

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 755 J.R.]

BETWEEN

MUHAMMAD KASHIF IBRAHIM, EMAAN IBRAHIM, MUAWIA IBRAHIM (A MINOR SUING BY HIS FATHER AND NEXT FRIEND MOHAMMED KASHIF IBRAMIM), NAWAL IBRAHIM (A MINOR SUING BY HER FATHER AND NEXT FRIEND MOHAMMED KASHIF IBRAHIM), IBTEHAL IBRAHIM (A MINOR SUING BY HER FATHER AND NEXT FRIEND MOHAMMED KASHIF IBRAHIM)
APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of January, 2019

1. The applicants are a Pakistani family. The father and mother were born in 1981 and 1984 respectively and married in 2008. They arrived in the State on 30th July, 2009 on visitor's visas and overstayed thereafter. The mother was seven months pregnant at that time. Visitor's visas normally expire after three months so the parents would have been unlawfully present at all times from on or about 30th October, 2009. There are three children of the family, born in Ireland on 11th September, 2009 and in 2013 and 2018.

2. On 10th April, 2015 the applicants sought residency. Supporting documents were submitted on 29th April, 2015. The Minister requested further information on 30th June, 2015, which was replied to on 16th July, 2015. On 27th May, 2016, the Minister refused the residency applications. Leave to remain submissions were made on 31st March, and 7th and 10th April, 2017 and 4th May, 2018. On 6th June, 2018 the Minister proposed making deportation orders. Further leave to remain submissions were made on 11th June and 17th July, 2018. The applicants were notified by letter dated 24th August, 2018 that deportation orders had been made.

3. I granted leave in the present proceedings on 24th September, 2018, the primary relief being a challenge to the deportation orders. A statement of opposition was filed on 13th December, 2018. I have received helpful submissions from Mr. Michael Conlon S.C. (with Mr. Garry O'Halloran B.L.) for the applicants and from Mr. Peter Leonard B.L. for the respondents.

Ground 1 - alleged disproportionate impact on children

4. Feeney J. in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] IEHC 166 [2007] 4 I.R. 309 at 324 held that decisions taken pursuant to the lawful operation of the immigration control of the State will be proportionate in all save a minority of exceptional cases, citing *R. (Razgar) v. Secretary of State for the Home Department* [2004] UKHL 27 [2004] 2 AC 368 at 390. Deportation of an unsettled migrant only gives rise to breach of art. 8 of the ECHR (as applied by the European Convention on Human Rights Act 2003) in exceptional circumstances: see *C. I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385 at 408 per Finlay Geoghegan J., *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164, John Stanley, *Immigration and Citizenship Law* (Dublin, 2017) at p. 397 et seq. citing *Costello Roberts v. United Kingdom* [1993] 19 E.H.R.R. 112 (Application no. 13134/87, European Court of Human Rights, 25th March, 1993) and *P.S.M. v. Minister for Justice and Equality* [2016] IEHC 474 [2016] 7 JIC 2930 (Unreported, High Court, 29th July, 2016); *Nagra v. Minister for Justice and Equality* [2018] IEHC 398 (Unreported, High Court, 5th June, 2018) (para. 5), *Rodrigues da Silva and Hoogkamer v. the Netherlands* (Application no. 50435/99, European Court of Human Rights, 31st January, 2006) (para. 39), *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018) (para. 9).

5. As I noted in *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 [2016] 7 JIC 2924 (Unreported, High Court, 29th July, 2016) an assessment of whether the rights of the child under art. 8 of the ECHR is properly counterbalanced by the legitimate entitlement of the State to operate an orderly immigration control system is primarily a matter for the Minister. The court must attach significant weight to a decision which is *prima facie* valid and which embodies the Minister's balancing exercise in that regard: see *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152 [2013] 1 I.L.R.M. 1 per Clarke J. as he then was at para. 10.2, *Sivsvadze v. Minister for Justice and Equality and Equality* [2015] IESC 53 and *Z.H. (Tanzania) v. Secretary of State for the Home Department* [2011] 2 AC 166 per Lady Hale at para. 33.

6. This does not mean that the applicants as unsettled migrants have no art. 8 rights, but rather that exceptional circumstances are required to allow the court to quash a ministerial decision to deport an unsettled migrant.

7. *A.A. v. United Kingdom* (Application no. 8000/08, European Court of Human Rights, 20th September, 2011) arose on very different facts, and in any event the Strasbourg court does not operate a system of *stare decisis*. It is the general principles of Strasbourg law that apply rather than it being a question of following individual cases, particularly outlying ones. The fact that there may be guidance based on specific time-period thresholds in U.K. Immigration Rules on Family and Private Life, Grounds of Compatibility with Article 8 of the European Convention on Human Rights, Statement by the Home Office (HC 194, dated 13th June, 2012), has no real relevance. There have, in any event, been a number of further major developments in the law of England and Wales since then: see e.g. *R. (Agyarko) v. Secretary of State for the Home Department* [2017] UKSC 11. Insofar as the best interests of the child are concerned, these do not arise under Article 42A.4 of the Constitution, which does not apply here, but only *via* the Strasbourg jurisprudence on art. 8. Because best interests for the purposes of deportation only arises in aspect of art. 8, the fact that deportation of the applicants as unsettled migrants breaches art. 8 only in exceptional circumstances also applies to the best interests principle. The family is being returned to Pakistan as an intact family, and the best interests of the children are presumptively with their parents. There is no basis to consider that the Minister did not have regard to the age of the children and it is clear from the decision that the Minister was aware of this.

8. As these applicants are unsettled migrants, their deportation has not been shown to be in breach of art. 8, or the best interests principle, or to be disproportionate; and nor have the necessary exceptional circumstances been shown.

9. To summarise the position in relation to the sub-grounds pleaded under para. 1 of the statement of grounds:

(a) The Minister did not fail to have regard to the best interests of the children because their art. 8 rights were

considered; and best interests in this context only arises in the context of the art. 8 rights. In any event, even if there was some obligation to acknowledge the best interests issue more expressly, which I do not accept, the applicants have not shown that the necessary exceptional circumstances exist that would entitle them to an order quashing the decision.

(b) The Minister was clearly aware of the ages of the children. It was not unreasonable to assume that an eight-year-old child was adaptable.

(c) Insofar as it is pleaded that "*there comes a stage when even unsettled migrants must be regarded as having private life rights as to require a Razgar proportionality analysis/assessment*", that arises only in exceptional circumstances which these applicants have not demonstrated.

(d) A rather peculiar point is pleaded that the Minister erred in relying on a case in respect of Brazilian children and suggesting that the Minister could not read across from that to say that the children should be able to adapt to life in Pakistan. The common law proceeds by analogy. The Minister is not required to find a Pakistani case before reciting caselaw.

(e) It is claimed that there was unlawful consideration because the Minister relied on the conclusion that he was not obliged to respect the parents' choice of residence; but he isn't so obliged.

(f) The decision is impugned on the basis that it factors in a requirement to show exceptional circumstances; but there is such a requirement.

Ground 2 - unlawful consideration of children's rights

10. Paragraph 20 of the applicants' written submissions contends that this ground "*relates to the infection of related deportation orders by the bad deportation orders*". As there are no bad deportation orders, this point does not arise.

Ground 3 - work prospects

11. Paragraph 21 of the applicants' written submissions states that ground 3 "*relates to the irrational findings with respect to the work prospects of the parents*". As far as the husband is concerned, the decision notes that he is not permitted by law to work in the State and that there is no information or documentation which shows that he has specialist skills which are in deficit in the State. He claimed "*I have been offered an accountant job for many organisation (sic) in Dublin, Ireland*". A job offer was produced which was not on headed paper, the position the signatory held was not specified, there was no proposed salary or salary scale and the placement was in Fermoy whereas the husband resides in Portlaoise. The Minister's conclusion was "*this cannot be taken to be a credible offer of paid employment*". Mr. Conlon claims this is irrational in the sense that it flies in the face of common sense. The position however is quite the reverse. A job offer without a salary does not amount to a contractual offer. What flies in the face of common sense is the suggestion that a job offer with no salary and with the features referred to by the Minister, and indeed the additional feature that it states contradictory hours of work, a point not specifically mentioned by the Minister as it happens, is a credible job offer.

12. Similarly, a complaint is made about the Minister's scepticism regarding the wife's job prospects. She states she is "*a qualified teacher and have been teach (sic) in a (sic) Islamic centre in Pakistan*". A letter is produced from Muhammad Farooq al Mustafa of the Islamic Education and Cultural Centre, which states that the centre is unable to hire her at the present time as a teacher but would be happy to employ her if she is granted the right to work. Again there is no proposed salary or salary scale, and the place of employment is in Dublin whereas she resides in Portlaoise. Another letter was produced from Sheikh Ahmed Halawa, Imam and Khateeb, Rahman House, Portlaoise, offering a job in the post of Arabic teacher and teacher of Islamic learning. Again there is no proposed salary and no indication of when the job might commence or whether it is full-time or part-time. The Minister's view that it cannot be considered as a credible offer is impregnable under those circumstances. The Minister notes that the mother may be qualified for the niche position of an Arabic and Koran studies teacher but that there is no information submitted to show she has any specialist skills which are in deficit in the State, and the Minister concluded her employment prospects are limited. Given that there is no indication of what sort of salary could be involved in the event of her gaining the type of employment referred to in the correspondence, this could be simply limited part-time teaching, which hardly amounts to self-supporting employment. Indeed, the applicants' written submissions state at para. 5 that "*the parents have done occasional work*". The Minister's conclusion on the job prospects of the parents and the manner in which the purported job offers were dealt with is well within the scope of what is reasonably open to him. There was a faint suggestion that the Minister should have reverted to the applicants and asked them to firm up on things. Mr. Conlon fairly accepted that he had no authority for the argument that the Minister was obliged to come back to the applicants and indeed conceded that there was authority converse to that proposition: see by analogy *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R.M. 109 at para. 60. There is no such obligation.

Order

13. The applicants have been present in the State unlawfully for almost a decade (in the case of the parents), and for much of that period were underground and did not engage with the authorities. Any private life they have built up in that period was at a time when they had no lawful immigration status. They have, and during that period have had, no right or title to be in the State and there is no legal basis whatsoever for them to have the deportation order set aside. The order therefore will be:

- (i). that the proceedings be dismissed; and
- (ii). that the respondents be released from their undertaking not to enforce the deportation orders.