Neutral Citation Number: [2010] IEHC 372

THE HIGH COURT

JUDICIAL REVIEW

2008 529 JR

BETWEEN/

J. E.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 22nd day of October, 2010.

1. By order of this Court of 25th March, 2010, leave was granted to the applicant to seek judicial review of a deportation order made in respect of the applicant by the respondent on 10th April, 2008. Leave was granted to seek, in particular, an order of *certiorari* quashing that order by reference to two specific grounds as follows:

> (a) Having accepted that the applicant suffers from and is being treated for HIV/Aids, the respondent failed to consider, to analyse and to determine the applicant's claim that his deportation to Nigeria would, in the light of the country of origin information submitted to him or recited in the file note containing the purported reasons for the decision, violate the prohibition on refoulement in s. 5 of the Refugee Act 1996 and/or Article 3 of the European Convention on Human Rights; and
>
> (b) It fails to disclose the salient or any reason for the finding that the deportation "is not contrary to s. 5 of the Refugee Act 1996 (as amended)".

2. As indicated in an *extempore* judgment given on the same day, the Court granted leave with some hesitation but considered that the issues embodied in those grounds warranted more deliberate consideration at a substantive hearing having regard to what appeared to be a potential similarity between the approach adopted in the "Examination File Note" which supported the order and that which formed the basis of the judgments of the Supreme Court in the then recently decided appeal of *Meadows v. Minister for Justice, Equality and Law Reform* of 21st January, 2010. The issues raised by these grounds arise in the following circumstances.

3. The applicant is a failed asylum seeker who had arrived in the State in July 2004. He was subsequently diagnosed as suffering from HIV/Aids and has been receiving treatment for the condition in this country since. Following the failure of his application for asylum, a deportation order was made against him on 15th September, 2005. That order was subsequently revoked and the applicant was given a further opportunity to submit representations against deportation. This was done on his behalf by his solicitor on 3rd July, 2007. The order which is now contested was then made on 10th April, 2008.

4. The issues arise, accordingly, out of the fact that the applicant suffers from this particular medical condition and are based upon the proposition that the termination of the treatment which he currently receives for it in this jurisdiction combined with the conditions he would face in Nigeria both as regards access to equivalent treatment and, more importantly, the allegedly pervasive attitude of stigmatisation and discrimination he would encounter, give rise to a threatened infringement of his rights under s.5 of the 1996 Act and/or Article 3 of the ECHR. These possible infringements, it is argued, have been inadequately considered by the Minister in evaluating the representations made against the making of a deportation order. Counsel for the applicant has acknowledged that as a matter of law, a mere discrepancy in the standard of medical treatment available in a country of origin cannot except in very rare circumstances, constitute a ground for challenge to an order of deportation. (The exceptional case which can give rise to a violation of Article 3 of the ECHR is illustrated by the judgment of the European Court of Human Rights in *D. v. United Kingdom* where it was found that an applicant who was terminally ill would be "exposed to a real risk of dying under the most distressing circumstances" such that the deportation would amount to inhuman treatment.) In the present case, however, it is not argued that the applicant's condition is such that his actual deportation to Nigeria would constitute a threat to his life.

5. The present claim is not, accordingly, grounded upon a simple proposition that the treatment available to the applicant in Nigeria is inferior but upon a more specific procedural point. It is claimed that in the representations made against the deportation order, extensive country of origin information was put forward to show that the applicant if returned would be subjected to stigma and discrimination including discriminatory treatment at the hands of personnel in the health and medical services there and that this would constitute a threat to his life or freedom which required the Minister to consider whether the prohibition on refoulement in s. 5 of the 1996 Act would amount to inhuman or degrading treatment and thus an infringement of the protection afforded by Article 3 of the Convention. Secondly, an argument based upon a failure to state any or any adequate reason is advanced by analogy with the *Meadows* case in that it is alleged the Examination of File Note, while acknowledging the evidence as to stigmatisation and discrimination prevalent in Nigeria, gives no reason or explanation for the conclusion that the prohibition on refoulement does not apply.

7. Before dealing with these questions it is, perhaps, no harm to recall that, according to the case law, the basis upon which a challenge can be raised to a deportation order is limited. The approach of the Court was described in the judgment of Clarke J. of 9th November, 2005 in *Kouaype v MJELR,* [2005] I.E.H.C. 380 at para. 5.1 as follows:

> "For all of the above reasons it seems to me that the grounds upon which a decision by the Minister to make a deportation order in the case of a failed asylum seeker can be challenged are necessarily limited. Without being exhaustive it seems to me that it would require very special circumstances for such a review to be possible unless it can be shown that:

(a) The Minister did not consider whether the provisions of s. 5 applied. Where the Minister says that he did so consider and in the absence of any evidence to the contrary this will be established;

(b) The Minister could not reasonably have come to the view which he did. ….

(c) The Minister did not afford the applicant a statutory entitlement to make representations on the so-called 'humanitarian grounds', or,

(d) The Minister did not consider any such representations made within the terms of the statute, or the factors set out in s. 3 (6) of the 1999 Act or (possibly) the Minister could not reasonably have come to the conclusion he did in relation to those factors."

8. There is no doubt that in the representations made on behalf of the applicant on 3rd July, 2007, a body of material was put before the Minister in support of the proposition that sufferers from HIV/Aids faced considerable difficulties in Nigeria. This was put forward in support of the proposition: "In view of the foregoing it is respectfully submitted that our client's deportation to Nigeria would be in breach of Article 3 of the European Convention on Human Rights and Article 40.3.2 of the Irish Constitution". (No direct mention was made of s. 5 of the Refugee Act 1996).

9. The memorandum entitled "Examination of File under s. 3 of the Immigration Act 1999, as amended" ("the File Note",) which supplements the statement of the Minister's reasons for making the deportation order given in the letter of notification dated 16th April, 2008, deals at its very outset with the prohibition of refoulement in s. 5 of the 1996 Act. It does so primarily by reference to the background to the asylum claim and to the more obvious threats to the applicant's life and well-being in the context of the account he originally gave in his asylum claim arising out of the alleged violence experienced by Christians at the hands of Muslims and his fear of Sharia courts and their punishments. Significantly, however, within the section devoted to consideration of the prohibition of refoulement in s. 5, the memorandum contains some five pages devoted to the consultation of information on attitudes to and the treatments available for HIV/Aids sufferers in Nigeria. The overall effect of this information coincides with that in the material quoted in the representations. It confirms, for example, the existence of evidence as to discrimination against people with Aids and the difficulties they experience in obtaining access to basic prevention, care, support and treatment services. At the end of the section the author states: "Having considered all the facts of this case, I am of the opinion that repatriating Mr. E. to Nigeria is not contrary to s. 5 of the Refugee Act 1996, as amended, in this instance." Clearly, this conclusion covers all of the facts dealt with in the preceding fifteen pages of the memorandum, including the material relating to the conditions faced by HIV/Aids sufferers in Nigeria. It cannot therefore be argued that there has been a failure as such to address that material as required by s. 3(6) (i) of the Act of 1999 nor to do so by reference to the prohibition in s. 5 or the protection afforded by Article 3. Although no express invocation of s.5 was made in the representations of 3rd July, 2007, it is in that context that the material has been covered in the file note.

10. The file note then proceeds to consider the possible application of s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000 followed by the headings required to be considered under s. 3 (6) (h), (i) and (g) of the Immigration Act 1999. The consideration of the rights of the applicant under Article 8 of the European Convention on Human Rights as regards private life and family life are then set out. The memorandum ends with an overall conclusion and a recommendation in these terms:

> "J. E.'s case was considered under s. 5 of the Refugee Act 1996, as amended, and under s. 3 (6) of the Immigration Act 1999, as amended. Refoulement was not found to be an issue in this case. Consideration was also given to Jude Edoas's rights under Article 8 of the ECHR. In addition no issue arises under s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000. Therefore, on the basis of the foregoing, I recommend that the Minister, having also had regard to s. 3 (1) of the European Convention on Human Rights Act 2003, in making his decision, signs a deportation order in respect of Mr. J. E.."

11. As indicated by the Court when granting leave, there is at least a superficial similarity between the approach adopted in the present File Note in expressing a conclusion and that which was before the Supreme Court in the *Meadows* case. It is clear from the judgments in that case that the applicant had made representations to the Minister in accordance with s. 3 (3) (b) of the 1999 Act which brought into play the possible application of the prohibition on refoulement on the basis that she claimed to risk being subjected to female genital mutilation ("FGM"), if repatriated. In other words, information was put before the Minister raising a possible implication of torture or serious assault in the sense of section 5.

12. In his judgment, Murray C.J. said:

> "… before making a deportation order the Minister is required to consider in the circumstances of each particular case whether there are grounds under s. 5 which prevent him making a deportation order. In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self evident. On the other hand, if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion."

13. In the earlier part of his judgment the Chief Justice records material contents of the decision under examination in that case including the text of the letter communicating and enclosing the Minister's decision to make a deportation order. It contained the sentence: "In reaching this decision the Minister has satisfied himself that the provisions of s. 5 (prohibition of refoulement) of the Refugee Act 1996 are complied with in your case." Exactly the same sentence appears in the second paragraph of the corresponding letter in the present case dated 16th April, 2008. Indeed, the fuller text of the letter quoted by the Chief Justice is replicated in virtually the same words in the latter letter and also in the corresponding letter considered by the Supreme Court in the case of *F.P. v. MJELR* [2002] 1 I.R. 164 (at 171), where the court found that the reasons thus given were adequate and sufficiently understandable. (See the judgment of Hardiman J. on behalf of the court at 174-175.)

14. The *Meadows* judgment of the Chief Justice also gives the summary of the information relating to the claim based upon the threat of FGM and quotes the conclusion at the end of the file note: "[The applicant's] case was considered under s. 5 of the Refugee Act 1996 and s. 3 (6) of the Immigration Act 1999. Refoulement was not found to be an issue in this case." Murray C.J. said:

> "In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced. The recommendation with which the memorandum submitted to the Minister with the file is not helpful and adds to the opaqueness of the decision. That states that 'refoulement was not found to be

> an issue in this case'. This decision is open to multiple interpretations which would include: (i) that refoulement was not an issue and therefore it did not require any discretionary consideration. On the other hand, it may well be that the Minister did consider refoulement was an issue and that there was evidence of the appellant in this case being subject to some risk of being exposed to FGM but a risk that was so remote that being subject to FGM was unlikely: alternatively, he may have considered that while there was evidence put forward to suggest the appellant might be subjected to FGM that evidence would be rejected as not being of sufficient weight or credibility to establish that there was any risk. The fact remains that it is not possible to properly discern from the Minister's decision the actual rationale of which he decided that s. 5 of the Act had been 'complied with'. Accordingly, in my view, there was a fundamental defect in the conclusion of the Minister on this issue."

15. Notwithstanding these apparent similarities of approach, however, the Court does not consider that this is an instance in which it would be justifiable to quash the deportation order for a failure to state an adequate reason. In the first place, the Court is not satisfied that there has been a material failure to give a reason for considering the prohibition in s. 5 to be inapplicable. Secondly, even if there could be said to be doubt as to the adequacy of the explanation for rejecting the basis upon which Article 3 (and by implication, s. 5,) had been invoked, the remedy of *certiorari* is at the discretion of the Court in a case of this nature and the Court is satisfied that the information which the Minister was required to consider could not in any event have constituted a basis for an opinion that the prohibition on refoulement was applicable or that Article 3 would be infringed.

16. As regards the first of these considerations, it is to be noted that quite apart from the conclusion to the File Note (see para 10 above,) and the content of the letter of 16th April, 2008, a direct conclusion in relation to all of the matters covered under the heading of s. 5 is given at the top of its page 16: "Having considered all the facts of this case, I am of the opinion that repatriating Mr. E. to Nigeria is not contrary to section 5, etc.". (It is not apparent from the judgments in *Meadows* whether any similar comment on the s. 5 analysis was contained in the File Note in that case.)

17. Section 5 (1) of the Act of 1996 prohibits the return of a person where "the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion". Subsection (2) provides that a person's freedom "should be regarded as being threatened if, *inter alia*, in the opinion of the Minister, the person is likely to be subjected to a serious assault (including a serious assault of a sexual nature)".

18. The conclusion given at the top of page 16 of the File Note can only be construed, in the view of the Court, as the expression of an opinion that repatriation of Mr. E. to Nigeria would not expose him to any threat to his life or freedom (including serious assault,) on the basis that, as a sufferer from HIV/Aids, he is a member of a particular social group. To the extent that the representations made on 3rd July, 2007, were treated in the memorandum as invoking both the protection of Article 3 and s. 5, the conclusion can only be interpreted as a rejection of that claim on that basis. It is to be noted that the Meadows case was concerned with an application for leave to seek judicial review, and the claim of exposure to a risk of FGM appears to have been addressed differently by the Minister under s. 3 of the Act as compared with the reason given for rejecting it by the Refugee Appeals Tribunal. (See the judgment of Fennelly J. at paragraph 17.) In those circumstances and because the "refoulement is not an issue" conclusion was open to at least three possible interpretations, the rationale of the decision to deport was not apparent. As already noted above (see para. 7) by reference to the decision of Clarke J. in the *Kouaype* case, the Minister's obligation to give reasons does not otherwise involve the need for any detailed or narrative statement. In his judgment in *Meadows*, Murray C.J. cited the statement on this point by Keane C.J. in *Baby O. v. MJELR* [2002] 2 I.R. 169 where the latter said:

> "Section 5 of the Act of 1996 does not require the first respondent to give any notice to a person in the position of the second applicant that he proposes to make a decision under that section: it simply requires the first respondent to satisfy himself as to the refoulement issue before making a deportation order. … I am satisfied that there is no obligation on the first respondent to enter into correspondence with the person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and to notify her of his decision: that was done, and accordingly, this ground was not made out."

19. Similarly, in the present case, the obligation of the Minister was to consider whether the prohibition on refoulement under s. 5 (and/or a possible infringement of the protection accorded by Article 3 of the Convention) arose both generally by reference to information available to him as to conditions at the deportation destination, and particularly, in the light of the information put before him when that protection was invoked. While it is possibly desirable that the author of a file note might go further by way of explanation, the Court is satisfied that it is sufficiently clear from a reading of this File Note as a whole that the opinion had been formed that notwithstanding the effect of the information as to conditions faced by HIV/Aids sufferers in Nigeria, the return of this applicant to that country would not bring about a threat to his life or freedom or expose him to torture or inhuman or degrading treatment for the purposes of Article 3.

20. The second reason for refusing relief is that even if, (*quod non*,) some criticism could be made of the absence of a more detailed explanation in the File Note so far as concerns the s. 5 conclusion, the Court is satisfied that it would be an inappropriate exercise of discretion to quash the deportation order by *certiorari*. This is because the information put before the Minister in the representations together with that consulted and recorded by the author of the File Note, could not in any event constitute a basis for an opinion that the repatriation of the applicant to Nigeria would violate the prohibition on refoulement or the protection afforded by Article 3.

21. Taken at its strongest, the information undoubtedly points to serious deficiencies in the health services of Nigeria so far as concerns the care and support given and treatment available to HIV/Aids sufferers. Furthermore, the information indicates that HIV/Aids sufferers face stigmatisation and discrimination including such treatment at the hands of some personnel in the health services in that country. Nevertheless, as a matter of law, stigmatisation and discrimination arising out of prejudice and ignorance on the part of even a large number of individuals (including individuals employed in the health services) will constitute ill-treatment which comes within the scope of the prohibition in s. 5 or the protection of Article 3 only in exceptional cases involving a minimum level of severity and probably some clear evidence that the ill-treatment is so endemic and institutionalised as to raise a presumption that it is official policy or condoned by state authorities. (See for example the judgment of the Strasbourg court in *Smith & Grady v. U.K.* [2009] 29 EHRR 493 at paras 117 – 123: and the judgment of Clarke J. in *E.M.S v. MJELR* [2004] IEHC 398 and the authorities cited therein including *Kuthyar v. Minister for Immigration & Multicultural Affairs,* [2000] FCA 110. See also, by analogy, the judgment of this Court in *MST & JT v. MJELR* [2009] IEHC 529 and the authorities referred to at paras. 42 & 43 on the concept of "inhuman or degrading treatment" in the context of the EC (Eligibility for Protection) Regulations 2006). As appears from those cases, an inferior standard of medical treatment resulting from discriminatory attitudes towards a particular social group will not amount to persecution for a Convention reason unless it is associated with an unwillingness or inability on the part of the relevant authorities to protect members of the group from such ill-treatment. *A fortiori,* such conditions will not come within the scope of s. 5 or Article 3.

22. It is to be noted that the medical opinion put before the Minister in the representations fell far short of raising any implication that

the applicant's then current condition was life threatening or that it would be so if he was returned to Nigeria. In the letter from the Mater Hospital dated 21st June, 2007, submitted with the representations of 3rd July, 2007, the Registrar and Social Worker say that his recent examination showed "that his CD4 count and his viral load are 375 and 7300 respectively. Normal CD4 counts are between 500 and 1000 therefore Mr. E.'s CD4 count needs to be monitored regularly; if his CD4 count dropped he would be susceptible to developing opportunistic infections and would need to be placed on Anti-retroviral therapy." In other words, the applicant was not then on anti-retroviral therapy or in immediate need of such treatment. Further their opinion was that: "His fears of being exported to Nigeria where he will not have access to the same medical treatment available in Ireland may effect (*sic*) his mental well-being". Again, the opinion is directed at mental well being and not at any life threatening facet of his condition. As already pointed, out a discrepancy in the standard of available medical treatment alone is not a circumstance which attracts the prohibition of refoulement or the protection of Article 3.

23. Thus, no question of any imminent threat to the life of the applicant was raised by the combination of the medical evidence and the country of origin information relied upon. In that regard the position of the applicant was and is materially different from that of the female applicant in the *Meadows* case who had alleged and (at least arguably), substantiated a risk to her of serious assault and even torture in the form of FGM. It follows in the judgment of the Court that no material error could be said to have been made in the forming of an opinion that neither the prohibition in s. 5 nor the protection of Article 3 would be infringed by the repatriation of the applicant.

24. For these reasons the application for judicial review is refused.