[2019] IEHC 759

**THE HIGH COURT**

**[2019 No. 421 JR]**

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

**BETWEEN**

**RAPHAEL OLAOLUWA OYEDELE BABATUNDE, OLASUBOMI OBEMBE (A MINOR SUING BY HIS FATHER AND NEXT FRIEND ENIOLA EBONY BABATUNDE), ELIZABETH MERCY BABATUNDE (A MINOR SUING BY HER MOTHER AND NEXT FRIEND ENIOLA EBONY BABATUNDE) AND MICHAEL BABTUNDE (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND ENIOLA EBONY BABATUNDE)**

**APPLICANTS**

**– AND –**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr Justice Max Barrett delivered 14th day of November, 2019.**

1. Mr Raphael Babatunde is a Nigerian national who has resided in the State since 2013. At present, he does not have permission to work here. The second applicant, Mr Obembe, is an Irish citizen and was, at the time of the impugned decision, a minor; he has since attained adulthood. Mr Babatunde is in a long-term cohabitation relationship with Mr Obembe's mother and stands *in loco parentis vis-à-vis* Mr Obembe. The third and fourth applicants, both of whom are Nigerian nationals, are the minor children of Mr Babatunde; they also live with Mr Babatunde and Mr Obembe.

2. Mr Babatunde used to have permission to reside in Ireland by virtue of a since dissolved marriage to a Polish national, which marriage – notwithstanding that it subsisted at law, that there was a child of the marriage, and that it endured for 4½ years before ending in divorce – was but a marriage of convenience, a finding which led ultimately to a deportation order issuing against Mr Babatunde by letter of 31st May, 2019. In arriving at the decision to deport, the Minister concluded, *inter alia*, that:

    - There was no family life between Mr Babatunde and Mr Obembe as Mr Babatunde was not married to Mr Obembe's mother and had not adopted Mr Obembe.

    - No information or documentation had been submitted to show that Mr Babatunde has any specialist skills which are currently in deficit in the labour market, yielding the conclusion that his employment prospects are limited.

    - Public policy and the interests of the common good in maintaining the integrity of the asylum and immigration system and ensuring the economic well-being of the State outweighed such aspects of Mr Babatunde's case as leant against deportation.

    - It would be open to Mr Babatunde's family (individually or collectively) to relocate to Nigeria to maintain family unity but deportation would not require such relocation.

    - While it was accepted that it was in the best interests of the third and fourth applicants to be raised by their parents, the decision to issue Mr Babatunde with a

deportation order would not become disproportionate by reference to its impact on the third and fourth applicants.

- Issuing Mr Babatunde with a deportation order does not interfere with his right to respect for his family life under Article 8 of the European Convention on Human Rights ("ECHR").

3. The applicants come now to court seeking, *inter alia*, a quashing of the deportation order made against Mr Babatunde. They contend that the eight questions, identified in bold text below, arise from the Minister's decision to deport.

**(1) Did the Minister err in concluding that no family life within the meaning of Art.8 ECHR existed between Mr Babatunde and the second applicant?**

4. Court's Answer: 'Yes'. It is clear from the decision of the European Court of Human Rights in *K and T v. Finland* (Application No. 25702/94), para. 150 that the existence of family life within the meaning of Art.8 is not established by proof of biological relationship; rather *"the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties".* Mr Babatunde furnished undisputed evidence that he has lived with Mr Obembe since 2014 and been a father-figure to him since that time; Mr Obembe also furnished an undisputed letter stating that, *inter alia*, to him Mr Babatunde *"is my Daddy".* In the face of this undisputed evidence as to family life within the meaning of Art.8 ECHR, the Minister placed impermissible emphasis on the absence of a formal legal relationship between Mr Babatunde and Mr Obembe. In the context of personal and family relationships, the old formalities are greatly crumbling, and new realities and relationships and diversely blended forms of families presenting: decision-makers and decision-making must make due allowance for this.

**(2) Did the Minister err in failing properly to consider Mr Obembe's rights pursuant to Art.8 ECHR?**

5. Court's Answer: 'Yes'. The court recalls in this regard the observation of the European Court of Human Rights in *Balogun v. The United Kingdom* (Application No. 60286/09), para. 43, that *"the totality of social ties between settled migrants...and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8"*. Mr Obembe is an Irish citizen which would seem to place him in an even stronger position in this regard. The Minister (a) found there to be no family life within the meaning of Art.8 ECHR between Mr Babatunde and Mr Obembe, and (b) as a result, did not assess the impact which Mr Babatunde's removal from Ireland would have on Mr Obembe's rights under Art.8 ECHR, effectively placing Mr Obembe in a position where he had to choose between (I) a private life in Ireland and (II) family life within the meaning of Art.8 ECHR.

**(3) Did the Minister err in law in issuing Mr Babatunde with a deportation order without conducting any assessment of the impact which this would have on Mr Obembe's rights under the Constitution, in particular Art.40.3?**

6. Court's Answer: 'Yes'. It appears from the impugned decision that there was, *e.g.*, no consideration of Mr Obembe's circumstances as Mr Babatunde's effective step-son, no consideration of his personal circumstances insofar as they related to his relationship with

Mr Babatunde, no express regard to Mr Obembe's constitutional right under Art.40.3.1° to have his welfare and best interests considered (albeit that there is some consideration of relevant factors in the impugned decision), and no acknowledgement of any right to be reared by the man he perceives to be his father. It is difficult to see how such an approach can be reconciled (the court does not see that it can be reconciled) with, *e.g.*, the type of assessment which Denham J. anticipates in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25, para. 31.

**(4) Did the Minister act unreasonably in determining that the economic well-being of the State required Mr Babatunde's deportation?**

7. Court's Answer: Mr Babatunde worked as a physicist in Nigeria and, during the time that he had permission to work here, did work here. Given this history, the court respectfully does not see how it flows as a matter of logic that Mr Babatunde's deportation was necessary to maintain the economic well-being of the State. To the extent that this involves (if it involves) the court getting into a consideration of the merits of the decision that fall to the Minister to decide, a separate difficulty in any event presents which is that the Minister in his decision expressly had regard to Mr Babatunde's failure to supply *"information or documentation…to show that he has any specialist skills which are in deficit in this State"* and in this regard was deciding an application that was not before him: Mr Babatunde was making submissions in the context of a proposed deportation order; he was not applying for an employment permit (which latter application would require him to demonstrate such specialist skills or experience).

**(5) Did the Minister fail to conduct any, or any adequate, assessment of the best interests of the children?**

8. Court's Answer: 'Yes'. Despite an abundance of evidence before the Minister as to Mr Babatunde's involvement in the upbringing of Mr Obembe, and of Miss Elizabeth and Master Michael Babatunde, there is no assessment of their best interests in the manner contemplated by, *e.g.*, the European Court of Human Rights in *Jeunesse v. The Netherlands* (Application No. 12738/10) or by the High Court *in F.B. v. Minister for Justice and Equality (No. 2)* [2018] IEHC 716. (Jeunesse is referenced but no analysis of the type contemplated thereby, let alone an analysis fitted to the particular facts before the Minister, engaged in).

**(6) Did the Minister err in law in failing to consider whether the children's lifelong separation from Mr Babatunde was proportionate?**

9. Court's Answer: 'Yes'. As Denham J. observes in *Oguekwe*, para. 31, sub-para.11, although an Irish-born child enjoys *"the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved".* Those remarks have been partly overtaken by the decision of the European Court of Justice in *Ruiz Zambrano (Case C-34/09)* [2011] E.C.R. I-1177, pursuant to which (para. 46) *"Article 20 TFEU is to be interpreted as…*[precluding] *a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, [inter alia] a right of residence in the*

*Member State of residence and nationality of those children...in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."* However, Denham J.'s comments as to proportionality continue to be good law. This being so, the Minister ought to have considered, in particular, whether what has the potential to be a lifelong separation from Master Obembe was proportionate to the end to be achieved. The failure to do so at this time, when the family relationship within the meaning of Art.8 ECHR and the social ties between Mr Babatunde were at their height, seems especially egregious.

**(7) Is the Minister's reasoning opaque to the extent that he has acted in breach of the applicants' right of access to the courts?**

10. Court's Answer: 'No'. The Minister may have erred but the court does not see that he was opaque in the manner in which he expressed his decision. Certainly the within application has been brought/made without any obvious difficulty and the applicants have succeeded on almost every point made. If the court applies, e.g., the standard identified by the Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, 731, whereby the rationale underlying a decision must be discernible expressly or inferentially, that standard has been met here.

**(8) Was the Minister's conclusion that the third and fourth applicants' primary carer was their mother unreasonable?**

11. Court's Answer: 'Yes'. Not only was it unreasonable, and not only does it appear to offend the constitutional guarantee of equality, such a conclusion seems also to give cause for offence to fathers like Mr Babatunde who, with his partner, appears, from the evidence, to have been involved actively in the raising of the third and fourth applicants since they were each born (a point accepted in the Examination of File, p.8). Mr Babatunde gives every appearance of being, like his partner, a primary carer of the third and fourth applicants, a factor that would obviously be of significance in any proportionality assessment that fell to be undertaken.

**Conclusion**

12. The court is mindful that Mr Obembe has reached adulthood since the impugned decision was made. However, in light of the above errors, the decision that was made cannot stand and matters ought now to be considered anew. The court will therefore grant the order of *certiorari* sought and remit this matter to the Minister for fresh consideration.