

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 571 J.R.]

BETWEEN

H.A.A. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of January, 2018

1. The present case is an application for *certiorari* of a ministerial decision refusing to revoke a deportation order under s. 3(11) of the Immigration Act 1999. The main point made by the applicant is that the Minister failed to deal lawfully with her allegation of anticipated harm if returned to Nigeria arising from her claim to have a same-sex orientation. Very helpfully indeed, counsel for the parties (Mr. Conor Power S.C. (with Mr. David Leonard B.L.) for the applicant and Ms. Cindy Carroll B.L. for the respondent) expressly indicated that detailed reasons would not be required, and I am most grateful to them for that (if not mildly hopeful that they might initiate a trend in that respect), so I now set out the reasons in summary for the order being made.

2. The fact-specific difficulty with the ministerial decision in this case is the combination of a failure to refer to the correct test for *refoulement* in s. 50 of the International Protection Act 2015 (not referred to expressly in the decision and at best paraphrased in a not entirely satisfactory manner), together with a lack of clarity as to why the decision-maker arrived at the decision that *refoulement* was not an issue, and in particular (a) a lack of clarity as to whether the credibility of the applicant was impugned (and indeed if so, why), and (b) a lack of clarity as to the reason for the conclusion (which is the core of the decision) regarding the availability of state protection and the finding that there is a functioning police force and judiciary in Nigeria; in the latter regard it was unclear as to whether this is being drawn from the U.S. State Department 2016 *Country Report on Human Rights Practices – Nigeria* (3rd March 2017), and if so what provisions of it, or alternatively whether it is drawn from the Minister's general knowledge of Nigeria, as suggested by Ms. Carroll based on the judgment of Birmingham J. in *G.O.B. v. Minister for Justice and Equality* [2008] IEHC 229 – and indeed if it is so drawn from the Minister's general knowledge, whether that can be particularised in some way (the fact that the analysis was apparently conducted by a contractor may or may not arguably detract somewhat from this argument, although we did not get to that point here).

3. In the course of the hearing, Ms. Carroll touched on and raised a whole string of significant question marks over the applicant's story, in particular:

- (i). the actual particulars of the claim of homosexuality;
- (ii). the long delay in making that claim;
- (iii). the fact that this claim was not referred to in previous correspondence when there was nothing stopping her doing so, given that she was *de facto* established in Ireland;
- (iv). the scattergun nature of the applicant's claims in relation to a number of other entirely different or unrelated grounds for fearing harm;
- (v). the rejection of her initial claim for asylum on credibility grounds;
- (vi). her evasion of the immigration authorities for over a decade;
- (vii). the implausible claim that her original lawyers advised her not to attend the GNIB – no attempt was made to stand that up in evidence;
- (viii). the fact that she bombarded the Department with emails to such an extent that she was requested on 11th July, 2016 to stop emailing on a weekly basis, a request she rejected, but she nonetheless never raised the homosexuality issue herself in these emails (she left it to her solicitors to send in this claim); and
- (ix). the fact that her story in relation to her fears relating to sexual orientation related to alleged persecution of a girl in her rural village, which happened fourteen years before she left Nigeria and well before she moved to more urban parts of that country.

4. However, as the decision stands at the moment it is unclear as to which of those, if any, were in the mind of the decision-maker.

5. In the light of the very fact-specific combination of the failure to refer to the relevant section of the 2015 Act, and the significant ambiguities in the wording of the decision, making it unclear what was the basis of the finding that *refoulement* did not arise, it seems to me that *certiorari* is an appropriate remedy in this case.

6. In terms of the precise relief, the court has a discretion to quash the flawed part of a decision leaving the rest intact; and given that there were a number of strands to the s. 3(11) decision which were not impugned, let alone condemned, this seems to me to be an appropriate case to exercise that discretion. Simon Brown J. described such a jurisdiction as "*consistent also with this court's increasing flexibility of response and remedy in the ever-developing field of judicial review*" in *R. v. Inner South London Coroner, ex parte Kendall* [1988] 1 W.L.R. 1186 at 1194: see also Michael Fordham, *Judicial Review Handbook*, 6th ed. (Oxford, 2012), para. 43.1.6, pp. 477-478. Again, helpfully, counsel on both sides are agreed that if an error is identified in this instance it is an appropriate case for an order to quash only a part of the decision, and I am once more grateful to them for that.

Order

7. Having regard to the foregoing the order will be:

(i). that there be an order of *certiorari* removing for the purpose of being quashed that portion of the Minister's decision under s. 3(11) from the heading "Homosexuality" on p. 7 to before the heading relating to s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000 on p. 9, insofar as that portion of the decision deals with the issue of homosexuality in the context of s. 50 of the 2015 Act (that section of the decision deals with other issues as well and the findings on those issues will stand); and

(ii). that the matter be remitted to the Minister to reconsider that part of the decision relating to the issue under s. 50 of the 2015 Act in respect of the homosexuality claim.