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THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 260 J.R.]

[2010 No. 261 J.R.]

BETWEEN

J. D S. [Nigeria]

APPLICANT

AND

P. T. D. S. (AN INFANT ACTING BY HIS MOTHER AND NEXT FRIEND J.

D. S.) [Nigeria]

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 11th day of July, 2012

1. By order of the Court (O'Keeffe J.) of the 20th December, 2011, the applicants in these two cases were granted leave to seek judicial review with a view to quashing deportation orders made in respect of them on the 9th February, 2010 by orders of *certiorari.*

2. The Court granted leave to apply for judicial review upon a single ground expressed as follows:-

> The consideration by the first named respondent of the applicants' rights pursuant to s. 5 of the Refugee Act 1996, as amended, (Prohibition of *refoulement*) is inadequate, unlawful and in breach of natural justice and fair procedures. Without prejudice to the generality of the foregoing the first named respondent does not disclose, as he was obliged to do in the said consideration, the reasons for *refoulement* not having to be found to be an issue in the case of the applicant. The applicant is entitled to a decision in this regard from the terms of which she can discern the reason for the first named respondent coming to the conclusion that the repatriation of the applicants to Nigeria would not be contrary to s. 5 of the Refugee Act 1996, as amended. The failure to provide reasons and/or a rationale for the decision renders the issue of the deportation order unlawful and vulnerable to review.

3. In essence, the case made in support of this ground on behalf of the applicants is that the relevant part of the "Examination of File" memorandum containing the analysis and reasons for the making of the deportation orders is similar to that considered by the Supreme Court in the case of *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, upon which reliance is placed. As explained below, it is submitted that it is impossible to discern from the conclusion expressed in relation to the consideration of the prohibition on *refoulement* in s. 5 of the Act of 1996, what the rationale of the Minister was and what his reasons were for concluding that the prohibition would not be infringed if the applicants were repatriated to Nigeria.

4. Counsel for the respondents, on the other hand, argues that when the file note is read as a whole and in light of the actual case put forward on behalf of the applicants in the representations for humanitarian leave to remain, the rationale and the reasons for the conclusion on this issue are perfectly clear and that furthermore the substantive content of the assessment for the purpose of s. 5 is clearly different from that which was before the Supreme Court in the *Meadows* case.

5. In addition, it is urged on behalf of the Minister that even if the Court were inclined to accept the ground as having been made out in favour of the applicants, it should nevertheless exercise its discretion to refuse relief because of significant new information which has come to the attention of the Minister since the challenged decisions had been made. This new information is said to cast considerable doubt on the good faith and truthfulness of the mother in these cases as further explained at the end of this judgment.

6. The adult applicant in case 2010 No. 260 J.R. ("the mother") is a Nigerian national who claims to have married her husband Daniel Sunny Idowu in Nigeria in 2006 and he is said to have arrived in the State shortly afterwards staying for two weeks. She claimed to have arrived in the State at the end of October 2008. Both claimed asylum. She gave birth to her husband's child, the minor applicant in case 2010 No. 261 J.R., on the 2nd January, 2009.

7. The mother's claim for asylum was based upon an alleged fear of persecution for religious reasons if returned to Nigeria. She claimed that her father was a Muslim and that she had been brought up in that religion. In 1998, she met her husband who was a Christian and in spite of the disapproval of her father, she left her father's home in 2006, moved to live with her husband, and married him without her father's consent. She claimed that when she became pregnant in January 2008, she decided to tell her father in the hope that he had changed his mind, but he forced her to drink a potion causing her to have a miscarriage. She said that she and her husband were threatened by her father. When she moved away to her sister-in-law's home she said her father sent a man after her who threatened to kill her if she did not move back to her father's house. She returned to her husband's home where she remained for several months while arranging her flight from Nigeria. In June 2008, she travelled to Italy where she remained for some four months before coming to Ireland.

8. The claim for asylum was rejected in a report under s. 13 of the Act of 1996, dated the 14th November, 2008, and its negative recommendation was upheld on appeal by a decision of the Refugee Appeals Tribunal of the 31st March, 2009. An application for subsidiary protection was then made on the 22nd May, 2009 in which the claimed risk of serious harm was once again the threat posed by her father. It was determined on the 14th January, 2010 that subsidiary protection would not be granted.

9. Following that refusal the mother was informed by letter on the 9th February, 2010, from the Repatriation Unit of the Irish Naturalisation and Immigration Service (INIS) that the Minster had decided to make a deportation order. The letter said: "In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 (as amended) are complied with in your case." The letter indicated that "a copy of the Minister's considerations pursuant to section 3 of the Immigration Act, 1999 (as amended) and section 5 of the Refugee Act, 1996 (as amended) [were] enclosed with the letter." This is the memorandum entitled "Examination of file under Section 3 of the Immigration Act 1999, as amended" in which were set out are the matters considered by the Minister by reference to the various subheadings of s. 3(6) of the Immigration Act 1999, s. 5 of the Act of 1996, s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000, and Article 8 of the European Convention on Human Rights.

10. The analysis under the heading "Section 5 of the Refugee Act 1996, as amended (prohibition of refoulement)" begins with a summary of the applicant's claim which, it is not disputed, accurately summarises the contentions that have been put forward on behalf of the mother, both in the asylum process and in the representations under s. 3 of the Act of 1999. This summary is followed by a series of quotations extending over five pages introduced by the statement: "The following country of origin information is relevant to the applicant's claim." There is then set out a series of extracts from country of origin information derived from a diversity of sources which are collated under the following headings: Geography, Constitution, Security Forces- Overview, Police, Avenues of Complaint, Freedom of Religion Overview, Religious Demography, Freedom of Movement, Exit-Entry Procedures, and Treatment of Failed Asylum Seekers.

11. This assembly of country of origin information is then completed by the conclusion: "Having considered all the facts of this case, I am of the opinion that repatriating [the mother] to Nigeria is not contrary to Section 5 of the Refugee Act 1996, as amended, in this instance."

12. At the end of the memorandum the overall conclusion under the heading "Recommendation" is expressed as follows: "[the mother's] case was considered under Section 3(6) of the Immigration Act 1999, as amended and under Section 5 of the Refugee Act 1996, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under Section 4 of the Criminal Justice (UN Convention against Torture) Act, 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights (ECHR). Therefore on the basis of the foregoing, I recommend that the Minster makes a deportation order in respect of [the mother]."

13. As indicated above, the essential case made on behalf of the applicant is that it is impossible to tell from the Minister's s. 5 consideration and concluding recommendation what the rationale of his decision was and what particular reasons he had for concluding that repatriation would not be contrary to the prohibition. The applicant had explicitly claimed that she had converted to Christianity, which resulted in her life having been threatened by her father, a Muslim cleric who had also forced or tricked her into aborting her pregnancy. This, it is argued, clearly brought the representations within the scope of the s. 5 prohibition and called for a clear, rational and intelligible decision on the part of the Minister. Instead, the respondents' response was characterised by counsel for the applicants as an attempt to "construct a hypothesis" as to why the Minister must have reached the conclusion. That, however, is not something which was permissible in law and in this regard counsel for the applicants relied upon the recent judgment of the Supreme Court of the 1st May, 2012, in *Rawson v. The Minister for Defence*.

14. In that case a successful application for judicial review was made of a decision given on appeal by a General Officer Commanding (GOC) of the Defence Forces dismissing the applicant from service for having tested positive for cannabis under a random drug testing scheme established under relevant regulations of the Defence Forces. Under the regulations in question it was provided that where it appeared "on foot of any representations made, that a reasonable doubt exists, that the individual ... may have innocently or inadvertently ingested, inhaled or otherwise introduced the substance, he should recommend that the individual be retained in the service." The applicant had denied that he had smoked cannabis but admitted that he had been present when two friends had done so and claimed that this was the cause of the positive result. When charged, his Commanding Officer rejected his defence. The applicant exercised his entitlement to appeal to the GOC and asserted that he was "in a position to produce evidence of third parties in relation to my innocently/inadvertently ingesting a substance" and asked "for an opportunity now so to do as this matter is relevant for the purposes of consideration of the matter and decision herein." His appeal was rejected in a single sentence which simply ordered him to be discharged from the Defence Forces.

15. The judgment of the Supreme Court given by Clarke J. considered that the case in question was not a "reasons case" in the sense that the challenge to the contested decision was based upon an alleged failure to give reasons, but one based on the proposition that it was unclear from the terms of the decision whether the decision maker had "asked himself the right question." Clarke J. cited the following passage from the judgment of MacMenamin J. in *Clare County Council v. Kenny* [2009] 1 I.R. 22:

> "[A] court in judicial review proceedings cannot act on what must be, at best, a hypothesis as to the possible rationale for the decision, particularly so in the context of the array of possible reasons, some of which would go beyond jurisdiction . . . The situation required a decision so that all the parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred from what was said by the respondent."

16. The Court is hesitant to accept the proposition that the present case should be treated as depending upon the somewhat nuanced distinction made in Rawson between an absence of discernable rationale and a failure to state reasons. As counsel for the Minister correctly pointed out, it is perfectly clear that the Minister in this case asked the relevant question: it is effectively set out in the heading to the pertinent section of the memorandum namely, whether the prohibition of *refoulement* in s. 5 applied in the present case. As counsel for the Minister also correctly demonstrated, the particular extracts from country of origin reports under the headings listed in para. 10 above are direct responses to the claims made under this heading on behalf of the applicants in their representations and references to similar sources. Particularly relevant is the reference to the proposition that Muslims who converted to Christianity were at risk in areas where Sharia laws applied or where vigilante groups of Islamic fundamentalists sought to punish such converts.

17. Accordingly, counsel for the Minister argued that, unlike the *Meadows* case where the single sentence, "Refoulement was not found to be an issue," was wholly unexplained and unrelated to any earlier analysis, the corresponding sentence in the final recommendation here followed the Minister's explicit expression of the summary of the s.5 claim and the relevant quotations

thereafter.

18. The Court accepts that this case is clearly distinguishable from Rawson insofar as the memorandum demonstrates that the Minister did ask himself the relevant question and does express the relevant opinion. He addressed the statutory consideration that was obliged to be addressed by reference to the prohibition ins. 5 of the Act of 1996. What is not clear, however, is precisely why he formed the opinion that repatriating the mother would not be contrary to s. 5. In this regard, it is relevant to note that during the asylum process, considerable doubts had been expressed as regards the credibility of some parts of the personal history given by the mother. The Tribunal member, in particular, had considerable doubt as to the veracity of her claim to have fled from Nigeria to Italy; to have spent four months there and then to have decided to come to Ireland, because "[she] and her husband sat down before a computer presumably and surfed the internet to seek out a safe country and on the advice of a friend or friends that Ireland was the location they should go to." Nevertheless, the Tribunal member expressed the opinion "that this Applicant could have and should relocate to another part of Nigeria."

19. These observations are relevant because, having summarised the claim based upon the threats to her life from her Muslim father at the beginning of the s. 5 analysis, the memorandum immediately proceeds to recite the country of origin information given above. This includes extracts relating to the existence of security forces and police; the availability of "avenues of complaint;" and the freedoms of religion and of movement. This part of the memorandum draws no explicit conclusions from these extracts, but the implication is that a Christian woman threatened by a Muslim father for having converted to Christianity would have avenues of complaint available to her in Nigeria which would secure her domestic protection from the police or security forces or, alternatively or additionally, by relocating elsewhere within Nigeria. Because this assemblage of country of origin information covering different possible topics is followed directly by the opinion of the author as already quoted above without any linking explanation or particularisation of reasoning, it is not possible, in the view of the Court, to understand precisely why the Minister formed the opinion that the applicant could be repatriated without risk that the prohibition would be violated. The implication clearly arises that, in the absence of any reiteration of, or reliance upon, credibility doubts expressed in the asylum process, the Minister is accepting that this is a woman who has converted to Christianity and has been or might have been, the subject of threats to her life by her Muslim father but that, if so, she would not now be at risk on repatriation because (a) she can complain to the police or security forces who will intervene to protect her from such threats; (b) she can relocate away from her father and it is unlikely he will pursue her there; and (c) such fundamentalist religious threats are only a problem in certain northern states of Nigeria where she has never lived.

20. In these circumstances the Court accepts that the fundamental proposition advanced in support of the leave ground is correct. While it is possible and even highly probable that the hypothesis advanced on behalf of the Minister as to the rationale and reasons for the s. 5 conclusion is that suggested, the addressee of a deportation order cannot be expected to wait for the forensic analysis of the memorandum in the course of judicial review in order to understand why the crucial opinion has been reached. Although, understandably, it has not been referred to by either side in the course of the present hearing, this is an issue which was addressed by this Court in its recent judgment in *Ahuka v. Minister for Justice* (Unreported, Cooke J. High Court, 20th June, 2012). In that judgment, the Court pointed to the dangers inherent in systematic processing of large numbers of decisions taken under s. 3 of the Act of 1999, where the tendency to reply mechanically by reference to country of origin information to the headings of s. 3(6) of the Act of 1999 or s. 5 of the Act of 1996 can deflect the decision maker from the need to stand back and ensure that a coherent and intelligible explanation is apparent from the memorandum when read as a whole. It is necessary in the view of the Court that the decision should explain why the deportation order is being made and why, in particular, it is concluded that the deportee faces no risk to life or to person on repatriation contrary to the prohibition ins. 5.

21. As already mentioned above, counsel for the respondents also urged the Court to exercise its discretion not to grant the reliefs sought in this case because serious issues had arisen as to the basis upon which the mother had brought and pursued her entire application for asylum. It was said that there were considerable doubts as to her actual identity and personal history.

22. The basis for this contention is the fact that, subsequent to the deportation of the applicant's husband to Nigeria on the 11th March, 2010, the Irish Embassy in that country was approached for a C-visit visa by a Nigerian national, who intended to come to Ireland for a short period to visit a friend lawfully resident in the State, one Ayodele Timothy Sanusi. This visa application was made in the name of Rev. Sanny Idowu with a date of birth of the 2th April, 1973, who claimed to be married to a woman called "Abosede Sanni" born on the 18th January, 1977. The applicant for the visa said that he had three children living in Nigeria named Toluwalse, born on the 14th December, 1997; Peter, born on the 2nd January, 2008; and Mary, born on the 16th March, 2010. The Minister's investigations confirmed by fingerprints that the visa applicant was in fact the same person as had been deported as the spouse of the mother in the present case on the 11th March, 2010. Furthermore, the material submitted by that visa applicant to the Embassy in Ahuja sought renewal of a pre existing visa issued for entry to the State in 2006. The stamps on the passports submitted in support of the application suggested that the applicant in question had come to the State for at least a fortnight in 2006.

23. This information came to the attention of the Minister after the contested decisions in the present case had been made. On foot of it, an application was brought to have the application for leave dismissed as vexatious and an abuse of process, because the information indicated that the mother was not in fact within the jurisdiction at all, but was the spouse of the visa applicant then present in Nigeria with three children.

24. When the motion to dismiss the proceedings came before this Court, in view of the possibility that the mother and child were in fact no longer in the State, but had left unbeknownst to the Minister, the Court directed that affidavits be filed by the mother and her solicitor confirming that she was present in the State; and providing a response to the information and implications of the husband's visa application in 2010 in Nigeria. On foot of that direction, the applicant's solicitor swore a short affidavit confirming that he had personally met the mother within the jurisdiction. The mother swore an affidavit averring that she had no contact with her husband since he was deported; that she had no knowledge of, or responsibility for, the personal facts and family circumstances upon which the visa application was apparently made; and that so far as she was concerned her husband never came to the State prior to 2008 and was never employed by the Lagos State Government as he had claimed in the visa application. In other words, the gist of the mother's response is that she has had no contact with her husband since he was deported, has no responsibility for the claims he has made in his visa application, and has no explanation as to why he had claimed to have three children living in Nigeria and to have been married to a woman with a different name, different date of birth and different date of marriage. In the present circumstances it is unnecessary for the Court to decide whether the mother or her husband is telling the full truth on these matters.

25. Notwithstanding the potentially serious implications of the information and documentation contained in that visa application, the Court does not therefore consider it necessary or appropriate to exercise its discretion to withhold relief in respect of the present contested decisions. The deportation order will be quashed upon the ground of the flawed consideration of the prohibition of *refoulement* in s. 5 of the Act of 1996. It will then fall to the Minister to make a new decision upon the original proposal to make the deportation order and it will be open to the Minister to invite these applicants to make any new and up-to-date representations with any explanations they wish to have considered. In these circumstances it would be inappropriate for the Court to make any comment

upon the adequacy or otherwise of the affidavit sworn by the mother by way of response to the information given in the visa application she accepts as having been made by her husband.