Neutral Citation Number: [2009] IEHC 334

THE HIGH COURT

2009 194 JR

BETWEEN/

E. A. I. AND A. A. I.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on 9th July, 2009.

1. By order of Peart J. on 9th March, 2009 the applicants were granted leave to bring the present application for, *inter alia*, an order of *certiorari* to quash the decision of 17th December, 2008 made by the respondent Minister under s. 3(11) of the Immigration Act 1999, refusing to revoke deportation orders made in respect of the applicants on 30th May, 2008. The five grounds for which leave was granted are set out later in this judgment. The decision of the 17th December, 2008 is hereinafter refereed to as the "Contested Decision". The background to that contested decision can be quickly stated.

2. The first named applicant arrived in the State on the 9th October, 2006 from Nigeria and claimed asylum on the basis of a claimed fear of persecution if returned there in the form of a risk to her of human and degrading treatment or torture because she had been the victim of abuse, rape and incest by her father.

3. On 10th November, 2006 the second named applicant was born in the State. On 10th February, 2007 they were notified of the section 13 Report of the Refugee Applications Commissioner in which it was recommended that they be not declared to be refugees. On 9th August, 2007 they received the decision of the Refugee Appeals Tribunal, which affirmed the report and the negative recommendation of the Commissioner.

4. In response to the Minister's subsequent proposal to deport them, the applicants made representations to the Minister and applied for subsidiary protection. The applications for subsidiary protection and for temporary leave to remain were considered and rejected and on the 30th October, 2008 deportation orders were made.

5. No challenge was brought by way of judicial review to either the refusal of subsidiary protection or to the making of the deportation orders. Instead, on 17th November, 2008 an application was made on behalf of the applicants to the Minister to revoke the deportation orders under section 3(11) of the 1999 Act.

6. By letter of 19th December, 2008, signed by Eamon Bennett, an officer of the Repatriation Unit of the Irish Naturalisation and Immigration Service in the Department of Justice, Equality and Law Reform, the applicants were informed that the outcome of the consideration of the application was "that the Minister's earlier decision to make the deportation orders remained unchanged." This is the Contested Decision which is now sought to be quashed.

7. As Clarke J. pointed out in the case of *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 380, the circumstances in which a person refused refugee status can challenge the making of a deportation are necessarily limited and require the special circumstances which he describes in that judgment. It follows, obviously, that in a case where a valid deportation order exists, as here, the circumstances in which a refusal under section 11(3) of the 1999 Act to revoke such an order may be challenged are even more restricted.

8. No conditions or criteria are stipulated in the section for the exercise of the Minister's power. Clearly however, it follows from first principles that the Minister must consider fairly the reasons put forward by an applicant for the request to revoke and he must also satisfy himself that no new circumstances are shown to have arisen since the making of the deportation order which would bring into play any of the statutory impediments to the execution of a deportation order at that point such as, for example, a change of conditions in the country of origin which would attract the application of the prohibition against refoulement in section 5 of the 1996 Act.

9. The Minister is not however obliged to embark on any new investigation or to engage in any debate with the applicant or even to provide any extensive statement of reasons for a refusal to revoke. Once it is clear to the Court that the Minister has considered the representations made to him and has otherwise exercised his power to decide under section 3(11) in accordance with all applicable law, the Minister's decision is not amenable to judicial review by this Court.

10. In this case, the letter of 17th December, 2008 communicating the decision is accompanied by way of statement of the reasons for refusal, by a 13 page memorandum comprising the analysis made by the Repatriation Unit of the revocation request. This demonstrates that consideration was given in some detail to the particular representations made including the final letter of 4th December, 2008, informing the unit that the applicant was pregnant and in Tallaght Hospital with resulting complications. In addition, the possible intervention of the statutory prohibition on refoulement was addressed and extensive country of origin information was consulted on the conditions in Nigeria relevant to protection against the persecution claimed and to the possibility of internal relocation. Further, account was taken of the position of the second named applicant as an Irish born, non-citizen child and the impact of Article 8 of the European Convention on Human Rights was addressed as regards the private life and family life of both applicants.

11. It was concluded that in the light of the consideration of all of those factors there was nothing to warrant revoking the existing deportation orders. On that basis the Repatriation Unit recommended to the Minister that the revocation of the orders was not justified and the letter of the 17th December was then sent to the applicants informing them of the

refusal.

12. It is in those circumstances that the Court is asked to consider the grounds now advanced as to why the refusal to revoke is claimed to be unlawful. Before examining the grounds, it must be emphasised that what is sought to be reviewed is the decision made under section 3(11) not to revoke. This Court is not concerned with the legality, much less the merits, of the earlier decisions to refuse subsidiary protection and to make the deportation orders, notwithstanding the impression that might be given by the terms in which some of the grounds are phrased. These grounds are as follows.

Ground A
13. "The provisions of section 3(11) of the Immigration Act 1999 (as amended), reserve to the respondent the discretion to amend or revoke a deportation order. The decision to revoke deportation orders directed to the applicants is not made by the respondent."

14. This ground is unfounded. It is submitted that because the refusal communicated by the letter is signed by Mr. Bennett and accompanied by the memorandum setting out the analysis of the application which bears the signatures of the officers who have carried out and then confirmed the analysis, the decision has not been made by the Minister personally as required by s. 3(11) of the 1996 Act. It was pointed out that the memorandum does not even bear the stamp "Approved by the Minister" which appears, for example, on the memorandum of the file note attached to the notification of the deportation order in this case.

15. Section 3(11) provides, "The Minister may by order amend or revoke a deportation order." Thus, the act of amending or revoking an order must be carried out under the Minister's official seal with the same formality as the deportation order itself, - presumably because a deportation order may require to be presented to a receiving authority in the country of origin and should therefore be revoked with the same formality. No such formality is required for a refusal to revoke because it changes nothing. It is a mistake, in the Court's judgment, to characterise the decision as not having been made by the Minister but by an official to whom the Minister has delegated his power. There has been no delegation. The refusal decision is made in the name of the Minister with his authority and the Minister retains responsibility and accountability for it. In the Court's judgment, that administrative procedure is entirely in conformity with the procedure approved by the Supreme Court in the cases of *Tang v. Minister for Justice*, [1996] 2 I.R. 46, and *Devaney v. Shields & Ors.*, [1998] I.R. 230, adopting in this jurisdiction the so called "Carltona principle" originating in the United Kingdom case of *Carltona Ltd v. Commissioner of Works*, [1943] 2 All E.R. 560. It was not necessary therefore that the Contested Decision be made and signed personally by the Minister; it was validly and effectively made as it stands.

Ground B
16. "The respondent fails and omits to give a substantial reason why the applicant should be deported; refusing to have regard to the law as found by the Supreme Court in *Dimbo v. Minister for Justice,* 1st May, 2008."

17. This ground is misconceived. There was as such no obligation on the Minister to give a substantial or any reason why the applicants should be deported. Those reasons were given when the deportation orders were made and the representations made to the contrary were rejected. Those reasons effectively became definitive when the validity of the deportation orders was not challenged. In the absence of any new information or changed circumstances to suggest that the original reasons were no longer tenable, there was no obligation on the Minister to provide new reasons for giving effect to the existing orders. His duty in law, at most, was to consider the reasons for the request for revocation and this was clearly done. In fact only two representations in that regard were made.

18. The first submission was a reiteration of the assertion that the applicant had been abused and raped by her father with the complaint that one particular report had not been considered by the Minister prior to making the deportation orders. Quite apart from the fact that this submission is in effect a belated attempt to attack the validity of the decision to make the deportation orders, the document in question is expressly mentioned on page 2 of the memorandum accompanying the letter of 17th December, 2008. The analysts clearly preferred, however, the content of the extensive country of origin information set out on the succeeding ten pages of the memorandum to that quoted in the applicants' submission.

19. The second submission was to the effect that a deportation of the minor applicant would be disproportionate and thus not compatible with the criteria enunciated by the Supreme Court in its judgments of 1st May, 2008 in the *Dimbo* case. Again, apart from the absence of any new circumstance identified in respect of the child since the consideration of her position on the making of the deportation order, no argument has been advanced as to how or why it would be considered disproportionate to deport a 2 year old child with her mother, who is her only parent, and her only relative in the State.

Ground C
20. "The respondent fails and omits to consider whether protection from incest was available to the first named applicant in Nigeria; *Ultra Vires* the provisions of Section 5 (1)(a) of the European Communities (Eligibility for Protection) Regulations 2006."

21. The argument advanced here was that there was an insufficient investigation by the Minister into "whether or not incest is a crime in Nigeria" which is said to be required by regulation 5(1)(a) of the 2006 Regulations. Again, this is a further attempt to reopen the decision refusing subsidiary protection under those regulations. For that reason alone it cannot be accepted. However and in any event, the applicant's assertion from the outset was that she had been the victim of incest because she had been violently abused and raped by her father. At all stages of the asylum procedure, up to and including the making of the deportation orders and the Contested Decision, extensive inquiry was undertaken into the availability of internal protection in Nigeria for victims of sexual abuse and rape. Approximately eight pages of the memorandum attached to the letter of 17th December, 2008 are devoted to those issues. It is disingenuous, if not tendentious, for the applicant to seek to argue at this stage that an inquiry should have been undertaken to ascertain whether, independently of the rape she suffered, the fact that she was by her father put her at risk of a crime of incest if returned and whether that would constitute a distinct offence.

Ground D
22. "The refusal to afford the applicants protection is contrary to the State's obligations under the provisions of Section 3(1) of the European Convention of Human Rights Act 2003 to perform its functions in a manner which is compatible with the Convention; whereby under Article 3 it has a positive obligation to ensure that no person shall be subjected to torture or to inhuman or degrading treatment."

23. Again, as has been pointed out above, the claim to a fear of persecution in the form of a risk of violent abuse and rape had been fully and definitively addressed in express terms in the earlier decision to refuse subsidiary protection. In particular, in the memorandum of analysis of the application for subsidiary protection in the case of the minor applicant, the issue defined and then addressed was explicitly stated to be, "whether the applicant would be subjected to torture or inhuman or degrading treatment or punishment of an applicant in the country of origin due to her young age." The fact that Article 3 of the European Convention of Human Rights also prohibits torture or inhuman or degrading treatment does not require a second and distinct inquiry or analysis to be made in respect of the same facts.

Ground E
24. "The respondent fails and refuses to have regard to the best interests of the second named applicant, thereby failing in its obligation to apply that principle in its administrative decisions in contravention of the provisions of Article 3 of the United Nations Convention on the Rights of the Child 1989."

25. It is again clear from the memorandum of analysis that the interest of the child in this case was expressly considered as regards the implications for her of non revocation of the deportation order from the point of view of her family and private life as protected by Article 8 of the Convention. In reply to a question from the court, counsel for the applicant was unable to identify in concrete terms any other specific best interest of this child which had in fact been omitted from consideration.

Ground F
26. "The deportation of the applicants would result in refoulement in breach of the provisions of Section 5 of the Refugee Act 1996, as amended."

27. Again, this is clearly an attempt to re open an issue expressly dealt with in the decisions on the making of the deportation order and the refusal of subsidiary protection and to do so in the absence of any indication of a change in circumstances which would render the prohibition newly applicable. In addition, the section 5 prohibition is directly addressed to that effect on page 2 of the memorandum of analysis.

28. The court considers fallacious the submission that the finding that protection by relocation is possible to the applicant constitutes an acceptance that there exists a risk to her so that the refusal to revoke is *ultra vires*, section 5(2) of the 1996 Act. That subsection provides that a person's freedom is regarded as threatened if she is likely to be subject to serious assault. In the present case, the only threat of serious assault to the applicant comes from her father. If she relocates away from her father the risk no longer exists.

29. For all of these reasons the court is satisfied that none of the grounds has been made out and the application will therefore be refused.