Neutral Citation No. [2010] NIQB 35 | *Ref:* **WEA7754**

Judgment: approved by the Court for handing down | *Delivered:* **10/02/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Success's (Alexander) Application [2010] NIQB 35

AN APPLICATION FOR JUDICIAL REVIEW BY

ALEXANDER SUCCESS

WEATHERUP J

[1] This is an application for Judicial Review of a decision of the UK Border Agency of 5 May 2009 rejecting an application for revocation of a Deportation Order made on 2 June 2008 and certifying under section 96(1) of the Nationality Immigration and Asylum Act 2002 that the claims made by the applicant could have been raised on a first appeal and that there was no satisfactory reason for not doing so. Mr McTaggart appeared for the applicant and Mr McGleenan for the respondent.

[2] Section 96 of the 2002 Act provides that an appeal under section 82(1) against an immigration decision (described as "the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies:

> (a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision");
>
> (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision; and
>
> (c) that in the opinion of the Secretary of State or the immigration officer there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.

[3] Section 96 requires a number of conditions to exist. First there must be 'an old decision' and for the purposes of this case that old decision was made on 2 June 2008. Secondly there must be 'a new decision' and in the present case that new decision was made on 5 May 2009. Thirdly the new decision must relate to a matter that could have been raised on appeal against the old decision, as to which see below. Fourthly there must be no satisfactory reason for not raising that matter on the old appeal. In the present case the respondent contends that the above conditions were satisfied and that the issue of the certificate was warranted. The effect of the certificate is to prevent the applicant exercising an in-country right of appeal. However the respondent accepts that the applicant may exercise an out of country appeal. Thus, if the respondent's decision is upheld, the applicant will be deported and he can proceed with an out of country appeal against the deportation.

[4] The Deportation Order was made further to the conviction and imprisonment of the applicant in respect of various offences. The matters that could have been relied on in the old appeal against the Deportation Order are matters concerning the right to family life under Article 8 of the European Convention. The issue is whether, in deciding that the applicant should be deported, the applicant's Article 8 rights have been interfered with in a disproportionate manner. The family rights in question concern the presence in Northern Ireland of the applicant's partner of some five years standing, a son by that partner, another child by a former partner now living in Omagh and a third child by another partner now living in England. Thus the new decision related to four matters that the respondent contends could have been raised on the old appeal as being matters of family life, namely the relationship with the partner, the child of that union, the child living in Omagh and the child living in England.

[5] The first matter concerns the relationship with the applicant's partner. Some years earlier the applicant had been married to a lady from Cork and the marriage had ended with no children of the marriage. A pre-sentence report was made available to the trial Judge for the purposes of the criminal proceedings against the applicant and it was reported that the relationship between the applicant and his partner had broken down. That report was before the Immigration Judge on the appeal against the old decision, which was dismissed on 13 November 2008. The applicant contends that the relationship was re-established shortly after the preparation of the pre sentence report and further contends that on the appeal to the Immigration Judge he referred to his ongoing relationship with his partner. The applicant further contends that the Immigration Judge misunderstood the position about the applicant's partner and confused the applicant's relationship with his partner and the relationship the applicant had had with his wife.

[6] The applicant's case then went to a review Judge who on 28 November 2008 confirmed the original decision to deport. Again the applicant questions

whether or not the review Judge understood that there was an ongoing relationship between the applicant and his partner. While the review Judge clearly recognised the distinction between the wife, from whom the applicant had separated, and the partner, with whom the applicant had later formed a relationship, the applicant states that it is not apparent from the text of the decision that the review Judge understood that the latter relationship was ongoing.

[7] There followed a section 103A reconsideration by a Judge on 18 February 2009. By that stage solicitors for the applicant had filed additional papers and specified additional grounds and had included a statement from the applicant's partner as to the nature of the relationship with the applicant. It is clear from the papers then available that there was said to be an ongoing relationship with the applicant's partner and that there were the various children of the applicant in the UK. What is unclear is whether the additional papers prepared by the solicitors were before the Judge who reconsidered the matter. The Court office dealing with the reconsideration was unable to confirm that the additional papers forwarded by the applicant's solicitors had reached the Judge before he issued his decision. In essence the applicant contends that he raised the matter of his ongoing relationship with his partner on the appeal against the old decision but the nature of that relationship was not properly understood by those considering the appeal, the review or the reconsideration.

[8] The second matter that could have been raised on the old appeal was the child in Omagh. The existence of the child in Omagh was raised on the appeal against the old decision before the Immigration Judge. It is clear that the family life issue concerning the child was considered by the Immigration Judge and the review Judge and the reconsideration Judge. The existence of the applicant's relationship with that child was not considered to be a basis that warranted Article 8 rights prevailing over the deportation of the applicant. Thus the matter was raised in the old appeal and failed.

[9] Thirdly there is the child in England. Again the existence of the child was made known and the family life issue was considered by the Immigration Judge and the review Judge and the reconsideration Judge. Again this is a matter that was raised in the appeal against the old decision and failed to secure the overturning of the decision. However there is an added point in relation to the child in England which concerns contact proceedings that were initiated by the applicant in England on 24 February 2009. That date was after the old decision had been appealed, reviewed and reconsidered and therefore obviously was not a matter that could have been raised in those proceedings. Outstanding contact proceedings may provide a ground for consideration of the right to family life under Article 8 as removal from the jurisdiction could interfere with the ability to advance the contact claim. It is not the fact of contact with the child but the opportunity to make the case in contact

proceedings that is the particular point. In the present case it appears that an agreement has been reached between the applicant and the mother of the child as to the terms on which the applicant should have residence/contact with the child. The Judge conducting the proceedings has been notified of this agreement and has deferred making an Order in the terms of the agreement between the parties while the present Judicial Review proceedings are outstanding. Thus access by the applicant to the English Court to conduct the contact proceedings is not an issue. The right to residence/contact with this child has been established by agreement. The matter of the family life rights relating to contact with this child was considered under the old appeal process and did not avail the applicant.

[10] The fourth matter is the child of the applicant and his partner. This too was known on the old appeal along with the existence of the other two children. The existence of this child of the applicant's partner did not satisfy any of those who considered the case that it was a matter that should warrant interference with the decision to deport. However, if the applicant and his partner had an ongoing relationship, the child would have been living with them and the consideration of the position of this child would have been influenced by any misunderstanding on the part of the Immigration Judge or the review Judge or the reconsideration Judge as to the ongoing relationship with the applicant's partner.

[11] In relation to the matter of the child in Omagh and the child in England I am satisfied that these are matters that were raised under the old decision and they were not sufficient to warrant any alteration of the decision to deport. Returning to the relationship with the applicant's partner, it is necessary to consider how the relationship was dealt with in the new decision of 5 May 2009. That decision set out on page 3 a reference to the applicant's core family unit with his partner, referred to her affidavit dated 12 February 2009 in which she gave a reason for not attending the old appeal hearing and also referred to a Court contact order for the applicant's son in Omagh. At page 4 the new decision referred to the length of residence of the applicant in the UK and the details of his family, citing paragraphs 54 and 55 of the old appeal decision.

[12] Thus the new decision relies on the details of his family set out in the decision on the old appeal. At paragraph 55 of the Immigration Judge's decision he referred to members of the applicant's family in the UK leading their own lives and the applicant being an independent adult. This is a reference to the applicant's parents and relations who are also in the UK. Paragraph 55 then referred to the applicant's three young children by different partners; the limited contact while the applicant was in prison; the indications that some of the mothers were not particularly anxious that contact be maintained, as evidenced by the need for the applicant to obtain a contact order; the significance of the applicant's wife not attending the

hearing; that in the pre-sentence report there was reference to her expressing goodwill towards the applicant but not an expectation of a reunion; that the children live at different locations and that, by reason of geography, contact would be limited.

[13] Paragraph 55 referred to the applicant's wife but may have intended to refer to the applicant's partner. If it was a reference to the wife there was no account taken of the partner. If it was a reference to the partner it also stated that there was no expectation of a reunion, so no account was taken of any reconciliation. Paragraph 55 referred to the limited contact with the children because of geography. That would not have applied to the child of the applicant's partner if there had been an ongoing relationship and she and the child were living with the applicant.

[14] It would appear probable that the Immigration Judge did not take account of the ongoing family relationship between the applicant and his partner and the child that was considered in the new decision. The new decision referred to the old appeal decision maker being fully aware of the details of the applicant's family. That is probably a mistaken view. It is probable that any ongoing relationship with the applicant's partner and her child were not matters that were considered under the old appeal.

[15] The conclusion to the new decision on page 5 stated that it was believed that any interference with family and private life would be legitimate, proportionate and in accordance with the law. In particular it was not considered this was a truly exceptional case or that removal would result in a flagrant denial of the applicant's right to respect for private life. This is a general statement of the reasons for the conclusion that there is no disproportionate interference with any Convention right. It is a conclusion that is probably based on a misunderstanding of the basis on which the old appeal process approached the applicant's relationship with his partner and the child.

[16] The new decision maker proceeded to issue the certificate under section 96. The conditions for the issue of the certificate were not satisfied. The matters on which the new decision was based included the ongoing relationship between the applicant and his partner and the child and that was not a matter on which the old decision was based. The new decision was certainly based on that ongoing relationship and mistakenly assumed that the old decision did likewise.

[17] A certificate cannot issue under section 96 in respect of matters that were not decided upon under the old decision. The ongoing relationship with the applicant's partner was not decided upon under the old decision. I propose to set aside the certificate. I understand the consequence will be that the applicant will be allowed to appeal in country.

[18] I am conscious that this case was reconsidered by the Immigration Officer in December 2009. However I consider that the appropriate step to be taken is by way of an appeal which would consider all the points relied on by the applicant and in particular would include consideration of the nature of any ongoing relationship with the applicant's partner and her child.

[19] For the reasons set out above the certificate issued on 5 May 2009 under section 96 will be quashed.