THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 509 J.R.]

BETWEEN

RAFIO ABDUL AZEEM

AND

KHAIR DIN AZEEM

AND

KHADIJA AZEEM (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND RAFIA ABDUL AZEEM)

AND

NARWAL AZEEM (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND RAFIA ABDUL AZEEM)

AND

MUHAMMAS UMAR (AN INFANT SUING BY AND THROUGH HIS MOTHER AND NEXT FRIEND RAFIA ABDUL AZEEM)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of November, 2017

1. The applicants, a mother and four children, arrived illegally from Pakistan in 2016. The mother has an extensive travel history having resided in recent years in Pakistan, Qatar, Italy, the U.K. and Ireland. The father has returned to Pakistan. The fifth named applicant has Down syndrome. The third named applicant has spina bifida, hydrocephalus and kidney disease, and has one kidney. The applicants made a case to remain based *inter alia* on the significantly reduced quality of life and lack of medical care in the case of the third named applicant, giving rise to issues under arts. 3 and 8 of the ECHR. Deportation orders were made on the 5th May, 2017. A minor extension of time was required to which the respondents very sensibly did not object. I have heard helpful submissions from Mr. Conor Power S.C. (with Mr. Ian Whelan B.L.) for the applicants and Mr. David Conlan Smyth S.C. (with Ms. Kilda Mooney B.L.) for the respondent.

Alleged defective art. 3 reasoning

2. Mr. Power submits that in the context of consideration of issues under art. 3 of the ECHR, as implemented in Irish law under the European Convention on Human Rights Act 2003, the Minister should have made a finding that there were services available specific to the applicants so that appropriate medical treatment would have been available in Pakistan rather than simply *some* medical treatment. Reliance is placed on *Paposhvili v. Belgium* (Application no. 41738/10, European Court of Human Rights, 13 December 2016). In *N. v. the United Kingdom* (Application no. 26565/05, European Court of Human Rights, 27 May 2008) at para. 43 the Strasbourg court had said that only in "*very exceptional cases*" would the expulsion of an applicant to a country where lesser medical care was available breach art. 3. At para. 183 of *Paposhvili* the court said that such circumstances could include "*situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy*".

3. At para. 186 the court emphasised the traditional caselaw under art. 3 that it is first of all for the applicant to adduce evidence capable of demonstrating substantial grounds for believing that there is a real risk of treatment contrary to art. 3 (*Saadi v. Italy* (Application no. 37201/06, European Court of Human Rights, 2008) para. 129). Mr. Power says that he has done that by putting forward information on the personal circumstances of the applicants; and he submits that such circumstances are extreme, as he puts it, requiring ongoing care. The material submitted is clearly totally insufficient to meet the high art. 3 threshold. The applicant has failed to put forward evidence establishing substantial grounds for believing there is a real risk of treatment contrary to art. 3. Thus for art. 3 purposes there is no onus on the Minister to do more than was done here. In such a context there is no obligation for the Minister to find that healthcare appropriate to any particular applicant is available in the country of origin unless the preliminary threshold under art. 3 is overcome. If it is so overcome the issue is not whether treatment appropriate to the applicant arises but whether the real risk of treatment contrary to art. 3 can be discounted. So the submission under this heading fails.

Alleged lack of reasons

4. Insofar as the deportation decision is *ad misericordiam*, no detailed reasons are required. Deportation arises only in the context of persons who have no entitlement to be in the State in the first place. In relation to discretionary aspects of the deportation order, the reasons are sufficient in that context. Insofar as the decision relates to legal rights under art. 3 of the ECHR the reasons are sufficient, in the context where the applicant has not overcome the obligation to present evidence giving rise to substantial grounds for believing in a real risk of violation of that provision. I will deal separately with the art. 8 issues.

The allegation that the art. 8 analysis was defective

5. In the analysis of this issue the Minister accepted that deportation had the potential to interfere with the private life of the applicants for the purposes of art. 8 but considered that the consequences of such interference were not of sufficient gravity as to engage the article such that a proportionality exercise would be required. It seems to me, first of all, that the issue has to be viewed in the context that a showing of an adverse health impact caused by deportation is capable of engaging art. 8. That appears from

C.I. v. Minister for Justice Equality and Law Reform [2015] 3 I.R. 385 [2015] IECA 192 and is also referred to in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309 [2007] IEHC 166, which I will come to in a moment. The ministerial discussion of this issue referred firstly to the fact that the unilateral decision of the mother to uproot the children from Pakistan and travel through Qatar, Italy, the U.K. and Ireland already amounted to considerable disruption to their lives having arrived in Ireland illegally and having remained here illegally. That seems to me to be a reasonable finding, although I am not sure that it fully answers the question presented here. The analysis then goes on to refer to the decision in the Supreme Court in *P.O. v. Minister for Justice, Equality and Law Reform* [2015] 3 I.R. 164 [2015] IESC 64 (para. 86) which in turn refers to the decision of the Strasbourg court in *Butt v. Norway* (Application no. 47017/09, European Court of Human Rights, 4 December 2012) (para. 79) that the conduct of children could be identified with that of their parents to avoid exploitation by the parents of the situation of their own children. I am not sure that that reference is hugely relevant because the issue is not so much exploitation of the position of the children as one of disruption in the sense of the previous comment by the Minister that the disruption likely to be occasioned to the children should be put in the context of a lot of previous disruption to this particular family. So the reference to *P.O.* and *Butt*, it seems to me, is not exactly central to the Minister's reasoning.

6. The analysis then sets out what purports to be a thumbnail summary of what is describes as "*case law*" under art. 8, although no specific cases are identified. It is not altogether clear where this summary comes from or indeed whether it is in fact an accurate summary of art. 8 case law. Mr. Conlan Smyth suggested that possibly inspiration may have been drawn from *Tarakhel v. Switzerland* (Application no. 29217/12, European Court of Human Rights, 4 November, 2014) but it is not clear to me that that fully explains the way in which the summary of case law in this decision is worded. Point number 3 of the summary is that it would appear that one of the broad situations where art. 8 might be found to be breached in the case of a long term illegally present child or recently aged out minor would be "*where the child has significant special needs and has been born in the State or has been in the State for a significant portion of his life*". It seems to me this may be an over-generalisation and matters may very much depend on what the special needs are. Being here for a significant time may be relevant as to whether art. 8 is engaged although it is hard to immediately see how the accident of being born here is in itself to mean that removal of a person with special needs has consequences of such gravity as to engage art. 8 irrespective of the conditions in the country to which he or she is to be removed. A major difficulty with the Minister's reasoning under this heading is that the whole discussion of art. 3 and art. 8 is confused and mixed together and all takes place under a single heading which is referable to art. 8 (the heading is "*Consideration under Article 8 of the European Convention on Human Rights ("ECHR")").*

7. The fundamental issue here is that art. 8 includes impact on both mental and physical health. There could be an art. 8 issue even if there is no art. 3 issue. The Minister held that there was a healthcare system in Pakistan but not that that there was no disparity of a significant nature between Ireland and Pakistan. The applicants submitted an article by Mr. Mohamed Modasir to the effect that the life of a person in Pakistan who has spina bifida is "*more than miserable*". That is certainly enough to suggest a significant disparity. That position was not expressly rejected by the Minister. Assuming that there is a significant disparity in treatment available between Ireland and Pakistan, and given that impact on physical health was an element of art. 8, there could be consequences of such gravity as to engage art. 8 such that a proportionality analysis is required. Mr. Conlan Smyth submits that disparity in healthcare systems is not generally sufficient to enable a person to make a call on the resources of authorities in the receiving country and that is of course entirely correct (see the authorities referred to in the ministerial analysis including *N. v. Secretary of State for the Home Department* [2005] UKHL 31 [2005] 2 A.C. 296 [2005] 2 W.L.R. 1124 and *Bensaid v. the United Kingdom* (Application no. 44599/98, European Court of Human Rights, 6 February 2001). But that does not answer the question as to whether the consequences of any interference with art. 8 rights are of such gravity as to require a proportionality assessment. Mr. Conlan Smyth relied on the decision in *P.O. per* Charleton J. at para. 36, where he says that "*the third principle is that in considering the interaction of the two parts of Article 8, a wide margin of appreciation in the analysis of the balance of a situation is afforded to decision makers. The often-claimed separate rights of children are, save for extraordinary circumstances, dependant upon the approach of the parent who claims on their behalf and their own behalf through that child. That emerges clearly from the decision of Feeney J. in* Agbonlahor v. Minister for Justice, Equality and Law Reform *[2007] 4 I.R. 309*". It seems to me the reference to the interaction between the two parts of art. 8 necessarily imply a context where a proportionality analysis has been carried out.

8. Further, reliance is placed on para. 90 of *P.O.*, where Charleton J. says that "*Pleading such rights, in any event, does not, save in exceptional cases, engage article 8(1) in such a way as to overbalance the entitlements of the state to form an immigration policy under article 8(2) of the Convention",* citing *Agbonlahor, C.v. the United Kingdom* [2005] 2 A.C. 296 and *Nnyanzi v. the United Kingdom* (Application no. 21878/06, European Court of Human Rights, 8 April 2008). Again it seems to me the reference to over balancing art. 8(2) rights seems to refer to a proportionality analysis, so the passages relied on in *P.O.* do not answer the questions to whether a proportionality analysis could be dispensed with, as was the case here.

9. *Agbonlahor v. Minister for Justice* [2007] 4 I.R. 309, relying on *Bensaid v. the U.K.* [2001] 33 E.H.R.R. 25 and *Raninen v. Finland* (1998) 26 E.H.R.R. 563, establishes that mental health and the desirability that it be treated could form part of private life capable of being protected by art. 8 of the ECHR. In my view the same must apply to physical health, as I interpret *C.I.* In *Agbonlahor*, Feeney J. said at para. 32 that "*having considered this case on its own individual facts this court is satisfied that the decision made by the first respondent, taking all the factors into account, was proportionate and that the facts of this case could not be identified as being exceptional"*. The format of the decision was not recited but that passage suggests perhaps obliquely that the Minister had got to the proportionality stage in that assessment.

10. It seems to me that there are three very fact-specific issues of relevance in this case, namely (a) a confusion between the legally distinct issues arising under art. 3 and art. 8 (b) a failure to acknowledge that significant adverse impact on physical health arising from a significant disparity in the medical systems between Ireland and the receiving country could engage art. 8, even if that disparity was not at a level such as to engage art. 3 and (c) positive evidence of such a significant disparity in medical treatment which was not rejected by the Minister and which would support the contention that removal would have consequences of such gravity as to engage art. 8.

11. In the context of the combination of those three fact-specific issues in this particular case it seems to me that the Minister's failure to conduct the proportionality analysis under art. 8(2) was incorrect. It does not follow that the Minister was not entitled in principle to make the deportation orders; but unless he is rejecting the contention that a specific disparity in treatment exists, then on the particular facts of this case he is required to conduct a proportionality analysis. It may be that if that analysis, when conducted, turns out to be negative, the comments of Charleton J. are para. 39 of *P.O.* may be pertinent, but I do not think that we have reached that stage yet. For those reasons I am upholding the complaint regarding defective art. 8 analysis as set out in ground E (i) in the statement of grounds.

Order

12. The order will therefore be:

(i). that time be extended for the bringing of the application up to the date on which it was made; and

(ii). that there be an order of *certiorari* removing for the purpose of being quashed the deportation orders against each of the applicants.

Postscript

13. Following further submissions I ordered:

(i). that costs be awarded to the applicants to be taxed in default of agreement including reserved costs on the basis that it was appropriate to have solicitors and two counsel at all stages; and

(ii). that there be a stay on the order until 11th December, 2017 on the respondent's undertaking not to act on the deportation orders.