Neutral Citation: [2014] IEHC 141

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 226 J.R.]

BETWEEN

P.O. AND S.O. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND P.O.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 21st day of March, 2014

1. The applicants seeks an order of *certiorari* quashing a decision made by the first named respondent on the 25th February, 2013, affirming the deportation orders made against them following a grant of leave to apply for judicial review on the 22nd April, 2013 (Clark J.).

2. The applicants are Nigerian nationals. The first named applicant arrived in the State on the 11th September, 2006 and applied for asylum on the 26th September. On the 20th October, the applicant's son, the second named applicant was born in the State, but is not entitled to Irish citizenship.

3. On the 1st October, 2007, the Refugee Applications Commissioner refused to recommend that the applicants be granted refugee status. No appeal was taken against this decision; instead judicial review proceedings issued. This challenge was subsequently withdrawn in 2010.

4. On the 20th January, 2010, a "three options" letter was sent to the applicants, detailing the State's intention to deport them on foot of the failed asylum claim. No application for subsidiary protection was made at this time and instead the applicants' case was considered by the respondent under s. 3 of the Immigration Act 1999. The deportation orders were signed on the 9th May, 2012. The applicants were notified in the appropriate way.

5. An application to revoke the deportation orders was made by the solicitors for the applicants on the 21st September, 2012, under s. 3(11) of the Immigration Act. In a decision dated the 25th February, 2013, the respondent refused to do so. The applicants now seek to quash the decision by way of judicial review.

The first named applicant's asylum claim

6. The first named applicant was born and raised in Lagos and was a skilful footballer, playing to international level for Nigeria and representing her country in the Women's World Cup. Though originally a Roman Catholic, she was converted to Pentecostalism by her husband. Her family did not approve of this conversion or the fact that her husband was a member of the Osu caste. She claims that her mother attempted to poison her husband, and the couple moved away to Jos.

7. While in Jos, the first named applicant met a friend, A., a Muslim, who was converted to Christianity after interacting with the applicant and her Church. She claims that a month after the conversion, A. disappeared and that her family held her responsible. She claims that the family pursued her and attacked the applicant's brother in law, a pastor and her step daughter.

8. The first named applicant went into hiding and her husband arranged her safe passage out of Nigeria. She claims that she travelled with an agent under a Nigerian passport that was not her own and that her own passport is held in safe keeping in a bank in Nigeria.

9. She claims that she did not make any complaints to the police about the various threats to her safety. She claims that she could not relocate in Nigeria as she is a well known footballer. She feared that her son would be subject to the same dangers if returned to Nigeria.

10. The Refugee Applications Commissioner raised issues of credibility concerning this story. It doubted her claim to be a member of the Roman Catholic Church because of her failure to name any of the Roman Catholic Sacraments and because she had not heard of Protestants before her conversion. A further credibility issue arose because the applicant did not know the pastor of the Redeemed Christian Church to which she said she had converted. The headquarters of the Church was in Jos.

11. The first named applicant fears harm at the hands of her mother and the family of her disappeared friend A. Though she escaped from her own family after marrying her husband, the applicant was not followed or found by her family in Jos. She claimed that she did not go to the police as they would do nothing to help her because it was a family matter.

Grounds 1(a), (b) and (c)

12. Counsel for the applicants contend that the Minister's decision ought to be quashed on the basis that it was reached in breach of fair procedures because the official making the decision used deficient country of origin information and largely ignored material submitted on behalf of the applicants.

13. The first named applicant contends that the information supplied by her solicitors was of a higher quality than that relied upon by the respondent and should have been preferred. In order to attract relief on this basis, the applicant must demonstrate a high degree of carelessness on the part of the decision maker or a fundamental error apparent from the materials. In *E.E. v. Refugee Appeals Tribunal* [2010] IEHC 135, Cooke J. stated:-

> "In that regard, the approach of the Court to the reliance placed by the Tribunal on such information is clear. It is for the Tribunal member to weigh and assess relevant information drawn from country of origin documentation and to decide what value or weight should be accorded to various parts of it, having regard to its relevance, the authoritative quality of its source, its apparent reliability and so forth. . . . the Court should intervene to disturb a decision only where it is shown that some fundamental mistake has occurred in the use or interpretation of the available information or where the conclusion reached is manifestly at variance with the content and obvious effect of the documentation."

14. A large body of country of origin information was submitted, collated and assessed by the respondent. The information submitted on behalf of the applicant consisted of:-

> (1) "Country Report on Human Rights Practice for 2011 in Nigeria" United States State Department (published May, 2012);
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> (2) "Nigeria: Police abuse rife despite anti corruption efforts". Integrated Regional Information Networks – published the 20th August, 2010;
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> (3) "Everyone's in on the game: corruption and human rights abuses by Nigerian police force" Human Rights Watch 17th August, 2010.
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> (4) Amnesty International 2012 Report.

15. The respondent considered a large body of country of origin information from sources such as the United Kingdom Home Office, the United States Department of State, an Australian Government Report, Amnesty International and a wide range of articles published by both international and Nigerian journalists. They detailed the reforms instigated by the Nigerian Government against police corruption and the policy concerning protections available in Nigeria. They were as follows:

> (a) United Kingdom Home Office Report for Nigeria. 6th January, 2012;
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> (b) Article "Nigeria Police Reforms in Era of Transformation", James Odaudu, 20th September, 2011;
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> (c) Article from Nigerian Best Forum, 24th November, 2011
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> (d) Article, "Senate to Repeal Police Act, Back Reform" in All Africa, 30th November, 2011;
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> (e) Amnesty International press release "Effective police reform must end legacy of human rights violations" 26th January, 2012;
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> (f) Article in Vanguard, 25th January, 2012;
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> (g) Article in All Africa published in February, 2012;
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> (h) Report from Integrated Regional Information Networks "Nigeria: Urgent need for police reform", 18th April, 2012;
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> (i) Article in Punch, 5th May, 2012;
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> (j) Article in Vanguard, 12th June, 2012;
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> (k) Article in Vanguard, "Jonathan to inaugurate code of conduct for police, 6th January, 2012;
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> (l) BBC News Article 19th December, 2011;
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> (m) International Religious Freedom Report, 30th July, 2012;
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> (n) United States Department of State Report, 30th July, 2012;
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> (o) Article, Al Jazeera news, 12th May, 2012;
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> (p) Article, The Nigerian Voice, 30th May, 2012;
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> (q) Article, Voice of America, 17th May, 2012

16. It is clear from the above that most of the information sourced and consulted by the first named respondent was more recent than the information supplied by the applicants' solicitors. Three of the reports relied upon by the applicant date from 2010 and 2011, predating the deportation decision.

17. The respondent relied upon a wider body of more recent information that details the reforms put in place by the Nigerian government and the challenges and developments arising out of this policy. It is clear from the respondent's decision that due regard was given to the country of origin information submitted by the applicant and it was acknowledged, referenced and weighed by the respondent as appears at pp. 6, 7, 18, 25 and 27 of the decision. Furthermore, p. 35 contains the following statement:-

> "Full consideration has been given to the country of origin reports submitted by the legal representatives and their representations made on behalf of the applicant"

18. I am satisfied of the following matters. Firstly, the country of origin information relied upon by the respondents is more recent than that submitted by the applicant. In volatile situations, the political and social climate of a country may change exponentially in a short time. It is, therefore, of paramount importance that the information relied upon by decision makers is relevant and up to date. In this case, the applicant relied, for the most part, upon old country of origin information which appears either to ignore or fails to take account of reforms put into place by the Nigerian government. While the policing situation may not be ideal, and this is true of many countries, the information indicates that state protection is available in the form of a reformed and reforming police force underpinned by a government inaugurated code of conduct. Secondly, it is not the case that a decision maker is required to consider only the information furnished by an applicant or is constrained by that information. It is the duty of the decision maker to ensure that all up to date information available is considered fairly. I am satisfied that the applicant has failed to demonstrate that the decision maker

made a fundamental mistake or error in the consideration of the materials submitted or available. It is clear that the decision maker was not convinced by the older country of origin information submitted and sought more recent and diverse sources of information. These sources are widely available to immigrant and asylum lawyers, but in this case nothing beyond the material outlined above was submitted on behalf of the applicants.

19. The nature of an application under s. 3(11) is that new or additional evidence is advanced in order to obtain a review of a deportation order. The applicants did not advance much that was new in the s. 3(11) application, or that could not have been advanced in an application for leave to remain had the first named applicant thought it appropriate to do so. The Supreme Court in *Smith & Smith v. Minister for Justice and Equality* [2013] IESC 4, held that it is only when additional material is advanced that a s. 3(11) application could receive a favourable review. Any judicial review seeking to challenge a refusal to revoke must be directed towards the lawfulness of the decision making process concerning that additional material.

20. It is claimed that the procedures adopted by the first named respondent were unfair in that the applicants ought to have been made aware of the respondents intention to rely on information other than that submitted by the applicant before making a decision. While there is no general obligation to inform an applicant of the documentation used and sourced, it has been recognised that situations may arise where such disclosure would be just and appropriate. In *Ahmed v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 24th March, 2011), Birmingham J. stated:-

> "In my view there is no general obligation on the decision maker to return to an applicant and inform him or her what documentation has been sourced. The applicant is aware of the task facing the decision maker and must expect that he or she will prepare themselves by making sure they are fully up to date. However, I would emphasise that while that may be the general position, one can certainly envisage that there may be particular cases where a document sourced late in the procedure has the capacity to alter radically the entire basis of the application; which would require that contact be made with the applicant. Again one could imagine that if it were the situation that a decision maker had access to a stream of information which was not publicly available but was in conflict with publicly available material then different considerations might arise"

21. Cross J. gave further guidance in *Zola Nanizaya v. The Minister for Justice and Equality* [2012] IEHC 126:-

> "The principle of *audi alteram partem* would apply if the Minister got into his possession private documents or indeed entirely new documents, which radically altered the situation claimed in relation to indiscriminate violence etc, as submitted by the applicant. The document actually referred to by the Minister in his decision is not "new facts, information or documentation not previously examined" but rather is an updating of previous documentation furnished by the applicant"

22. I am satisfied that the new documentation relied upon by the first named respondent in these proceedings is freely available to the public and did not come from private sources. Furthermore, the information sought did not alter the scope and nature of the inquiry made by the decision maker. A challenge was raised against the efficacy of the police force in Nigeria, and the decision maker, in examining the issue and the nature of any reforms undertaken by the authorities in Nigeria, accessed further information relevant to that matter. The information is not new and I am satisfied that the information obtained is an updating of previous documentation furnished by the applicant and was readily available to the applicant from well known sources to those practising immigration and asylum law. I am satisfied that there was no obligation to inform the applicant of the additional country of origin information accessed by the first named respondent or to provide a copy of that information to the applicants before making the decision. I am not satisfied that the applicants are entitled to any relief on this basis.

23. The applicants also contend that the first named respondent failed to inform them of the principles, policies and guidelines in operation with regard to decision making under s. 3(11), and that such a failure renders the contested decision invalid. The respondent contends that a decision under s. 3(11) is based on the facts of the case, the country of origin information and the applicable law. The nature and extent of the jurisdiction exercised by the first named respondent under s. 3(11) has been considered in a number of cases. In *T.C. v. Minister for Justice* [2005] 4 I.R. 109, Fennelly J. stated at para. 26:-

> "'On its face, this provision confers a broad discretion, to be exercised in accordance with general principles of law, interpreted in the light of the Constitution and in accordance with fair procedures."

As is the case with other powers conferring on a Minister the exercise of a discretion, the decision must be taken in accordance with natural and constitutional justice and international obligations which have been incorporated into domestic law by the Oireachtas. The first named respondent is required under the Constitution to consider each case on its merits and to apply fair procedures appropriate to the case in accordance with law (*East Donegal Cooperative Limited v. Attorney General* [1970] I.R. 317).

24. Furthermore, the issue concerning the absence of guidelines, principles and policies has already been considered in *Sivsivadze v. Minister for Justice and Equality* [2012] IEHC 244 in which a challenge to the validity of s. 3(11) having regard to the provisions of the Constitution, was rejected. Kearns P. stated:-

> "It is thus contended on behalf of the applicant that no guidelines, principles or policies have been written into the section and that the Minister is thus "at large" when exercising what should properly be seen as a law making function in relation to decisions under section 3(11). But is the power one to make subsidiary laws or form polices, or is it a discretionary power exercisable by reference to the facts of individual cases? ... The exercise of this power does not strike me as the making of a "policy" decision but rather involves the exercise of a margin of appreciation related to the facts of individual cases. That discretion was clearly left by the Oireachtas to the Minister" (p. 39)

The learned President relied upon *T.C.*, cited above and a number of well established Supreme Court and High Court authorities. For example, in *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 17th December, 2009) Cook J. summarised the effect of previous High Court case law as follows:-

> "When an application to revoke is made to the Minister under s. 3(11) of the Act, the Minister has in effect two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation was made no change of circumstances has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions in the return of a failed asylum seeker to the country of origin…otherwise…in dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or inquiry; nor is he obliged to enter into any exchange of observations and replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive

> narrative statement of his reasons for refusal. Once it is clear to the court that the Minister has properly discharged those two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with."

It is clear that a decision maker must focus carefully on the circumstances of each particular case. The absence of guidelines or policy does not vitiate the decision the nature of which must be understood in the context of an overall consideration of the statutory scheme, the relationship between s. 3(1) and (11), and previous decisions taken in the asylum process.

25. The applicant relies upon *R.(Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12 in support of the proposition that a blanket policy or guidelines are required. I am satisfied that the *Lumba* case is distinguishable in that it revolved around the misuse of a blanket policy to justify the detention of prisoners prior to the making of a deportation order. The blanket policy, which allowed no exceptions, was also contrary to the published policy of the United Kingdom Home Department. There is no analogous situation to *Lumba* which makes it applicable or persuasive in the present case. As *Sivsivadze*, *Smith, M.A.* and other authorities illustrate, the s. 3(11) process is not a policy decision, but a power exercised under the functions conferred on a Minister by the Act in respect of changed circumstances.

26. Following the receipt of the "three options" letter from the first named respondent refusing asylum, the first named applicant failed to make any application for subsidiary protection or leave to remain in the State, though it was stated that it was intended to be done. No further explanation is offered for this omission. Consequently, on 17th May, 2012, a letter issued enclosing deportation orders dated 9th May, 2012, together with "an examination of file" dated 24th April, 2012. The examination of file contained an assessment in accordance with the provisions of s. 3(6) of the applicants' case. It accurately outlined the circumstances of the first named applicant and her son. It included reference to and an assessment of the material submitted. The applicants made no challenge to the deportation decision and the conclusions reached in the examination of file by way of judicial review. Other material offered by the applicants in the s. 3(11) application would have been available to them in an application for humanitarian leave to remain, but this was not made. Nevertheless, the first named respondent received the material offered and considered the matter under s. 3(11) which, in this case in the reasonable exercise of his discretion, he might have refused to do. As already noted, the court is completely satisfied that most of the material considered in the s. 3(11) consideration was previously considered and available in the examination of file prior to the making of the deportation orders. Some additional materials are referenced and quoted in the consideration and the court is satisfied that these were readily available to the applicant and do not afford any basis upon which to challenge the decision refusing to revoke the orders.

Article 8 of the European Convention on Human Rights – Ground 2

27. It is contended that the applicants' Article 8 rights to private and family life have been engaged to the point where affirming their deportation from the state would be unlawful and that there was a failure to provide a reason or rationale as to why it was considered that the private life rights of the applicants would not be engaged by the deportation.

28. This was also a matter that was considered in the examination of file prior to deportation. Both aspects of Article 8(1) were considered, though no representations had been submitted on the behalf of the applicants at that time. It was noted that the second named applicant had entered the education system in the state. The first named applicant was married to a Nigerian husband who continued to reside in Nigeria. They had no other family connections in the state. In the consideration of file prior to the s. 3(11) decision, these rights were reconsidered. A number of character references were noted and quoted in respect of the first named applicant. Her involvement in the community and participation in a number of educational and vocational courses were considered. Educational reports were received in respect of the second named applicant and his mother's involvement with the local national pre-school. It was concluded that a decision to deport the applicants did not constitute a breach of their right to respect for private or family life under Article 8. The consideration notes that the first named applicant stated during her asylum interview that she was still in contact with her husband who was living in Nigeria. Though the second named applicant was not an Irish citizen, he was entitled to Nigerian citizenship as both his parents were Nigerian. The first named applicant's immediate family, including her parents and three siblings, were currently living in Nigeria. It was concluded that a decision to deport the applicants did not, therefore, constitute an interference with the right to respect for family life under Article 8(1).

29. It was contended that the second named applicant had commenced school and that he would benefit from the Irish education and health systems. As noted by Feeney J. in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309:-

> "Aliens who are subject to expulsion cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state except in exceptional circumstances."

While the second named applicant has commenced school, he is still very young and his immediate and extended family reside in Nigeria. The determination, in those circumstances, that the deportation would not have consequences of such gravity as to amount to a failure to respect the right to private or family life was entirely reasonable. The benefits which the applicants may derive from continuing residence in the state, and in particular, the social and educational benefit to the second named applicant, do not amount to such exceptional circumstances as would entitle them to remain in Ireland. I am satisfied that the reasons furnished on this aspect of the decision were clearly stated.

30. I am satisfied, for all of the above reasons, that this application for an order of *certiorari* should be refused.