Neutral Citation: [2016] IEHC 400

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 444 JR]

BETWEEN

F. A. AND A. A. M.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 11th day of July, 2016

1. The applicants seek leave to apply for *certiorari* quashing a visa appeal decision in respect of the second named applicant dated 23rd May, 2016. The first named applicant says that he is a Somalia national, born on the 12th February, 1980, who came to Ireland in December 2003. He applied for asylum but was refused. In April 2005 he travelled to the United Kingdom and on at least two occasions between 2006 and 2008 he made an application for asylum in the United Kingdom.

2. Further to the provisions of the Dublin II Regulation, the first named applicant was returned to Ireland in August 2006. He appears to have made a further entry into the United Kingdom thereafter. A second transfer request was made by the United Kingdom authorities but Mr. A. returned to Ireland voluntarily on the 21st August, 2008. He made an application for subsidiary protection in Ireland but thereafter withdrew it.

3. As an exceptional measure, Mr. A. was granted permission to remain in the State for one year on the 21st October, 2011, and his temporary leave to remain has been renewed on a number of occasions and is valid until the 14th December, 2018.

4. The first named applicant applied to the respondent for a visa on behalf of the second named applicant to enter Ireland. He says that the second named applicant is his wife. It is said that she is the first named applicant's second cousin and that she lives with his mother in Ethiopia having left Somalia in 2002. She is described in the papers as an undocumented refugee residing in Ethiopia, and I understand this to mean a person who claims to be entitled to refugee status though no declaration in that respect has been made.

5. The visa application and appeal were examined in accordance with a policy document entitled "Non-EEA Family Reunification" published by the Minister in January 2014. The Minister says that the document was prepared in observance of Art. 41 of the Irish Constitution and Art. 8 of the European Convention on Human Rights.

6. The decision maker in this case noted the financial situation of the sponsor. Eight transfers from the first named applicant to the second named applicant made between the 17th February, 2015, and the 18th April, 2016, were identified and noted. These were in varying amounts between approximately €180.00 and approximately €340.00. Five Tesco mobile top-up vouchers were provided, said to be evidence of communication between the applicants. These were noted by the decision maker.

7. The decision maker noted and described the circumstances of the second named applicant. The decision maker stated as follows:-

> "I have considered the issue of finances and in doing so I have born in mind all the circumstances of the case to include the specific matters relating to the hardship endured as a result of death of child (sic), the applicant's stated current status of undocumented refugee in Ethiopia indeed that the applicant herself became and remains very unwell. I have considered submissions made that [the applicant's] health has been affected by the current circumstances. I have also considered submissions made that it would be unreasonable to expect that [the first named applicant] should leave the State to join his wife in Ethiopia.
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> I have considered the applicant's stated undocumented refugee status in Ethiopia. I have also considered the stated medical circumstances on the basis of medical certificate provided. The medical certificate itself has been deemed to be of poor quality. Little if any contact details were provided in order to afford the opportunity to verify or establish the stated medical particulars of the applicant.
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> The name of physician attending the applicant was not disclosed. A yahoo.com email address was evident. A phone number was not provided nor was the document on headed paper. Some of the particulars made mention of in the report could be deemed to be inconsistent as regards diagnosis time frame. In this regard I refer to date of report, date of child's passing and diagnosis in respect of 'severe Depression and Post partum blues'. Whilst I am not a medical professional nor am I qualified in the field of psychology, I find it somewhat out of sync that the diagnosis provided in respect of 'severe Depression and Post partum blues' could be arrived at in the timeframe evident. Whilst I am not discounting that the onset of severe Depression and Post partum blues could quite likely and indeed more likely than not arise, the diagnosis as presented in tandem with the quality of the document, gives rise to reasonable concerns. I further note that an up to date medical document\opinion has not been provided in respect of the applicant to afford me the opportunity to assess and consider the current circumstances. Further no medical documentation has been provided in respect of [the applicant]. Accordingly, little evidential weight if any can be afforded to the current medical circumstances of either party.
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> I am not satisfied having considered all of the circumstances of the case that sufficient reasons exist that would warrant

> an exemption, as submitted by the applicant's advocate in respect of financial matters. The applicant's advocate in making submissions would appear to be seeking an almost complete derogation from the financial requirements in respect of a 'join spouse' visa application. In considering the particular circumstances of this case, I am mindful of the policy document and what was envisaged in setting out the particulars of same. However, I am of the view that Subsection 1.12 as referred to by the applicants' advocate and submissions made, i.e. decision maker discretion should only apply in the most exceptional of circumstances. Whilst the circumstances of the loss of a child are without doubt a particularly significant burden and cause for upset to the parties concerned, I as the decision maker must be mindful of how an exemption to the extent of the one sought in this instance, may lead to similar decisions in cases where financial concerns arise. The particular financial and self sufficiency circumstances of the reference\sponsor in this instance give rise to reasonable concerns. A consequent reasonable concern arises that in circumstances where a 'join spouse' visa was to be granted, that this would more likely than not give rise to a further burden on public funds and or public resources.
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> The sponsor in the State [the applicant] has not demonstrated that he meets the financial criteria set out in paragraphs 17.4 and 17.6 of the Policy Document. If the applicant is granted a visa to join her spouse in the State, she may become a burden on the State.
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> …
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> I am further not satisfied that sufficient documentary evidence has been provided to establish ongoing social, emotional or economic ties between the parties concerned.
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> Having considered all the circumstances of the case at hand, in the round, I am not satisfied that the applicant and the reference\sponsor in this State have demonstrated that they fulfil the requirements as set out the Policy Document on Non-EEA Family Reunification to warrant the granting of the visa sought. (sic)"

8. The decision then proceeds to examine the matter under Art. 8 of the European Convention on Human Rights and concludes that, in refusing the visa, no lack of respect for family life under Art. 8.1 of the Convention will occur. The decision then proceeds to examine the application under Art. 41 of the Constitution. It is accepted that family rights under Art. 41 of the Constitution arise but it is indicated these are not absolute. The decision maker concludes:-

> "While it may be the case that [the first named applicant and the second named applicant] would prefer to maintain and intensify their links in Ireland, the right to family life under the Constitution does not guarantee a right to choose the most suitable place to develop family life."

9. Seven grounds were advanced in favour of a grant of leave to seek judicial review in this case. The court is cognisant of the fact that the applicant was only required to demonstrate arguability of these grounds at this stage (see *G. v D.P.P.* [1994] 1 I.R. 374).

10. The first ground is as follows:-

> "A reference to the [non-E.E.A. Family Reunification] Policy Document is not an adequate consideration of the Constitutional family rights of the applicants or of the individual circumstances of applicants for 'join spouse' visas."

11. This ground is not arguable because the decision maker did not attempt to address the Constitution and/or other legal rights of the applicants by a mere reference to the policy document on Non-E.E.A. Family Reunification. That document itself was examined in detail and was not dealt with by a mere reference thereto. In addition, the decision maker carried out a detailed analysis of the application by reference to Art. 8 of the European Convention on Human Rights and to Art. 41 of the Constitution.

12. The second ground advanced is as follows:-

> "The strong Constitutional right of a long-term migrant such as the first applicant to have a family life based on marriage in Ireland, where he has lived for many years, was engaged by the application. The respondent failed to identify, consider, protect or vindicate the Constitutional rights of the applicants and/or to respect the Article 8 ECHR rights of the applicants to have a family life."

13. The decision maker fully accepted that Constitutional and E.C.H.R. rights of the applicants associated with marriage and family life were engaged and were required to be addressed. Having considered the extent of these rights, the decision maker concluded that the rights that they enjoyed under the Convention and under the Constitution would not be breached by refusing the visa sought. This ground must be rejected because the decision maker did not fail to identify or to consider the Constitutional rights of the applicants or of their rights arising under the E.C.H.R..

14. It is not indicated how the refusal of the visa fails to vindicate or to protect the rights asserted in circumstances where non-E.E.A. nationals do not enjoy rights to live in the State. They do not enjoy rights to enter the State. They do not enjoy the right to enjoy family life in the State unless they have permission to be in the state. They may be permitted to live in the State or to enter the State and then to enjoy family life in the State but this a matter for the relevant Minster and her officials to process.

15. The mere denial of a visa does not establish a breach of rights. A bald assertion that rights have been violated notwithstanding the existence of a lengthy decision where rights are identified and analysed will not suffice to attract a grant of leave to seek judicial review because the court is not informed what argument supports the conclusion that rights have been violated and not vindicated. The point cannot be arguable in the absence of an argument. It is apparent from the tone of this ground, and indeed of the application in general, that the applicants disagree with the result and seek leave to pursue *certiorari* for that reason. More is required to grant leave. This court is not a visa appeal court.

16. The third ground advanced is:-

> "It was unreasonable or disproportionate to find that the applicants could reasonably be expected to establish and enjoy family life in Ethiopia or Somalia given their circumstances."

17. The decision maker does not say that the applicants could reasonably be expected to establish family life in Ethiopia or Somalia. This ground is based on an assertion of a nonexistent finding in the decision in suit and, therefore, cannot be the basis of arguable illegality.

18. The fourth ground advanced was:-

> "It was unreasonable or disproportionate to find that the applicants' family life was less important because they had had limited contact with each other before marriage. The applicants are related and had a marriage arranged through their families. The marriage certificate was verified and the marriage was considered to be valid marriage by the respondent." (sic)

19. This ground is not arguable because the decision maker did not find that the applicants' family life was less important because they had limited contact with each other before marriage. The ground cannot succeed because it is based on a fundamental misunderstanding of the decision in suit and an assertion as to a finding by the decision maker which was not made.

20. The fifth ground advanced is as follows:-

> "The respondent applied a fixed policy being the income thresholds in the Policy Document without really considering the individual and unusual circumstances of the case".

21. Even a cursory reading of the decision in suit indicates that the opposite is in fact what happened. The decision maker carefully considered the financial circumstances of the first named applicant and the submissions made in respect of the criteria in the policy document. The application for a visa contended that if the first named applicant did not meet the financial criteria of the policy document then the exceptional measures provisions in that document should be applied, and it can be seen that very careful consideration was given to whether the financial guidelines in the policy document might be disapplied in this case. The case made in favor of granting exemption from the financial criteria in the policy document was carefully and fully considered. The decision making in this case reveals the opposite of the application of a fixed policy.

22. The sixth ground advanced in this case is as follows:-

"Further, or in the alternative, the respondent failed to have regard to relevant considerations being the money transfers to Ethiopia, the difficult situation for undocumented refugees from Somalia in Ethiopia and the particular problems of the second named applicant following the death of her child."

23. As a matter of fact it is clear that the decision maker had full regard to the money transfers to Ethiopia and gave careful consideration to the difficult situation arising from the death of the second named applicant's child. This ground therefore fails to meet the threshold of arguability to attract a grant of leave. The decision maker referred on eight occasions to the second named applicant's situation as an undocumented refugee from Somalia in Ethiopia. The particular allegation of illegality is that the decision maker:-

> "failed to have regard to … the difficult situation for undocumented refugees from Somalia in Ethiopia …"

24. In my view no illegality attached to the fact that on seven occasions when the decision maker referred to the fact that the second named applicant was an undocumented refugee in Ethiopia no express or particular reference was made to the fact that such circumstances are difficult – as they self-evidently are. Being an undocumented refugee anywhere in the world is self-evidently a difficult circumstance.

25. On the eighth occasion when this matter is addressed, it is expressly noted that the second named applicant's circumstances are that she is living in a refugee camp in Ethiopia. Noting that the second named applicant is an undocumented refugee living in a refugee camp in Ethiopia inherently acknowledges that her circumstances are difficult. Neither the visa application nor the appeal submission makes reference to a particular difficulty attaching to the circumstances of the second named applicant, other than the difficulty associated with living in a refugee camp as an undocumented refugee from Somalia in Ethiopia, and these circumstances are expressly noted by the decision maker. Therefore, the sixth ground set out in the pleadings is not arguable and must fail.

26. The seventh ground alleges without elaboration that:-

> "…the applicants surely fulfilled the unusual or exceptional circumstance referred to in the Policy Document that might allow for family reunification."

27. This ground, as expressed, could not constitute an arguable basis upon which this court could grant leave to seek to set aside the decision in suit. The ground is expressed as a point of mere disagreement with the conclusion of the decision maker without laying any basis of illegality or any charge of an illegality in respect of the conclusions of the decision maker. As it does not reveal arguable illegality it must fail.

28. In these circumstances leave to seek judicial review of the decision in suit is refused.