed in this application. The requirement that "the consideration of individual cases should as far as possible be consistent one with the other" as stated by Hardiman J underscores the relevancy of these matters to the consideration in relation to the parent applicants herein.

46. Accordingly, I have concluded that the respondent herein also failed to have regard to relevant considerations and accordingly the decision was not taken in a proper manner.

47. Finally, I have concluded that this decision was also made in breach of the obligations of the respondent under s. 3 of the European Convention on Human Rights Act 2003 for the following reasons.

48. As already concluded the citizen child had a private life in the State in November 2003 which demanded the respect of the respondent.

49. *Prima facie*, the decision to deport the mother (and the father) is an interference with the right of the citizen child to respect for his private life in the State. The result of the deportation is that the child has to leave the State to maintain his family life with his parents, with the consequent interference in his private life in the State.

50. The *prima facie* interference does not of course mean that a decision to deport either the father or the mother will necessarily be in breach of Article 8 of the Convention. It does however mean that the applicants have discharged the onus of establishing that the respondent was obliged by Article 8 of the Convention to consider and determine the questions set out in the Oguekwe judgment, if this decision is to be justified under Article 8. Those questions were not addressed in the examination on file, nor was there any submission made seeking to justify the decision in accordance with article 8. Accordingly, the decision taken must be considered to be in breach of the citizen child's right to respect for his private life under Article 8 and the respondent to be in breach of s. 3 of the Act of 2003.

51. I have assumed that as no separate submissions were made in respect of the examination on file and other considerations leading to the decision in respect of the third named applicant, that they were identical to those of the second named applicant and the same conclusions apply.

52. Having concluded that the process by which the decision was taken was in breach of the first named applicant's rights and the respondent's constitutional and statutory obligations, it is unnecessary for me to consider any further submissions, including the challenge to the so-called rule of law as determined in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

53. Counsel for the respondent made similar submissions in relation to the granting of relief even if I were to determine that the decision taken was not taken in accordance with law. For the reasons set out at the commencement of this judgment I have determined that the court should not exercise its discretion so as to refuse the relief.

54. Accordingly, on this aspect of the claim there will be an order of *certiorari* of the decisions communicated to the second and third named applicants in the letters of 1st February, 2006 to affirm the deportation orders made in 2004.

Relief

55. Accordingly the applicants are entitled to:

> 1. Orders of *certiorari* of the decisions of the respondent of 16th August, 2005 to refuse to grant residency in the State to the second and third named applicants under IBC/05 and an order remitting the applications for consideration and determination in accordance with law.
>
> 2. An order of *certiorari* of the decisions communicated to the second and third named applicants in the letters of 1st February, 2006 to affirm the deportation orders made in 2004.