Neutral Citation Number: [2010] IEHC 509

THE HIGH COURT

JUDICIAL REVIEW

2010 286 & 272 JR

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, THE REFUGEE ACT 1996 AS AMENDED AND IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN:

E. I. AND B. I. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND E. I.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE ATTORNEY GENERAL, IRELAND

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Ryan delivered the 15th October 2010

1. This is an application for leave to apply for judicial review of deportation orders made by the first-named respondent in respect of the applicants dated 23 November 2005 and 23 February 2010. The hearing took place on 6-7 October 2010. Mr Hugo Hynes S.C. appeared with Mr James Healy B.L. for the applicants and Ms Siobhán Stack B.L. appeared for the respondents. I propose to deal with the merits of the case before considering the question of delay.

2. The first applicant, a Nigerian national, claimed asylum in this State on 9 August 2004 on the basis that she was a member of a particular social group, namely, a person at risk of female genital mutilation (FGM) and as a person trafficked into Ireland for sexual exploitation. Her application was prioritised, without objection from the applicant, and on 15 September of the same year, the Refugee Applications Commissioner (RAC) recommended that she should not be declared a refugee. The Refugee Appeals Tribunal (RAT) affirmed this recommendation on 11 July 2005. A deportation order was made by the first respondent (`the Minister') in respect of the first applicant on 23 November 2005. In June 2007, the applicant instituted High Court proceedings seeking to compel the Minister to accept and process her application for subsidiary protection. An application for subsidiary protection was made on 15 June 2007 and refused on 17 July 2007. The applicant was arrested on 16 June 2009 for failing to present as required. She was released when she stated she wished to make an asylum application on behalf of her son.

3. The second applicant is the son of the first applicant and was born in this State on 19 April 2005. Asylum was claimed on his behalf by his mother on 7 July 2009. This application was also prioritised, again without objection from the first applicant. His claim was based entirely on his mother's alleged experiences in Nigeria and Ireland. On 24 July 2009, the RAC recommended that he should not be declared a refugee. On 11 November 2009 the RAT affirmed this negative recommendation. An application for subsidiary protection was made on 14 December 2009 and was determined on 8 February 2010. On 23 February 2010, the second applicant was notified that the Minister had made a deportation order in respect of him.

4. The applicants' central claim is that the respondent failed to consider their claims in accordance with the Supreme Court decision in *Meadows v MJELR* [2010] IESC 3 which criticised a concluding sentence used in a report accompanying the deportation order that "Refoulement was not found to be an issue in this case." Murray C.J. held that this phrase was capable of multiple interpretations which meant it was not possible to discern from the decision the rationale upon which the Minister decided that no risk of refoulement arose. In the instant case, the letter notifying the first applicant of her intended deportation used the same phrase that was criticised in *Meadows*. It was submitted that, as in *Meadows*, no reasons were apparent from the decision or the memorandum containing the examination of the first applicant's file as to why it was decided that the provisions of s.5 Refugee Act 1996 were complied with. It was argued that this meant that no consideration was present which would allow a court in judicial review proceedings to assess whether the decision to deport was a rational one.

5. The applicants cited the case of *D. [a minor) and another v Refugee Applications Commissioner* [2010] IEHC 172 where Cooke J. granted leave to argue that:

> a. The processing of the application was unlawfully prioritised or accelerated as a result of a direction given by the respondent which is incompatible with the provisions of Article 23 of Council Directive 2005/85/EC (`the Procedures Directive');
>
> b. The said procedure deprived the applicant of an effective remedy against the first instance determination of his asylum application before a court or tribunal in compliance with Ch. V of the said Directive.

6. In relying on this grant of leave, counsel on behalf of the applicants argued that these applications for asylum were unlawfully prioritised having regard to the Procedures Directive and that, although the Immigration Act, 1999 allows for the option of judicially reviewing a deportation order, this is not an effective remedy under the Procedures Directive.

7. The principal basis for the applicants' claim is the Supreme Court decision in *Meadows*. The second ground based on the decision to grant leave by Cooke J. in a separate case seems to me to be wholly inapplicable and I will briefly refer to it before returning to the

main point.

8. There are key distinctions between the present case and *D. [a minor] and another v Refugee Applications Commissioner* [2010] IEHC 172. The first applicant's deportation order predates the coming into effect of the Procedures Directive so it simply does not arise in the mother's case. In respect of the second applicant, Counsel sought to rely on *D.* to challenge the decision to prioritise his application and in failing to provide an effective remedy against the RAT decision and/or deportation order. However, the *D.* case was concerned with providing an effective remedy against the first instance determination of the applicants' application for asylum; it did not refer to or discuss deportation orders. In *D.,* leave to challenge the RAC decision was refused in respect of an applicant who had gone through the Tribunal process as the second applicant here has done. The grant of leave in D. therefore, has no bearing on the instant case.

9. Turning to the applicants' central argument; the decision of the Supreme Court in *Meadows*, the question seems to me to be the following: is this case similar to *Meadows*? Counsel for the respondent cited the decision of Hanna J. in *Ugbo and Buckley v MJELR* (Unreported, March 5, 2010) where the learned judge interpreted *Meadows* to mean that the Minister is required to give reasons as to why there is no risk of refoulement only where a claim or factual material to ground a risk pursuant to s.5 Refugee Act, 1996 is put forward. In this case, no claim of any threat in relation to refoulement was made. Nevertheless, the respondent devoted two pages of the first applicant's report to examining the issue of FGM before reaching any conclusion.

10. In relation to the second applicant, the only possible reference to a risk of refoulement occurred in representations made to the Minister on 14 December 2009 stating "The applicant, his mother instructs, will not be afforded optimum access to basic human rights if forced to return to Nigeria." Despite the vagueness of this statement, the respondent nonetheless considered the human rights situation in Nigeria and on the basis of cited COI concluded that there was no risk of a breach of the principle of non-refoulement if the second applicant returned to Nigeria.

11. It seems to me that, in circumstances where no real risk of refoulement was claimed, in carrying out these assessments of the alleged risk to the applicants in Nigeria, the respondent went beyond what was required in *Meadows* where Murray C.J. stated that "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 [is] self-evident."

12. In these circumstances, it seems that the invocation of Meadows is somewhat opportunistic. Nevertheless, the Minister did take up the question and it seems to me that the applicants are entitled to argue the invalidity of the consideration and the reasons even if the Minister may have undertaken more than he was legally required to do.

13. In my view, the decision in *Meadows* is not essentially about form but rather about substance. Does the decision convey sufficiently the rationale behind it? The extent of the similarity of the expression of the reasoning is of course relevant to that question but is not in itself decisive. The case must be viewed in its proper factual context. Murray CJ said in Meadows that the "rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context."

14. The letter of notification does not convey anything about the reasoning process. One must look at the background report to the Minister to see if it reveals the reasons for deciding that refoulement did not arise in the case. That was prepared by an Executive Officer and it is noted that it went to superiors at Higher Executive Officer and Assistant Principal Officer level, who endorsed it with their own observations. Then it went to the Runai Aire and the report is stamped as having been approved by the Minister. No complaint can be made as to the levels at which the case was considered.

15. Is the rationale of the decision evident in the report? That report, in effect, said: Here is the country of origin information that is available relevant to refoulement and it does not give rise to an opinion that the applicants' lives or freedom are or would be threatened. In those circumstances, the conclusion is justified that deportation would not breach s.5. The reason is to be found in the country information in so far as it reveals the absence of grounds for having the relevant opinion.

16. Let me conclude this topic by saying a word about words. The applicants' argument focuses on the words used rather than on the material basis of the decision, which as I have said elevates appearance over reality. It is not easy to devise all unimpeachable formula of words to express the reasoning behind a negative opinion or, to put the task more accurately, the reasons for the absence of an opinion. The point is that there is no or no sufficient material to cause the Minister to form the necessary opinion for s.5 to operate as a bar to deportation.

Delay

17. The second applicant requires an extension of some 10 days in order to bring these proceedings. In the circumstances of the case generally and having regard to the explanation offered I allow the extension in his case. His mother's position is very different.

18. The first applicant's deportation order was dated 23 November 2005 and notified to her by letter dated the 29 November 2005. These proceedings were instituted on 12 March 2010. From the date the first applicant was notified of the order, this is a delay of **4 years, 3 months and 12 days**. The statutory time-limit as stated in s.5 (2) of the Illegal Immigrants (Trafficking) Act, 2000 is **14 days** which can be extended if the applicant shows `good and sufficient reason.' The principles for an extension of time were reviewed by Finnegan J. in *G.K. v Minister for Justice* [2002] 1 ILRM 81. In that case, the learned judge stated that a relevant factor to be considered was the period of delay and that "If the delay is very short say a matter of a day or two a very slight justification only for the same would be required to justify the Court exercising its discretion in favour of an Applicant." Presumably, the opposite is also true; where a delay is of an excessive nature, a detailed justification would be required. Other factors to be considered are the reasons for the delay, the prima facie strength of the applicants' case and the blameworthiness of the applicants and their lawyers. Counsel for the applicant put forward an explanation that can only be described as weak at best. Put simply, it is that the delay was not the fault of the first applicant as she examined all options open to her from the date of the deportation order and that the introduction of subsidiary protection application and a change in lawyers representing the applicant contributed to the delay. This reason is neither good nor sufficient. The Supreme Court in *C.S. v MJELR* [2005] 1 IR 343 stated that in such a case, "the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself." Here, there is no explanation for each month or even year of the delay. There is nothing on affidavit to criticise the applicant's former legal advisers, the Refugee Legal Service.

19. A further factor when considering whether to grant an extension of time is the intention of the applicant to challenge the impugned decision. In the instant case, the deportation order of 2005 predated the EC (Eligibility for Protection) Regulations, S.I. 518/2006 which would have granted the applicant an automatic right to apply for subsidiary protection. In 2007, the first applicant

brought proceedings to compel the respondent to apply his discretion to allow her to make a subsidiary protection application. These proceedings did not challenge the validity of the deportation order. It is clear that the 2007 proceedings to bring what became an abortive application for subsidiary protection constituted implicit acknowledgment of the validity of the deportation order and demonstrated that the applicant had no intention of challenging that order. I think that to agree to, or even to consider, such an extension of time in these circumstances would be to undermine the statutory scheme in a flagrant manner.

20. For all these reasons, I refuse this application.