Annotation No. 25. European Court of Human Rights 28 June 2011, No. 55597/09, Nunez v. Norway

Klaassen, M.A.K.

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M.A.K. Klaassen, Institute of Immigration Law, Leiden University

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1. The *Nunez v. Norway* ruling concerns the expulsion from Norway of a Dominican national who established and developed family life in Norway while her residence status was precarious. Initially, the applicant had lawful residence in Norway, but this was revoked with retroactive effect after it was discovered that the applicant had used a false identity to obtain a residence permit. In this annotation I will discuss the facts of the case and the ruling of the European Court of Human Rights (the Court). After that, I will analyse the test used by the Court to determine whether there is a violation of Article 8 ECHR and the best interests of the child in this assessment. Finally, I will place this judgment in the context of the subsequent case law.

2. The applicant, Ms. Nunez, was born in 1975 in the Dominican Republic, of which she is a national. On 26 January 1996, the applicant arrived in Norway as a tourist. On 16 March 1996, she was arrested for shoplifting and was issued a fine. She was deported from Norway and received a re-entry ban for two years. On 19 July 1996, the applicant returned to Norway using a passport with a different name. On 11 October 1996, she married a Norwegian national and on 17 October 1996, she successfully applied for a residence permit based on her family ties. On 19 April 2000, the applicant received a settlement permit. On 17 December 1999, the applicant applied for Norwegian citizenship, but this application was discontinued after her husband applied for a separation on 18 April 2001. In the spring of 2001, the applicant started cohabiting with a Dominican national with a settlement permit in Norway. In 2002 and 2003, two daughters were born from this relationship. In the summer of 2001, the police received information regarding the true identity of the applicant. On 2 October 2002, her residence permit was revoked with retroactive effect. The Appeal against this decision was unsuccessful. On 26 April 2005, the Norwegian authorities decided to deport the applicant and issued her a re-entry ban for two years. The appeal against this decision was finally rejected by the Norwegian Supreme Court on 30 April 2009. During the procedures, the applicant and her new partner separated in October 2005. The children remained in the care of their mother. On 24 May 2007 a local court awarded sole custody over the children to their father until the applicant would return to Norway after her re-entry ban would be finished. The applicant was granted visitation rights to her children. On 19 October 2009, the applicant complained at the ECtHR that her right to respect for family life would be violated if she would be deported from Norway and would not be allowed to re-enter for two years.

3. The Court observed that it was not disputed that there was family life between the applicant and her two children. However, the Court reiterated that the Convention does not guarantee the right of an alien to enter or reside in a particular country. The Court notes that the residence permit of the applicant had been based on false identity and that she therefore never had lawful residence in Norway. In order to determine how compliance with Article 8 ECHR should be tested, the Court holds that there is no need to determine whether there has been an interference

with the applicant's right to respect for family life or whether there has been a failure to comply with a positive obligation, since the applicable principles are similar. In for example *Tuquabo – Tekle v. Netherlands*, the Court does hold that it is a case of a positive obligation to admit the applicant (see ECtHR 1 March 2006, Appl. no. 60665/00, *Tuquabo-Tekle v. Netherlands*). The Court holds that factors which are taken into account in such cases are:
– the extent to which family life is effectively ruptured;
– the extent of the ties in the host state;
– whether there are insurmountable obstacles preventing the exercise of family life in the country of origin of the applicant;
– whether there are factors of immigration control or considerations of public order weighing in favour of exclusion; and
– whether family life was created at a time when the persons involved were aware of the precarious status of the residence in the host state.
The Court holds that if family life is created at a time when the residence status is precarious, the removal of the applicant would only be incompatible with Article 8 ECHR in exceptional circumstances.

4. Applying these factors to the case, the Court sees no reasons to disagree with the Norwegian Supreme Court concerning the aggravated character of the applicant's breaches of immigration law. Furthermore, when the applicant re-entered Norway, she did not have any links with that country. The applicant was aware of her illegal stay when she started family life in Norway and at no time did she have any prospect to remain there. Her links with the Dominican Republic remained strong, as she lived there all her life before she came to Norway. All the factors mentioned by the Court as listed above seem to be in favour of deporting the applicant from Norway. However, after mentioning these considerations, the Court separately examines whether the best interests of the children would nevertheless lead to a violation of Article 8 ECHR in case the applicant would be deported. In this regard the Court notes that the applicant was the children's primary caregiver and the most important person in their lives. Furthermore, the children were in a particularly vulnerable position as they had experienced stress due to the risk of the expulsion of their mother, the separation of their parents and by being moved from the care of their mother to their father due to the custody arrangements. The Court also reproaches the Norwegian authorities that it did not seek the applicant's expulsion at an earlier moment. The authorities discovered the applicant's identity fraud in 2001 and only in 2005 did they seek her deportation and entry ban. With a reference to the best interests of the child concept as enshrined in Article 3 of the UN Convention on the Rights of the Child, the Court holds with five votes against two that the applicant's expulsion and two years re-entry ban would constitute a very far reaching measure vis-à-vis the children which leads to finding a violation of Article 8 ECHR.

5. Two elements of the *Nunez v. Norway* case deserve further elaboration, namely the test employed by the Court to determine whether there is a violation of Article 8 ECHR and the important role of the best interests of the child concept in this case.

6. The Court acknowledges in many cases that it is difficult to sharply distinguish between admission and expulsion cases; it is difficult to determine whether there is an unjustified interference with the right to family life or whether the respondent state fails to comply with a positive obligation. As in many other cases, the Court solves this problem by holding that it is not necessary to choose between the negative and positive obligation, because in any way in both instances a fair balance must be struck between the competing interests involved. In itself, this assertion is correct: both in the case of a negative and of a positive obligation, the

competing interests of the individual concerned and of the state must be balanced against each other. However, how those competing interests are balanced against each other differs. Article 8(2) contains a clearly defined test in which an interference with the obligation to respect private and family life must be in accordance with the law, have a legitimate aim and be necessary in a democratic society. The latter element involves a test whether the means employed are proportionate to the aims pursued. Even though the exact parameters to be used in this test may differ from case to case, the manner in which those parameters must be compared with each other is clearly defined. This is very different in the fair balance test, in which the Court lists the different elements it deems relevant, but does not specify how these elements are compared to each other. The difference is also relevant considering that the level of protection seems to be higher in cases in which the Court uses the Article 8(2) justification test as compared to the fair balance test. Elsewhere I argue that the ECtHR should offer more guidance to the contracting parties in such cases by formulating guiding principles, just like it did in *Boultif v. Switzerland* for public order cases (see Klaassen, M. (2019). Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases. *Netherlands Quarterly of Human Rights*. https://doi.org/10.1177/0924051919844387).

7. In *Nunez*, the Court for the first time explicitly ruled that a state is under the obligation to allow for the residence of a parent explicitly because of the best interests of the child. In no earlier judgment did the Court give the best interests of the child concept such an important position in an immigration case. In this judgement, the best interests of the child-test negates all the reproachable behaviour of the applicant; it gives near absolute protection to the children in the context of the balancing of interests in the Article 8 ECHR test. In doing so, the Court undoubtedly limits the margin of appreciation enjoyed by the state. As the Court recognises in each and every judgment, it is within the sovereign power of the state to determine which immigrant may enter and reside in its territory. However, the state is limited in doing so by human rights obligations. In *Nunez*, the best interests of the children outweigh the legitimate aims the state has in seeking to deport the applicant. In their dissenting opinion, judges Mijović and De Gaetano argued that if in the facts of this case the expulsion of the applicant is regarded as disproportionate, "*it would be difficult to envisage when it would be possible to expel a foreign national who has a child with a person holding a residence permit.*" This, the dissenters advocate, would lead to the undesirable situation that foreign nationals can regularise their unlawful residence by entering into marriage and having children. Indeed, if the best interests of the child triumphs over other considerations, this implies that families with children are in a better position than families who do not have children in the context of Article 8 ECHR. This triggers the question whether in fact this should be regarded as a risk. It follows from the UN Convention on the Rights of the Child that children should be regarded as bearers of individual rights. From the perspective of the emancipation of children as holders of rights, it is not problematic that the presence of the children may be the decisive factor in the balancing exercise inherent in Article 8 ECHR. However, from the perspective of immigration control, attaching too much weight to the interests of children could lead to a situation in which parents use children to enhance their legal protection. From the perspective of immigration control, this fear is present and real. For that reason, in Butt v. Norway, the Court accepted that strong immigration policy considerations would in principle mitigate in favour of identifying children with the conduct of their parents, to avoid the risk that parents exploit the situation of their children in order to secure a residence permit for themselves (See ECtHR 4 December 2012, Appl. no. 47017/09, *Butt v. Norway*, para 79).

8. The Court seems to struggle with the best interests of the child concept in the balancing of interests. In *Antwi v. Norway*, the Court did not find a violation even though the factual circumstances closely resemble the facts in *Nunez* (ECtHR 14 February 2012, Appl. no. 26940/10, *Antwi and others v. Norway*). The applicant in that case is a Ghanaian national who moved to Norway to live there with his spouse using a false identity. Based on this, he received a residence permit, which was revoked with retroactive effect after the authorities discovered his false identity. While being aware of his precarious immigration status, he got a child. In *Antwi*, the Court held that it the facts are different from *Nunez* in the sense that the child did not suffer from as much stress due to disruptions of the family and the procedure had taken considerably shorter. The Court held that moving to Ghana would definitely not be beneficial for the child, but nevertheless ruled that there would be no violation of Article 8 ECHR in case the applicant was to be deported. This was labelled as paying "*lip service to a guiding human rights principle*" by the dissenting judges.

9. Even more illustrative of the inconsistency of the Court in employing the best interests of the child concept is the ruling in *Arvelo Aponte v. Netherlands* (ECtHR 3 November 2011, Appl. no. 28770/05, *Arvelo Aponte v. Netherlands*). That case concerns a Venezuelan woman who seeks family reunification to her Dutch partner in the Netherlands. In the visa procedure, the applicant was not asked for previous criminal convictions, however the application for a residence permit was rejected as the applicant was convicted from drugs smuggling in Germany ten years before applying for a residence permit in the Netherlands. Considering that there are no insurmountable obstacles for the applicant and her husband and child to move to Venezuela, the Court does not find a violation of Article 8 ECHR. It is remarkable that the Court does not even mention the best interests of the child concept in this case, considering that the judgement came merely a year after *Nunez v. Norway*.

10. In its subsequent case law, the ECtHR did refer to the best interests of the child again. In *Jeunesse v. Netherlands* – a case concerning the regularisation of a Surinamese mother of three children with a long period of unlawful residence in the Netherlands – the Court held that the Netherlands had insufficiently taken the best interests of the child into account in the domestic proceedings (ECtHR 3 October 2014, Appl. no 12738/10, *Jeunesse v. Netherlands*). After establishing that the children would suffer a certain degree of hardship if they would have to accompany their mother to Surinam – even though there were no insurmountable obstacles to do so – the Court found a violation of Article 8. In both the judgment of the ECtHR in *El Ghatet v. Switzerland* and the admissibility decision in *I.A.A. v. United Kingdom*, the Court held that the best interests of the child are not a 'trump card' which required the admission of all children who would be better off living in a contracting state (See ECtHR 8 November 2016, Appl. no 56971/10, *El Ghatet v. Switzerland;* and ECtHR 8 March 2016, Appl. no. 25960/13, *I.A.A. and others v. United Kingdom*). However, the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it (*El Ghatet*, para. 46).

11. The judgment of the ECtHR in *Nunez* was an important step in the development of the best interests of the child in immigration cases under Article 8. Since this judgment, the Court has referred to the best interests of the child in various cases with different contexts. In order for the implementation of the case law at the domestic level, I call for the development of guiding principles on the application of the best interests principle in the fair balance test in the case law of the Court.

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