The right to respect for private life under article 8 ECHR ? the Irish cases of Dos Santos and CI

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Introduction

On 30th July 2015, the Irish Court of Appeal delivered judgments in two related cases concerning the right to respect for private life under article 8 of the European Convention on Human Rights [1] (ECHR) (*Dos Santos v. Minister for Justice and Equality* [2015] IECA 210 and *C.I. v. Minister for Justice and Equality* [2] [2015] IECA 192). These were cases in which deportation orders against each member of a family unit were challenged. Given that there was no prospect of a rupture of the family unit, the right to respect for family life was not an issue.

The facts of Dos Santos are summarised here [3] and those of CI here [4]. In both instances appeals were made before the Court of Appeal, which ultimately held against the applicants in both cases on two principal grounds:

- In the *Dos Santos* case, it was held that given that Ireland operated a dualist system of law and that the United Nations Convention on the Rights of the Child [5] (UNCRC) had not been adopted into domestic law, the relevant provisions of Irish law could not be construed as requiring that the best interests of the child be a *primary consideration* in determining whether or not to make a deportation order;
- The decisions in both cases that the alleged interference with the right to private life under article 8 ECHR did not have consequences *of such gravity to potentially engage* its operation were held to be reasonable.

Commentary

1. Best interests of the child

Ireland?s dualist system of law is founded on Article 29.6 of the Irish Constitution, which provides that ?no international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas [the Legislature]?. Article 3 of the UNCRC states that ?in all actions concerning children ? the best interests of the child shall be a primary consideration?. While accepting that this latter article did not form part of Irish domestic law, the applicants argued that as Ireland had ratified the UNCRC, its terms could be used to inform a proper interpretation of relevant domestic law provisions, in this case s. 3 of the Immigration Act 1999 [6], which sets out a number of considerations to which the Minister must have regard in making a deportation order. One such consideration is ?the age of the person?. It was submitted that where the Minister learned from the age of the person that he or she was a child, s. 3(6) of the Immigration Act 1999

should be interpreted as requiring the Minister to consider the child?s best interests as a primary consideration. The Court of Appeal rejected this argument ? s. 3 set out the relevant considerations which the Minister was required to consider and some of these related to the welfare or best interests of the child. In the context of the full section and scheme of the 1999 Act, the best interests of the child was one among a number of considerations, but not a primary consideration (*cf.* *Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department* [7] [2011] EWHC 2 (Admin) (11 January 2011), see paras. 148 and 210).

While this aspect of the case did not raise arguments related to article 8 ECHR, it is noteworthy that recent case law of the ECtHR has put increasing emphasis on the best interests of the child as a factor to be considered as part of the article 8 ECHR analysis, in addition to the well-established *Boultif v. Switzerland* [8] [2001] ECHR 497 criteria. While not speaking in terms of a *primary* consideration, the ECtHR requires that this consideration be given *sufficient weight*. On the facts of the relevant cases, it is clear that what amounts to sufficient weight is considerably weighty. In *Nunez v. Norway* [9] App. no. 55597/09 (ECtHR, 28 June 2011), the applicant had at all times had precarious residence and custody of her children had been awarded to their father. She had nevertheless been their primary carer prior to the separation and continued to take an active role in their care. In light of the children?s long lasting and close bonds to their mother, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities took their decision to order the applicant?s expulsion (from 2001 to 2005), the ECtHR was not convinced that sufficient weight was attached to the best interests of the children for the purposes of article 8 ECHR. In *Jeunesse v. the Netherlands* [10] App. no. 12738/10 (ECtHR, 3 October 2014), but for a short initial period, the applicant had at all times had precarious residence. The ECtHR noted that as the applicant was the primary and constant carer of the children, it was obvious that their interests were best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname. The materials in the case file did not disclose a direct link between the applicant?s children and Suriname, a country where they have never been. The ECtHR was not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it concluded that insufficient weight had been given to the best interests of the applicant?s children in the decision of the domestic authorities to refuse the applicant?s request for a residence permit (see also *Uner v. Netherlands* [11] [2006] ECHR 873 and *Rodrigues Da Silva & Hoogkamer v. the Netherlands* [12] [2006] ECHR 86).

These decisions are relevant to the extent that the ECtHR requires the best interests of the child to be afforded sufficient weight in the article 8 ECHR balancing exercise as a matter of ECHR law. Thus, those contracting states which, like Ireland, operate a dualist system, but which have incorporated the ECHR (and interpreting case law of the ECtHR) into domestic law, may nevertheless be required to afford this factor greater weight than the Irish Court of Appeal in *Dos Santos* appreciated.

2. Minimum gravity requirement

Both the High Court and Court of Appeal endorsed the approach set out in the House of Lords case of *Razgar* [2004] UKHL 27, [2004] 3 All ER 821 [13] to the article 8 ECHR analysis. Essentially, Bingham LJ proposed that five questions be posed: would the removal amount to an interference? If so, would this interference have consequences of such gravity as potentially to engage the operation of article 8? If so, is such interference in accordance with law, necessary in a democratic society and proportionate? Support for the second question was derived from the ECtHR case of *Costello-Roberts v. United Kingdom* [14] App no. 13134/87 (ECtHR, 25 March 1993).

The High Court in *CI* interpreted the second minimum gravity question as positing ?no specially high threshold for art. 8(1). It simply reflects the fact that more than a technical or inconsequential interference with one of the protected rights is needed if art. 8(1) is to be engaged?. It concluded that ?though the decision maker identifies the area of private life with which there will be interference, no attempt whatsoever is made to identify the consequences of the interference. The obvious consequence is that the identified private life will cease ? It is difficult to discern why the removal of the children from their school would not constitute a grave consequence sufficient to engage article 8?.

The Court of Appeal however held that the High Court had erred in taking this approach to the second Razgar question. The relevant consequence of deportation to be examined in determining minimum gravity was not the ?bringing to an end of the private life in the sense of existing social and educational ties in Ireland? but rather ?the gravity of the consequences of deportation (including severing social and educational ties or relationships) for the individual and in particular how it affects his or her moral or physical integrity?.

This distinction may give rise incoherence in the application of the private life aspect of article 8 ECHR. First, where a person has an established private life in a state, removing that person from the framework of that private life will always have an effect, to varying degrees, on his or her moral or physical integrity. There are circumstances in which private life could not be said to have been established, for instance due to a short length of time in the state or a failure to make efforts to integrate.

Second, and as identified by the Court of Appeal, the ECtHR has not generally required the inclusion of an onerous minimum gravity requirement. While the ECtHR has iterated that ?not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by article 8? (*Bensaid v. United Kingdom* [15] App. no. 44599/98 (ECtHR, 6 February 2001) and *Nnyanzi v. United Kingdom* [16] [2008] ECHR 282), it was only in *Costello-Roberts* and *Bensaid* that this gave rise to a separate minimum gravity step in the analysis. In other cases, the ECtHR has omitted this step, proceeding directly from the first to the final three Razgar questions (i.e. a two-step process simply from article 8(1) to article 8(2) ECHR) (*Slivenko v. Latvia* [17] App. no. 48321/99 (ECtHR, 9 October 2003), *Aristimuno Mendizabal v. France* [18] [2006] ECHR 34 and *Nnyanzi*).

Third, it is submitted that the insertion of an onerous minimum gravity step is contrary to the spirit and structure of article 8 ECHR. It is acknowledged that some cases will have a positive factual element suggesting that it does not satisfy the minimum gravity threshold. Beyond such exceptional cases, however, it is submitted that the correct approach is to proceed with the two-step analysis of *Slivenko*, *Mendizabal* and *Nnyanzi*, from a consideration of whether there has been interference with a right to respect for private life under article 8(1) ECHR to the balancing exercise of the proportionality assessment of article 8(2) ECHR. This ensures that there is a fair weighing of the interests of the individual as against those of the state based on the facts of each individual case.

If the facts of the above cases are considered, it becomes clear that in the cases in which the minimum gravity threshold was not found to have been met, there was some factual element leaning towards such a finding. In *Costello-Roberts*, the ECtHR noted that complaints made at the national level to the British police and to the National Society for the Prevention of Cruelty to Children of the practice of ?slippering? had not been accepted on a similar basis. In *Bensaid*, the applicant placed emphasis on his health condition to ground a submission that his removal would have a particularly adverse effect on his moral and physical integrity. The ECtHR found that the risk of damage to the applicant's health from return to his country of origin was based on largely

hypothetical factors of a possible relapse of his psychotic symptoms. It was further found on the facts that his marriage had been one of convenience, which does not seem to have been contested.

On the flip side, in *Razgar* itself, Bingham LJ considered that ?a decision which, if implemented, might lead to Mr. Razgar taking his own life, could scarcely (if that evidence were accepted, and it has not as yet been tested) be dismissed as of insufficient gravity?. In *Slivenko*, the applicants were required to leave Latvia as the family members of a former Russian military officer pursuant to the terms of the Latvian-Russian Treaty 1994 on the withdrawal of Russian troops, despite the fact that both mother and daughter had lived there practically all of their lives. No minimum gravity analysis was undertaken by the court, which instead proceeded directly to a consideration of the proportionality of such deportation orders. It held that the justification of removal measures did not apply to the same extent to *retired* military officers and their families and so, in all the circumstances, the court concluded that the applicants' removal was not proportionate to the objective sought to be achieved. In *Mendizabal*, the applicant was originally granted refugee status in France as a Spanish national in 1976, which was revoked three years later following the political changes in Spain. She was then subjected to an administrative quagmire in that instead of granting her a carte de séjour, she was given a series of temporary residence permits. Between 1978 and 2003, the ECtHR counted 69 renewals, some between intervals of a mere few weeks. There was no minimum gravity step in the court?s analysis, but in examining the proportionality of this interference in her private life for the purposes of article 8(2) ECHR, the court took into account the effects of the precarious and uncertain situation the applicant sustained for a long period and held that article 8 ECHR had been violated.

3. Settled migrants v. migrants with precarious residence

The applicants in all the above cases (with the exception of *Costello-Roberts*, which is not an immigration case) had precarious residence in the host state. The distinction between ?settled migrants (in the sense of immigrants who have been lawfully present in the host state)? and ?a person who has never been a lawful migrant? seems to have played a large part in the decision of the Court of Appeal to prefer the inclusion of a separate minimum gravity step to a traditional two-step approach, weighing all the relevant factors at the stage of the proportionality assessment. The court observed that the ECtHR had not ?directly addressed the question as to whether or not, in relation to a person who has never been a lawful migrant, but whilst living unlawfully ? establishes social ties with members of community, such social ties constitute part of the concept of a private life protected by article 8?. The judgment does not refer, however, to the abovementioned cases of *Slivenko* and *Mendizabal*, in which the private life of the applicants, who at all times had precarious residence, was weighed in the proportionality assessment of a traditional two-step approach. It is also noteworthy that while *Balogun v. United Kingdom* [19] App. no. 60286/09 (ECtHR, 10 April 2012), referred to by the Court of Appeal, self-identifies as a ?settled migrant? case, of eighteen years of residence by the applicant in that case, only four had been with valid leave to remain.

The Court of Appeal nevertheless made clear that it did not accept the submission of the Minister that persons ?who were never lawfully present in the state (other than being permitted to enter and/or remain to pursue an asylum claim) are not capable of establishing within Ireland a private life in the sense of educational or other social or community ties potentially capable of protection pursuant to article 8?. Thus the precarious nature of residence is simply a factor to be taken into consideration at either the minimum gravity or proportionality stages of the article 8 ECHR assessment.

Conclusion

While the *Dos Santos* decision of the Irish Court of Appeal makes clear that the UNCRC cannot have direct effect in the domestic legal systems of dualist contracting states, the case law of the ECtHR suggests that the principle of the best interests of the child must be afforded sufficient weight in the balancing exercise required by article 8 as a matter of ECHR law. As regards the private life aspect of this article, it is submitted that unless there is some positive factual element suggesting that a case does not satisfy the minimum gravity threshold, the correct approach is to proceed with the traditional two-step analysis from a consideration of whether there has been interference with a right to respect for private life under article 8(1) ECHR to the balancing exercise of the proportionality assessment of article 8(2) ECHR. The precarious nature of residence is simply a factor to be taken into consideration in this analysis.

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(This journal entry is an expression of the authors own views, and not necessarily those of EDAL or ECRE)

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Links:
[1] http://www.echr.coe.int/Documents/Convention_ENG.pdf
[2] http://www.asylumlawdatabase.eu/en/case-law/ireland-dos-santos-ors-v-minister-justice-and-equality-ors-2015-ieca-210
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