

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 382 JR]

BETWEEN

J.W., H.G., E.W. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND J.W.), P.W. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND J.W.), E.W. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND J.W.), J.W. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND J.W.) AND P.W. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND J.W.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on Thursday the 15th day of October, 2020

1. The second-named applicant is an illegal immigrant from Nigeria who falsely claimed to be from Liberia. He was convicted of sexual assault on a minor, and it appears that he only entered a guilty plea after his victim was required to give evidence and be cross-examined. According to the Circuit Court Judge, her victim impact statement explained that the crime has had a "*significant effect on her*" and that she had difficulty going out and travelling which impeded her ability to do part-time work. She was a vulnerable victim and "*in fear and dread*" in relation to the court appearance. She was "*still traumatised and is on medication*" and the Circuit Court Judge said that what she underwent constituted "*an indelible mark that will be left on her for the rest of her life.*" A custodial sentence was imposed and the second-named applicant was placed on the Sex Offenders Register for seven years. Unsurprisingly, perhaps, a deportation order was subsequently made. That is now challenged. Virtually all of the grounds advanced are ruled out on the basis of previous caselaw so, perhaps also unsurprisingly, the present challenge also fails.

Facts

2. The second-named applicant was born in 1983: where exactly is not totally clear, but it seems to have been Nigeria. He also had a Liberian passport which was found to be a false document.
3. He arrived in the State on 21st July, 2008 and fraudulently applied for a declaration of refugee status as a Liberian. That was rejected and an appeal was also rejected on 18th June, 2009. He then applied for leave to remain and subsidiary protection.
4. He apparently has an older child born in 2009, but doesn't have access to that child.
5. He claims to have met Ms. J.W. in 2009 and claims that they married in a non-legal religious ceremony on 12th February, 2011. They apparently have three children: E.G., born 2012; J.G., born 2014; and P.G. born 2015. Ms. J.W. also has two children from a previous relationship: E.E. (who is an Irish citizen, but not a child of the applicant), born 2004; and P.W., born 2008.

6. In 2012 the second-named applicant applied for leave to remain on the basis of parentage of an Irish citizen child, but failed to supply relevant documentation. The application was closed.
7. On 1st January, 2014 the false Liberian passport was seized by Gardaí.
8. The second-named applicant's subsidiary protection application was refused on 31st December, 2014 and there was no appeal.
9. On 17th February, 2014 he was convicted of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990. The Circuit Court, on appeal, affirmed the conviction and reduced the sentence from six months to five months' imprisonment, as well as putting the second-named applicant on the Sex Offenders Register.
10. A notification of intention to deport was issued on 8th May, 2015 and a deportation order made on 29th September, 2017.
11. Following a first set of judicial review proceedings [2017 No. 861 JR], it was agreed that the deportation order would be withdrawn. A further proposal was made on 13th June, 2018. That resulted in a second deportation order on 8th May, 2019 which is challenged in the present proceedings, filed on 18th June, 2019. Leave was granted on 24th June, 2019 and on 9th June, 2020 I allowed an amendment to the statement of grounds without prejudice to any submissions that the respondents might make at the substantive hearing. I have now received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Paul O'Shea B.L.) for the applicants and from Mr. Anthony Moore B.L. for the respondents. On 31st July, 2020 having heard the matter, I informed the parties of the order being made and indicated that reasons would be given later.

Some general considerations

12. It is worthwhile to contextualise challenges of this kind by setting out a number of general considerations which are established in the caselaw but that unfortunately are sometimes overlooked, particularly by applicants:
 - (i). there is a presumption of validity for administrative decisions: *per* Finlay P., as he then was, in *In re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 5th December, 1977) and *per* Keane J., as he then was, in *Campus Oil v. Minister for Industry and Energy No. 2* [1983] I.R. 88 at 102;
 - (ii). there is a presumption that material has been considered if the decision says so: *per* Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401;
 - (iii). the State has a wide discretion in immigration matters: *per* Keane C.J. for the court in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 (paras. 82-83), citing Costello J., as he then was, in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 at 599;

- (iv). the common good includes the control of non-nationals, and the normal system of application to enter the State is from outside: *per* Hardiman J. in *F.P. v. Minister for Justice* [2002] 1 I.R. 164 at p. 174;
- (v). judicial review is not an appeal on the merits and it is not for the court to step into the shoes of the decision-maker: *per* Finlay C.J. in *the State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at 654; *per* Denham J., as she then was, in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743; and *per* Clarke J., as he then was (McKechnie and Dunne JJ. concurring), in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014), at paras. 3.8 to 3.15;
- (vi). the weight to be given to the evidence is quintessentially a matter for the decision-maker: *per* Birmingham J., as he then was, in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) at para. 27;
- (vii). the onus of proof remains on the applicant at all times: *per* Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at 743;
- (viii). it is not for the applicant to dictate the procedures to be adopted: see *per* Ryan P. (Peart and Hogan JJ. concurring), in *A.B. v. The Minister for Justice and Equality* [2016] IECA 48 (Unreported, Court of Appeal, 26th February, 2016) at para. 43;
- (ix). an applicant does not have a legal entitlement to a discursive narrative decision addressing all submissions: see *per* Clarke J., as he then was (Fennelly and MacMenamin JJ. concurring), in *Rawson v. Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, 1st May, 2012) at para. 6.9;
- (x). a judicial review applicant is confined to what is pleaded - while the view of Costello P. regarding the circumstances of amendment of pleadings evolved significantly since *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 at 503, his view that the scope of judicial review is limited by the order granting leave remains fundamental; and
- (xi). a judicial review applicant must plead with specificity: O. 84, r. 20(3) that an "assertion in general terms" is inadequate, but the applicant must "state precisely each such ground, giving particulars where appropriate".

Headings of challenge

13. An implausible 19 grounds of challenge are set out in the amended statement of grounds. In the applicants' revised written submissions that is reduced to eight headings, and in oral submissions counsel accepted the questions could be framed under a more manageable four headings:

- (i). disproportionality;

- (ii). proper consideration of family and private life rights including constitutional rights;
- (iii). alleged obligation to publish policies; and
- (iv). proper consideration of the best interests of the child.

Disproportionality

14. The decision is not disproportionate. It is clearly open to the Minister to consider that the relevant interests of family members concerned, including all applicants, was outweighed by the offence committed by the second-named applicant. An assessment of proportionality is generally a matter for the Minister unless a clear illegality is demonstrated: see *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 98, [2018] 1 JIC 1607 (Unreported, High Court, 16th January, 2018), at para. 28. The Minister is entitled to weigh matters and hold that interests of public policy can outweigh interests of family and private life: see e.g. *P.S.M. v. Minister for Justice, Equality and Law Reform* [2016] IEHC 474, [2016] 7 JIC 2930 (Unreported, High Court, 29th July, 2016). A misconceived argument about there being no less restrictive process available was made, but that has already been rejected in *A.O. (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 365, [2019] 4 JIC 3009 (Unreported, High Court, 29th April, 2019), for the reasons set out there.
15. As noted in *Alawiye v. Minister for Justice and Equality* [2016] IEHC 673, [2016] 11 JIC 2108 (Unreported, High Court, 21st November, 2016), at para. 15, a decision which was not actually disproportionate doesn't become invalid because the Minister doesn't use the legalistic language of a proportionality exercise or any other formula dictated by an applicant.

Proper consideration of family and private life rights including constitutional rights

16. The family and private life rights at issue were considered in substance. Insofar as the Minister proceeded on the basis that the constitutional rights of married couples didn't apply to the first and second-named applicants, that is perfectly correct. No equivalent rights of unmarried couples under the Constitution were actually asserted, so they didn't have to be considered. The basic problem with the whole argument under this heading is that the arguments made to the court were not made to the Minister. Indeed, in submissions, Mr. Moore legitimately and eloquently says that "[a]s an exercise in gaslighting, the Applicants' submissions on this matter are a veritable tour de force". The only provision of the Constitution relied on in the submissions to the Minister dated 12th July, 2018 was Article 42.5, which had been repealed more than three years earlier on 28th April, 2015. Insofar as reference was made in the decision to insurmountable obstacles, there was nothing wrong with that comment. But even if there was, the other family members have no intention of leaving the State, so the point is irrelevant: see *T.A. (Nigeria)* at para. 23. Insofar as a discrimination point is launched claiming that other people who had convictions were allowed to remain, there is no analogy with *Igbosonu v. Minister for Justice and Equality* [2017] IEHC 681, [2017] 10 JIC 0407 (Unreported, High Court, 4th October, 2017), because a deportation order was ultimately made against that applicant. Even if there conceivably could be other applicants who were not the subject

of deportation orders, that doesn't give any rights to these applicants: see *Singh v. Minister for Justice and Equality* [2019] IEHC 537, [2019] 7 JIC 0102 (Unreported, High Court, 1st July, 2019).

17. Even if, contrary to the foregoing, the applicants are entitled to assert some failure of box-ticking by the Minister, the family circumstances were in fact fully considered and the decision can't be quashed on this basis: see *T.A. (Nigeria)*, at para. 26; *O.A.B. (Nigeria) v. The Minister for Justice and Equality* [2018] IEHC 142, [2018] 2 JIC 2709 (Unreported, High Court, 27th February, 2018), at para. 13(iv); and *Seredych v. The Minister for Justice and Equality* [2018] IEHC 187, [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018), at para. 11.

Alleged obligation to publish policies

18. The applicants claim that the Minister has an obligation to publish policies in relation to her discretionary powers. There is no such obligation: see *D.E. v. Minister for Justice and Equality* [2018] IESC 16, [2018] 3 I.R. 326; and *A.P. v. Minister for Justice and Equality* [2016] IEHC 669, [2016] 11 JIC 1418 (Unreported, High Court, 14th November, 2016), at paras. 19-23. Nor is there any obligation to publish policies as to what amounts to "an adaptable age". Even if there was, the applicants can't succeed under this heading because the issue is irrelevant given that the children are not going to be leaving the State anyway.

Alleged lack of proper consideration of the best interests of the child

19. The best interests issue only arises under art. 8 of the ECHR, not under the Constitution. There was no failure to validly consider the issue. The only applicant being deported is the second-named applicant who is an unsettled migrant, and deportation of unsettled migrants is contrary to the ECHR only in exceptional circumstances. In any event, the best interests of the children haven't been shown to raise anything exceptional to demonstrate that the decision is unlawful (see *e.g. Ibrahim v. Minister for Justice and Equality* [2019] IEHC 61, [2019] 1 JIC 2914 (Unreported, High Court, 29th January, 2019)).
20. As in any case where there are countervailing public policy considerations, particularly in relation to breach of the criminal law, best interests of the child do not constitute a trump card, and such interests can be outweighed by other factors: see *Wang v. Minister for Justice, Equality and Law Reform* [2017] IEHC 652, [2017] 10 JIC 0608 (Unreported, High Court, 6th October, 2017); and *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468, [2016] 7 JIC 2924 (Unreported, High Court, 29th July, 2016), at para. 37. Indeed the *O.O.A.* decision is actually quoted in the supporting analysis for the decision under challenge. That analysis states that all submissions on behalf of the second-named applicant have been "read and fully considered". The applicant hasn't demonstrated otherwise: see *G.K. v. Minister for Justice Equality and Law Reform* [2002] 2 I.R. 418, [2002] 1 I.L.R.M. 401.
21. Insofar as the applicants claim that there is a constitutional right to have best interests considered in the deportation context, that has been previously rejected: see *Dos Santos*

v. Minister for Justice [2015] IECA 210, [2015] 3 I.R. 411; *E.B. v. Minister for Justice and Equality* [2016] IEHC 531 (Unreported, High Court, Faherty J., 27th July, 2016); and *T.A. (Nigeria)*, at para. 27.

Order

22. Accordingly, the order I made on 31st July, 2020 was as follows:

- (i). that the proceedings be dismissed, and in that regard I don't need to decide whether to set aside the amendment or to dismiss on grounds of discretion because the action fails on the merits anyway; and
- (ii). in relation to the interim injunction granted at leave stage, while it does not seem to have been continued, if and insofar it was continued it is discharged, and insofar as any undertakings were given by the respondents, they are released therefrom.