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AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Record No. 2023/37

[2024] IESC 35

Dunne J.

Woulfe J.

Hogan J.

Collins J.

Donnelly J.

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS
(TRAFFICKING) ACT, 2000 (AS AMENDED)**

BETWEEN

AZ, MZ AND CZ (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND MZ)

Applicants/Respondents

AND

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 25 July 2024

1. I agree that, in the very particular factual circumstances here, the Minister failed to properly consider the impact of the proposed deportation of AZ on his wife and son and their collective family unit.

2. Undoubtedly, there were (and are) multiple factors that, individually and cumulatively, could reasonably be regarded as warranting AZ's deportation from the State. He entered the State unlawfully – apparently using a false passport – and remained and worked here without permission for many years. He committed a criminal offence in 2003 which he subsequently failed to disclose when he applied for permission to remain in the State following his marriage to MZ. He has been in the State without permission since 2017. More significantly, he committed a number of very serious criminal offences in 2012, while present in the State and working illegally. The gravity of those offences can be gauged by the fact that on conviction he was sentenced to seven years imprisonment (with three years suspended) of which – with remission – he served three years in prison. Furthermore, apparently triggered by the making of the first deportation order against him, AZ engaged in a despicable campaign of abusive, intimidatory and misogynistic email communications with a number of officers in the Department of Justice and persisted in that campaign even after being asked to desist and having been expressly warned that account would be taken of those emails in the Minister's consideration of his case.

3. As against that, AZ has been married to MZ, who is an Irish citizen, since 2012 (their relationship dates back to 2005) and is father to CZ, born in 2007 and who is also an Irish citizen. The evidence suggests the existence of very real and close bonds of mutual

affection between AZ and his wife and son and indicates that he plays a very important role in raising and caring for CZ, who has particular health and developmental issues which it is not necessary to describe in detail.

4. That AZ has an Irish citizen spouse does not, of course, give him any entitlement to remain in the State or exclude the power of the Minister to make an order for his deportation under section 3 of the Immigration Act 1999 (“*the 1999 Act*”). But where – as is said to be the position here – a deportation order would make it difficult or impossible for AZ and MZ to continue to cohabit, that is a factor of substantial weight that must be properly considered by the Minister: see per O’ Donnell J (as he then was) (MacMenamin, Dunne and Charleton J agreeing) in *Gorry v Minister for Justice and Equality* [2020] IESC 55, at paras 24 - 27 and 70-76. The facts in *Gorry* were of course different to the facts here in that there was no suggestion that the non-national spouse there had engaged in criminal unlawful conduct (other than possible breaches of immigration law) but that does not appear to me to affect the issue of principle involved.
5. Equally, the fact that AZ has an Irish citizen child, who has lived in the State since birth, does not render him immune to deportation. But where the effect of a deportation order would be to separate AZ and CZ – as appears to be the case here – that too is a significant factor to which the Minister must have appropriate regard. That follows from the well-established jurisprudence of this Court: see in particular *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 IR 795, per Denham J (as she then was) for a unanimous court, at paras 56-62, 66 – 69 and 85.

6. As is evident from *Oguekwe*, and re-iterated by this Court in *IRM v Minister for Justice and Equality* [2018] IESC 14, [2018] 1 IR 417, at paras 112-113, the weight to be given to that factor will depend on all the facts and requires a case-by-case, fact-sensitive assessment by the Minister.

7. Even where it appears that family life can be maintained elsewhere – and that does not seem a realistic prospect here – in considering whether to make a deportation order the Minister must give significant weight to the fact that, in such circumstances, the Irish citizen or citizens involved will be compelled to sacrifice a fundamental incident of Irish citizenship – the right to reside in the State and all that follows from that – as the price of sustaining family life. In the constitutional context, therefore – and whatever may be the position under Article 8 ECHR – the fact (if fact it be) that there may be no insurmountable obstacle to a family living together outside the jurisdiction in the event that the non-citizen family member is deported, does not, of itself, mean that deportation will be proportionate or permissible or absolve the Minister from a careful consideration of the impact of relocation on rights and interests of the other family members, particularly of minor children who cannot exercise an independent judgment as to where they should reside.

8. I agree with Woulfe J that these proceedings cannot properly be determined without considering Article 42A. Having regard to the interests at stake in the proceedings, it was entirely appropriate for the Judge to raise Article 42A with the parties and give them an opportunity to address it. The Minister had, after all, purported to carry out a comprehensive assessment of the constitutional rights of CZ (albeit without any or at

least any express consideration of Article 42A) and the adequacy of the Minister's assessment was the central issue in the proceedings. Consideration of Article 42A therefore did not broaden the scope of the proceedings or bring any new issue into the case. Had the Applicants applied to amend the Applicants Statement of Grounds to add a reference to Article 42A, it is inconceivable that such an application would have been refused, however late in the day such application was made. Such an amendment would not have caused any legitimate prejudice to the Minister. In any event, the High Court has addressed Article 42A in its judgment and, in my view, it would be entirely inappropriate for this Court to determine this appeal without reference to it.

9. I would not, however, be prepared to endorse the suggestion that Article 42A imposes an “*autonomous duty*” on the Court to have regard to its provisions, independently of the position of the parties. Such a far-reaching proposition does not, in my view, follow from this Court's decision in *Sivsivadze v Minister for Justice and Equality* [2015] IESC 53, [2016] 2 IR 403 and I would want to hear much more detailed argument on this question before expressing a view on it. The point being made by Murray J at para 31 of his judgment in *Sivsivadze* was that, in considering whether to exercise its discretion to dismiss the appeal on grounds of abuse of process (due to lack of candour on the part of the applicant parents), the court had to have regard to the interests of the applicant children. *Sivsivadze* does not suggest that in *inter partes* litigation, Article 42A – or any other provision of the Constitution – entitles or obliges a court to reach outside the parameters of the dispute before it as defined by the pleadings and submissions of the parties. That is not what happened here: the impact on CZ of the proposed deportation

of his father was at all times the central issue in these proceedings. I agree with Woulfe J that this issue should be left over for a future debate.

10. I am also unpersuaded by the Minister's argument that these proceedings constitute an impermissible collateral attack on the deportation order made in June 2019. The Minister agreed to give "*fresh consideration*" to AZ's application to revoke that deportation order under section 3(11) of the Immigration Act 1999. In light of that agreement, it was incumbent on the Minister to consider whether the deportation of AZ remained a proportionate measure and, in that context, the Minister was obliged to assess the up-to-date information as to the impact of deportation on the Applicants as a family, and in particular on CZ. That is what the Minister undertook to do. The core contention of the Applicants – that in the particular circumstances here the deportation of AZ would be disproportionate and that, accordingly, the Minister was wrong not to have decided to revoke the deportation order – is properly directed to the Minister's section 3(11) decision and cannot be dismissed as a collateral attack on the deportation order.

11. As to the substance of this appeal, I agree with Woulfe J that the rights and interests of the family, and in particular the rights and interests of CZ, were not properly considered by the Minister here. Woulfe J interprets Article 42A.1 of the Constitution as obliging the Minister to regard the best interests of CZ as "*a primary consideration*" in deciding whether or not to revoke the deportation order affecting his father. I agree that, in any case where the interests of a child will be adversely affected by a deportation decision, the interests of the child must be given "*significant weight*" (the language used by the

Strasbourg Court in *Jeunesse v Netherlands* (Application No 12738/10) at para 109). So much is clear from the previous decisions of this case, particularly *Oguekwe*. In his judgment, Woulfe J makes it clear that the obligation to treat the best interests of the child as a primary consideration does not mean that such interests are to be regarded as paramount or more important than the other significant interests that deportation engages or that it gives rise to any presumption against deportation. So understood, I agree that, where deportation potentially affects a child, his or her best interests must be regarded as a primary consideration.

12. Deportation decisions differ significantly from decisions where the welfare of a child is the central issue, such as decisions concerning guardianship, custody, access, adoption, or public law proceedings concerning child welfare such as proceedings under the Child Care Act 1991. In almost every case, the best interests of the child will weigh against deportation of a parent (just as the best interests of the child will normally weigh against the imposition of a prison sentence on a parent). However, while the impact of deportation on a child or children is an important factor which must in every case be properly identified and weighed (and which may differ from case to case, depending on the particular facts, the nature of the relationships involved and, as a factor of particular importance, whether or not the children involved are citizens) many other factors will also be relevant – as to which see section 3(6) of the 1999 Act – and ultimately it is a matter for the Minister to weigh up all the relevant factors and make a decision.

13. I agree with Woulfe J's analysis of the important differences in language and scope as between Article 42A.1 and Article 42A.4. I also agree that the provisions of Article 42A.4 are not engaged in the context of deportation.

14. In so far as *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 indicates that the best interests of the child must be the first factor considered in the context of deportation and that no other factor can be given greater weight, I respectfully disagree with it. To approach the matter in that way would effectively create a *de facto* presumption or default rule against deportation where that would be contrary to the best interests of a child. I agree with Woulfe J that no such presumption arises from Article 42A.1 and I agree also that there is no principle or rule that what is determined to be in a child's best interest should generally dictate the outcome, as was suggested by Lord Kerr in *ZH*.

15. As I have said, the evidence here is that the Applicants constitute a closely knit family unit, that there are strong bonds between AZ and his son and that AZ plays an important role in his son's life. In my view, the Minister did not properly identify or assess the effect of deportation on MZ, as AZ's wife and as CZ's mother and, particularly, on CZ. The file note speaks of "*disruption*" when, on any view of the evidence, a far more profound impact must inevitably follow. In particular, the Minister's assessment did not adequately address AZ's role as primary day to day carer for CZ and his particular needs. Part of the problem is that the Minister's assessment did not squarely face up to the fact that deportation would sunder the family. Although at one point the assessment appears to accept that it would not be reasonable to expect MZ and CZ to relocate to

Albania, at other points it seems to suggest that relocation is a possibility (without addressing how such relocation might be a practical proposition in the circumstances here, where neither MZ nor CZ appear to have any links to Albania beyond their relationship to AZ). All of the evidence points to the conclusion that relocation to Albania is not, in fact, a plausible option for the family here and that was accepted by counsel for the Minister at the hearing of this appeal. If that be so, the deportation must be assessed on the basis that it will indefinitely sunder the family and deprive MZ of the care and company of her husband and CZ of the care and company of his father. The proportionality of a decision having such consequences would require careful assessment in any case. In this case, in light of the needs of CZ, a particularly rigorous assessment – involving a real and meaningful engagement with the reality of how the deportation of AZ would impact MZ and CZ – was essential.

16. It is, of course, a fundamental fact that AZ is a non-national who has no legal entitlement to be in the State and who has, in addition, engaged in conduct which, on any view could reasonably be regarded as warranting his deportation. Nonetheless, on the facts of this case, there were and are particular countervailing factors that, if properly considered, *could* warrant a decision to revoke the deportation order. The difficulty here is that those countervailing factors were not given proper consideration by the Minister. The matter should now be considered afresh by the Minister and for that purpose the Applicants should ensure that comprehensive and up-to-date information is provided to her regarding the health and development of CZ.

17. For these reasons, and the further reasons set out by Woulfe J in his judgment, with which I agree, I would affirm the order made by Phelan J in the High Court and dismiss the Minister's appeal.