Judgment Title: P., L., & B. -v- Minister for Justice Equality and Law Reform

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Judgment by: Hardiman J.

Status of Judgment: Approved

THE SUPREME COURT

Keane C.J.,
Denham J.
Murphy J.
Murray J.
Hardiman J.

P. v. THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

41/01

L. v. THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

42/01

and

B. v. THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM and THE ATTORNEY GENERAL

43 & 44/01

JUDGMENT of Hardiman J. delivered the 30th day of July, 2001.

In these cases the Applicants appeal against the refusal of the High Court (TC Smyth J.) to grant them leave to institute judicial review proceedings in respect of Deportation Orders made in regard to each of them, other than Mr. B. who was granted leave to apply for such relief on a single ground. This is the subject of a cross-appeal.

The factual background to each case, and the procedural steps taken in relation to each Applicant, are set out in the judgment of the learned High Court Judge. I gratefully adopt his summary. On the hearing of this Appeal, it was not contended that there was any error or omission in either the personal or the procedural histories of the Applicants and their applications.

Starting point.

Each Applicant applied for asylum in the State and was refused. Each appealed and was unsuccessful in the appeal. Two of the applications were found to be *"manifestly unfounded"*.

Accordingly, as the learned High Court judge found at page 9 of his judgment, *"These cases take as their point of departure the conclusion of a process under the* ***Refugee*** *Act, 1996..... no proceedings have been taken against the various decisions made under (that Act)"*.

It follows from this, and may be important to emphasise, that the Applicants have not sought to challenge in any way the decisions of the competent authorities whereby their applications for asylum were refused. They have followed another course.

This course involved them in applying for what is often referred to as humanitarian leave to remain and is more

properly described as the making of representations in writing pursuant to Section 3(3)(b) of the Immigration Act, 1999 to the Minister urging him not to make a Deportation Order in respect of a person making the representations, despite the existence of an unchallenged refusal of asylum.

In the present case, a number of points were taken relating to:-
(a) The proposal to make a Deportation Order,
(b) The consideration given to the representations,
(c) The Order actually made.

These points are to a large extent common to each Applicant. Certain additional points, particularly relating to the Applicant B., will be considered below.

The statutory scheme.

The statutory scheme in relation to the notifications and decisions about the Applicants have been comprehensively set out in the judgment of the learned trial judge and again I gratefully adopt what he has said. It is convenient however to set out certain of the statutory provisions at the point where they arise in this judgment, for the sake of clarity.

The legal context.

The topic of *"The constitutional status of non-nationals"* has been comprehensively considered by the Supreme Court in In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360 at pages 382 to 386 of the report. The observations in the judgment of the Court indicate exhaustively the essential constitutional background to legislation such as that governing the procedures impugned here. I would draw particular attention to the citations from the judgment of Costello J. in Pok Sun Shum v. Ireland

[1986] ILRM 593 and from Gannon J. in Osheku v. Ireland [1986] IR 733. The effect of these is repeated in the judgment of Keane J. (as he then was) in Laurentiu v. Minister for Justice[1999] 4 IR 42 where he asserts:-
".....The general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute".
In both the earlier judgments this inherent power is regarded as an aspect of *"the common good related to the definition, recognition and protection of the boundaries of the State"*, per Gannon J.

The inherent nature of these powers in a State is demonstrated by their assertion over a vast period of history from the very earliest emergence of States as such, and its existence in all contemporary States even though these vary widely in their constitutional, legal and economic regimes, and in the extent to which the rule of law is recognised.

In Ireland, the other common law jurisdictions, the member States of the Economic Union and elsewhere this power is the subject of detailed regulation both by domestic law and by international instruments. There is detailed provision directed at ensuring the constitutional and human rights of Applicants for asylum. In these cases it is to be presumed, and the documents exhibited in these applications in my opinion demonstrate, that these rights have been fully vindicated in unchallenged proceedings conducted pursuant to statutory provisions.

The proposal to deport.

Since Mr. B. has in fact been granted leave to apply for judicial review on a ground relating to this initial aspect of the procedure, what follows under this heading mainly applies to

the other two Applicants.

It is undisputed that the Applicants are persons to whom the provisions of Section 3(1)(f) apply, that is that they are non-nationals whose applications for asylum have been refused by the Minister and are accordingly persons in respect of whom he may make a Deportation Order requiring each of them to leave the State within such period as may be specified in the Order and thereafter remain out of the State.

Section 3(3)(a), so far as relevant, provides that:-
"Where the Minister proposes to make a Deportation Order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it....".

In the two relevant cases, the Applicants received notice of the refusal of their appeals, following the recommendations of the Appeals Authority. The notification then said:-
"As a result of this refusal, the Minister.....proposes to make a Deportation Order in respect of you under the power given to him by Section 3 of the Immigration Act, 1999".

On behalf of the Applicants it was argued that the mere fact that a person is within the categories in respect of which the Minister *"may"* make a Deportation Order is not in itself a sufficient basis for the Minister actually to propose to do so. It was argued that there must be something more. Since the only reason given for the proposal was the refusal of asylum and the failure of the appeal in that regard, it was argued, the proposal was therefore invalidly made.

I can see no merit whatever in this submission either in terms of Section 3 itself or in terms of the more general legal and constitutional status of non-nationals. Subsection (2) of the

Section lists the categories of person in respect of whom the Minister may make a Deportation Order. Each Applicant is within one of these categories. In principle, therefore, the Minister may make the Order, but subject to the subsequent provisions of the Section in relation to seeking and considering representations broadly on humanitarian grounds. In so doing the Minister is exercising specifically the power contained in Section 3 but that power is simply the current statutory manifestation of the inherent power residing in the State itself as an essential attribute of its sovereignty.

The Applicants however rely strongly on the requirement in subsection (3) for the Minister to notify them individually not merely of the proposal but *"of the reasons for it"*. They emphasise the plural form, *"reasons"*. They say that being a person whose application for asylum has been refused is only one reason: the use of the plural form requires that there be another, additional, reason at a minimum. According to this argument, it is impossible to deport a person whose application for asylum has been refused as manifestly unfounded so long as he can avoid giving the Minister any other reason to deport him.

In my view this ground is manifestly unsustainable and does not meet the established criterion for granting leave to apply for judicial review. As the learned trial judge said at page 11 of his judgment, *"The word reasons (plural) embraces the singular reason"*. This is indisputable having regard to the provisions of Section 11(a) of the Interpretation Act, 1937. I also agree, however with the immediately following observation of the Judge: *"Where one of a number of reasons is given by the Minister he cannot afterwards rely on any other uncommunicated reasons to defend his compliance with the subsection"*.

Consideration and decision on the representations.

Once representations were received within the statutory period the Minister became obliged, pursuant to Section 3(3)(b) to do the following things:-

"(i) Before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and
(ii) Notify the person in writing of his or her decision and of the reasons for it....."

Pursuant to Section 3(6):-

"In determining whether to make a Deportation Order in relation to a person, the Minister shall have regard to -
(a) The age of the person;
(b) The duration of residence in the State of the person;
(c) The family and domestic circumstances of the person;
(d) The nature of the person's connection with the State, if any;
(e) The employment (including self employment) record of the person;
(f) The employment (including self employment) prospects of the person;
(g) The character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
(h) Humanitarian considerations;
(i) Any representations duly made by or on behalf of the person;
(j) The common good; and
(k) Considerations of national security and public policy, so far as they appear or are known to the Minister".

In this case, each Applicant received a communication in due

course which, in so far as material, stated:-
"I am directed by the Minister for Justice Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make Deportation Orders in respect of you under Section 3 of the Immigration Act, 1999. A copy of the Order is enclosed with this letter.

In reaching this decision the Minister has satisfied himself that the provisions of Section 5 (Prohibition of Refoulement) of the ***Refugee*** *Act, 1996 are complied with in your case.*

The reasons for the Minister's decision are that you are a person whose ***refugee*** *status has been refused and, having regard to the factors set out in Section 3(6) of the Immigration Act, 1999, including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system outweigh such features of your case as might tend to support your being granted leave to remain in this State".*

All of the Applicants contend that this communication is not an adequate compliance with the duty to give reasons arising under Section 3(3)(b)(ii).

They claim that the decision which it evidences is likewise invalid. All of the Applicants submitted that the letter of notice:-
(a) Gave inadequate reasons,
(b) Is not readily understandable,
(c) Is devoid of reasons,
(d) Is deficient in failing to explain public policy and the common good,
(e) Constitutes a reflection on the good name and reputation

of the Applicants in so far as it suggests that the common good requires the deportation of each of them,
(f) Takes into account extraneous or unintelligible matter.
Before considering whether any of these complaints have sufficient merit to ground a grant of leave to apply for judicial review, it is worth restating the status of the Applicants at the time they made their representations. They were persons whose applications for asylum had been rejected at first instance and on appeal. They lacked any entitlement to remain in the country save that deriving from the procedures they were operating i.e. a right to await a decision on a request not to be deported. Both the fact that they had been refused **refugee** status, and the nature of the decision awaited as it appears from the Act, emphasise that this was in the nature of an *ad misericordiam* application. The matters requiring to be considered where the personal circumstance of the Applicant, described under seven sub-headings; his representations (which in practice related to the same matters) and *"humanitarian considerations"*. The impersonal matters requiring to be considered were described as *"the common good and considerations of national security and public policy"*. They did not include in any way an obligation to revisit the original decision.

I approach these contentions in the light of the authorities mentioned by the learned High Court Judge, which I am satisfied, are appropriate to the consideration of the point made to him. This Court in Ní Éili v. The Environmental Protection Agency, (Supreme Court unreported 30th July, 1999) surveyed the authorities in some detail and, inter alia, cited with approval the decision of Evans L.J. in MJT Securities Ltd. v. Secretary of State for the Environment [1998] JPL 138. Dealing with statutory

obligations to give reasons, the learned judge said:-
"The Inspector's statutory obligation was to give reasons for his decision and the Courts can do no more than say that the reasons must be 'proper intelligible and adequate', as had been held. What degree of particularity is required must depend on the circumstances of each case...."

In the case of administrative decisions, it has never been held that the decision maker is bound to provide a *"discursive judgment as a result of its deliberations"*; see O'Donoghue v. An Bord Pleanála [1991] ILRM 750.

Moreover, it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself. In a case such asInternational Fishing Vessels v. Minister for Marine [1989] IR 149 or Dunnes Stores v. Maloney [1999 3 IR 542, there was a multiplicity of possible reasons, some capable of being unknown even in their general nature to the person affected. This situation may require a more ample statement of reasons than in a simpler case where the issues are more defined. Thus, in a case dealing with a response to representations of precisely the kind in question here, but given prior to the coming into force of the 1999 Act, Geoghegan J. considered the adequacy of a decision. That was in Laurentiu v. Minister for Justice [1999] 4 IR 26, where the decision was in the following form:-
"I am directed by the Minister for Justice Equality and Law Reform to refer to your request for permission to remain in Ireland on behalf of the above-named and to inform you that having taken all the circumstances of his case into consideration including the points raised in your submission, it has been decided not to grant your client permission to remain".

Considering this statement, Geoghegan J. held:-
"I do not think that there was any obligation constitutional or otherwise to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds has been refused. The letter makes clear that all the points made on behalf of the Applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating that the first Respondent did not consider the detailed reasons sufficient to warrant granting the permission to remain in Ireland on humanitarian grounds. It was open to the first Respondent to take that view and no court can interfere with the decision in those circumstances".

The form of the decision in the present case is somewhat different, so as to show compliance with the new statutory regime. Nevertheless I consider that the approach of Geoghegan J. is one that can be applied here, for the reasons set out below.

In the circumstances of this case, the Minister was bound to have regards to the matters set out in Section 3(6) of the 1999 Act. In my view he was also clearly entitled to take into account the reason for the proposal to make a Deportation Order i.e. that the Applicants were in each case failed asylum seekers. If the reason for the proposal had been a different one, he would have been entitled to take that into account as well. He was obliged specifically to consider the common good and considerations of public policy. In my view he was entitled to identify, as an aspect of these things, the maintenance of the integrity of the asylum and immigration systems. The Applicants had been entitled, in each case, to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that they were

not entitled to asylum their position in the State naturally falls to be considered afresh, at the Minister's discretion. There was no other legal basis on which they could the be entitled to remain in the State other than as a result of a consideration of Section 3(6). In my view, having regard to the nature of the matters set out at sub-paragraphs (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the Minister. These factors must be considered in the context of the requirements of common good, public policy, and where it arises, national security.

To put this another way, each of the Applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of application for entry into the country, made from outside. There is no reason of policy why they should be enabled to bypass this system simply on the basis that they had made an application for asylum which had failed, or might even have been found *"manifestly unfounded"*.

In this context, it is important to reiterate that the*"common good"* in this context has already been held to include the control of aliens, in In The Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999 and the authorities referred to therein. That, in my view, is the context in which

the phrase *"the common good"* occurs in Section 3(6)(j). I agree with the observations of the learned trial judge in relation to the different context in which the phrase is used in Section 3(2)(i). It follows from this that the invocation of the *"the common good"* in subsection (6) does not require or imply any opinion derogatory of the individual whose case is being considered. It simply entitles the Minister to have regard to the State's policy in relation to the control of aliens who are not, on the facts of their individual cases, entitled to asylum.

Accordingly, I would reject the submissions that the decision as communicated takes into account extraneous or unintelligible matter: in my view it affirmatively states considerations which are both relevant and entirely intelligible. For the reason already given I consider that reference to *"the common good"* does not imply any conclusion derogatory of the Applicants as individuals. The reference to the necessity to maintain the integrity of the asylum and immigration system in my view refers to a legitimate aspect of public policy and the common good, and one which has been clearly expounded in the judgment of the Court on the Article 26 reference cited. It follows from these findings that I consider that adequate reasons have been stated in the letter which has been quoted and that these are sufficiently understandable.
Where an administrative decision must address only a single issue, its formulation will often be succinct. Where a large number of persons apply, on individual facts, for the same relief, the nature of the authorities consideration and the form of grant or refusal may be similar or identical. An adequate Statement of Reasons in one case may thus be equally adequate in others. This does not diminish the statements

essential validity or convert it into a mere administrative formula.

Form of order.
A further point taken on behalf of the Applicants was that the Deportation Order itself, as opposed to the notification of the decision should contain the reasons for the Minister's decision and the date of effect of the deportation. I can see no substance in this point. The statutory obligation on the Minister is to notify the Applicant in writing of his decision and of the reasons for it. He is entitled to do so by letter if he wishes and this indeed is the most obvious way to do so.

Section 3(7) provides that:-
"A Deportation Order shall be in the form prescribed or in a form to the like effect".

The form actually employed in these cases is the form prescribed by the Immigration Act, 1999 (Deportation) Regulations 1999 (Statutory Instrument No. 319 of 1999). Moreover, the letter in each case refers to the order, a copy of which is enclosed with it. I can see no substance whatever in any submission that there is inadequacy, technical or otherwise, in either the letter or the order or in both of them taken together.

The standard for the grant of leave.
On the hearing of this appeal, there was considerable argument on the construction of Section 5(2)(b) of the Illegal Immigrants (Trafficking Act, 2000). This requires that:-
"..... Such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed".

In the Article 26 reference, the judgment of the Court considers this matter at pages 394/395. It indicates that a similar requirement has been imposed in the context of other legislation dealing with planning, fisheries, and the Takeover Panel. The Court then held:-
"In McNamara v. An Bord Pleanála (1) [1995] 2 ILRM 125 Carroll J. interpreted the phrase 'substantial ground' in the provisions of the Planning Act, 1992 as being equivalent to 'reasonable', 'arguable' and 'weighty' and held that such grounds must not be 'trivial or tenuous'. Although the meaning of the words 'substantial grounds' may be expressed in various ways the interpretation of them by Carroll J. is appropriate".

For the purpose of this case, I have not found it necessary to consider whether any more onerous standard is required in any circumstances by the phrase in question and therefore express no view on the learned trial judge's findings at pages 25 to 27 of his judgment. Indeed, I do not believe that, in the circumstances of this case, the Applicants position would be any better if the *"substantially lower-standard arguable case"* criterion were applied.

The third-named Applicant's marriage.
The Applicant arrived in Ireland on or about the 21st November, 1997. He claimed **refugee** status on arrival. On the 27th July, 1998 he received a letter refusing his application for this status and on or about the 25th September, 1998 he appealed. Between these dates, on the 18th August, 1998 he married another Romanian national who has also applied for **refugee** status, been refused, and has applied for leave to remain notwithstanding the refusal.

The Applicant claims that the Minister was obliged to have regard to Article 41.3.1 of the Constitution and to protect the family unit constituted by the Plaintiff and his wife.

It is clear that the parties marriage took place at a time when each of them was at different stages of the procedure for applying for asylum or appealing or refusal thereof. Neither of them appears on the evidence to have taken any step to request that their applications appear together, or one after the other. The fact of their marriage within the State certainly could not have affected their individual applications for asylum. One of the matter to which the Minister must have regard under Section 3(6) is *"the family and domestic circumstances of the person"*. There is no evidence that he did not do this and the Applicant has made no attempt at all to discharge the burden that lies on him in this regard.
In so far as it is submitted that Article 41.3.1. of the Constitution in some way precludes the Minister from deciding to deport one partner while the other's application for leave to remain is pending, I would reject that proposition. If this Applicant's wife is successful in avoiding deportation she will be enabled lawfully to remain in the State but she will not therefore be obliged to do so. Only if it were thought arguable that the Applicants marital status restrained the Minister's freedom of action as a matter of law could this aspect of his circumstances avail him on the present application. The State's obligation to protect with special care the institution of marriage and protect it against attack cannot, in my view, be invoked to limit the Minister's discretion in relation to an individual Applicant whose application for asylum has been refused.

Cross-appeal.

The Applicant B. was granted leave to apply for judicial

review on one ground. This was:-
"..... There was a failure to expressly give reasons under Section 3(a) after the coming into force of the Act of 1999 which was a prerequisite to proceeding to the determination under Section 3(b).

This ground is based on the fact that the Applicant's request for leave to remain (more properly, that a Deportation Order should not be made) was made before, but decided after, the coming into effect of the Immigration Act, 1999. This event took place on the 7th July, 1999. The learned trial judge held, correctly in my opinion, that the correspondence before and after the coming into effect of the Act were inextricably linked, and that this linkage is evident not only in the letters written on behalf of the Minister but also in the letters written on behalf of the Applicant. Nevertheless it is the case that no reason for the proposal to make a Deportation Order was given pursuant to Section 3(3)(a) of the Immigration Act, 1999. The last letter prior to the coming into effect of the Act was dated the 29th March, 1999. It was naturally not written in the terms of an Act which had yet to come into force, but it did invite the making of representations as to why the Applicant should not be deported. On the 9th April, 1999, still before the coming into effect of the Act, this Applicant's Solicitor made such representations and enclosed a medical certificate to the effect that the Applicant was suffering from diabetes. In the correspondence after the Act was passed it is simply stated that the Minister *"proposes to consider your client's deportation under the power given to him by Section 3....."*. On the 4th February, 2000 the Applicant's Solicitor replied stating that *"In accordance with Section 3 of the Immigration Act, 1999 we wish to make further written submissions to the Minister..... stating reasons why our client*

should be allowed to remain in Ireland”.

There is no express transitional provision in the Act of 1999. It is in my opinion arguable that the provisions of Section 3(3)(a) are mandatory, to be complied with literally, and incapable of waiver or estoppel. In those circumstances I am of the opinion that the learned trial judge was correct in granting the Applicant Mr. B. leave to apply for judicial review on this sole ground.

Conclusion.

The foregoing completes a discussion of the points actually urged on the appeal to this Court. On the Applicants appeals, I would in each case dismiss the appeal and affirm the order of the learned trial judge. On the Minister’s cross appeal, relating to the third-named Applicant only, I would dismiss the appeal and affirm the order of the learned trial judge.