

**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**

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 16th day of December, 2020

1. In *J.W. v. Minister for Justice and Equality (No. 1)* [2020] IEHC 500, [2020] 10 JIC 1501 (Unreported, High Court, 15th October, 2020), I dismissed an application for judicial review of a deportation order against the second-named applicant. I delivered that ruling *ex tempore* on 31st July, 2020 and published a formal written judgment on 15th October, 2020.
2. The applicants now seek leave to appeal and I have considered the relevant caselaw, including *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, MacMenamin J., 13th July, 2006) and *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2 (Unreported, High Court, Clarke J., 11th January, 2008). I have heard helpful submissions from Mr. Paul O'Shea B.L. for the applicants and from Mr. Anthony Moore S.C. for the respondents.

Applicants' first proposed question

3. The applicants' first question is "[w]hether in applying the test or principle reaffirmed by the Supreme Court in the case of *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 to an application to quash a decision made by the respondent to deport a non-EU national who is the parent of a minor children (sic) lawfully resident in the State, the High Court was correct in law in exercising its jurisdiction in judicial review on the basis that:
 - (a). *It is not sufficient that an application merely asserts that the decision is irrational, unreasonable and disproportionate and invites the Court to reassess the balance of proportionality and / or reasonableness as between the interests of the State and the rights and interests of the applicants;*
 - (b). *The Court is entitled to require the applicant to identify the particular error, omission or other flaw in the respondent's reasons or assessment of the case which is claimed to render the decision irrational, unreasonable or disproportionate?"*
4. The main problem for the applicants under this heading is that the questions of proportionality and the limits of judicial review in that regard have already been well

traversed in Supreme Court jurisprudence. The Supreme Court has repeatedly reaffirmed that judicial review is not an appeal on the merits, that it deals with the legality rather than the correctness of the decision and that it is not for the court to step into the shoes of the decision-maker: see *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; *per* Clarke J., as he then was (McKechnie and Dunne J.J. concurring), in *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014), at paras. 3.8 to 3.15; *V.J. v. Minister for Justice* [2019] IESC 75 (Unreported, Supreme Court, 31st October, 2019), *per* O'Donnell J. (MacMenamin, Dunne, Charleton and O'Malley JJ. concurring), at para. 79; and *A.A.A v. Minister for Justice* [2017] IESC 80 (Unreported, Supreme Court, 21st December, 2017), *per* Charleton J. (Dunne and Hogan JJ. concurring), at paras. 18-21.

5. In the light of that clear and consistent jurisprudence, raising this question again in reworded form doesn't provide a sufficient basis for leave to appeal, but it is perhaps worth making some additional points anyway. Much of the question is superfluous. It is hard to see why proportionality should as a matter of law involve a separate set of rules for deportation of parents of children resident in the State as opposed to any other equally important discretionary decision. Furthermore, the question doesn't entirely make grammatical sense, but the gist of it seems to be whether the court should conduct its own assessment or reassessment of the balance and whether the court should require the applicants to identify the particular flaw in the decision-maker's reasoning.
6. A fundamental problem for the applicants here is that I didn't approach the case on the restrictive basis implied by the question. I don't think there was much doubt about what specific flaw was argued for on behalf of the applicants. At its core, it was to do with the family and private life rights of the various family members including children and their best interests, although in fairness a number of points were raised on their behalf. Furthermore, I didn't approach the case on the basis that I was limited to irrationality or unreasonableness, and I *did* assess the balance of proportionality.
7. Mr. Moore submits that there is no legal difficulty with the concept that the court can assess proportionality and quash the decision if it is disproportionate. But that I think is the same as asking whether the court thinks that the decision is disproportionate. One couldn't quash a decision as disproportionate unless one had come to a conclusion about what were the range of potential decisions that could fall within a proportionate balancing of the legal rights and interests involved. Proportionality is a range, not a unique value, and there is no point affecting a spurious quasi-mathematical certainty that one and only one decision would be proportionate and everything else disproportionate. That would be a misunderstanding. A decision will be upheld against a disproportionality challenge if it falls within a range of proportional decisions, even if the court, were it the decision-maker, would have made a different decision that was somewhere else on the spectrum of potentially proportional decisions.

8. To say that a decision is proportionate is not to be confused with saying that it's the best possible decision, or the decision that one would take oneself, or with otherwise getting involved in the merits, as opposed to the legality, of the decision. In that light, the question doesn't arise on the facts. In this case, I have reviewed the decision and assessed or, if you like, reassessed, the proportionality balance, and don't think it is disproportionate. In doing so, I have gone well beyond mere reasonableness or irrationality and considered whether the family and private life rights of all the various family members at issue, including the best interest of children, can proportionally be outweighed by the public interest in the deportation of a sex offender in circumstances such as these, and consider that they can. Whether I agree with the decision is irrelevant because even if I didn't agree with it, that wouldn't affect the legal conclusion. Even though it doesn't in fact arise as an issue here, as regards the suggestion that there is some uncertainty as to whether the applicants should be compelled to identify the particular legal error concerned, that is trite law. Denham J., as she then was, in *Meadows* pointed out that the onus is on the applicant at all times.

Applicants' second proposed question

9. The applicants' second proposed question is "[w]hether Irish law recognises the same or an appropriately adapted principle such as that identified by the Supreme Court of the United Kingdom in *Lumba* such that there is an obligation on public authorities enjoying a broad discretion to publish any policy or criteria by reference to which such discretion is likely to be exercised whether that policy has been formally adopted or represents an established practice".
10. The reference to the UKSC authority is to *R. (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] AC 245. The Supreme Court has already rejected a similar argument regarding the alleged need for a *Lumba*-type policy in the deportation context in *D.E. v. Minister for Justice and Equality* [2018] IESC 16, [2018] 3 I.R. 326. There is no pressing need for further clarification. The points made by Clarke C.J. for the Supreme Court in *D.E.* are equally applicable here. He concluded at para. 6.17 that, "I am not satisfied that there are substantial grounds for arguing that the Minister was obliged to adopt a policy or practice in relation to the exercise of the very broad residual discretion which the Minister is given to allow persons to remain in the State for humanitarian reasons. It follows that leave to seek judicial review on these grounds could only be required to be given if it could be demonstrated that there were substantial grounds for believing that there was an actual policy or practice in place which had not been disclosed or made available to interested parties so that prejudice might be said to have arisen."
11. *Lumba* was about adopted policies that weren't followed. *D.E.* was about a committee report, suggestive of a policy, which the decision-maker denied amounted to a policy. This case deals with an even more discretionary situation. There is no suggestion that there is any actual policy or practice which has been adopted but not followed, or which exists but remains undisclosed so as to cause prejudice to the applicants. What is involved here is simply the exercise by the Minister of a general discretionary power,

assuming, as held in the *No. 1* judgment, that relevant legal rights have not been infringed by the decision. Thus, there is even less basis than there was in *D.E.* in contending that the Minister has any obligation to adopt and publish a policy.

Order

12. Accordingly there is inadequate basis for concluding that there is any point of law warranting further appellate clarification. Therefore the application for leave to appeal is refused.