Neutral Citation [2014] IEHC 427

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2013 No. 350 J.R.]**

**BETWEEN**

**F.B.**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice McDermott delivered on the 5th day of September, 2014**

1. The applicant in these proceedings seeks an order or *certiorari* quashing the decision of the respondent refusing to grant family reunification to the applicant's granddaughters pursuant to s. 18(4) of the Refugee Act 1996.

2. The applicant is resident in the State and originally came to Ireland as a refugee from Nigeria. She was granted a declaration of refugee status in 2008, and subsequently became an Irish citizen in March, 2013. She is in receipt of an old age pension as her sole source of income and welfare assistance in the form of a rent allowance. She is 70 years old.

3. The applicant has been very unwell over the last number of years. She contracted cancer which required major surgery. She remains under medical care.

4. The applicant sought the respondent's permission to have her granddaughters join her in the state, pursuant to s. 19 of the Refugee Act 1996. Her granddaughters, E.S. and E.L., are 15 and 13 years old and her sole living relatives. Their mother died in 2005 and their father disappeared some time before this.

5. The applicant has, since coming to Ireland, remitted some funds to her granddaughters, sending them to a family friend who agreed to take care of the girls in Nigeria. She also arranged for their uncle on their father's side to provide financial assistance to allow the girls to continue their education. The amount remitted has been challenged. Receipts produced by the applicant claim that €494.00 was sent to Nigeria. However, the respondent was not satisfied that €350.00 of that amount was verifiable due to lack of information on the remittance forms. Therefore, the total sent was calculated to be €144.00.

6. The applicant lives in a small two bedroom apartment in Waterford which is said to be large enough to accommodate the applicant and her granddaughters. The Methodist Church in Waterford has also agreed to assist her, and has agreed to finance the girls' education in Ireland.

**The Law**

7. Section 18(4) of the Refugee Act 1996, establishes the conditions for family reunification as follows:-

> "18(4)(a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
>
> (b) In paragraph (a), "dependent member of the family", in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully."

**The Family Reunification Applications**

8. A first application for reunification was made on the applicant's behalf by her pastor in February, 2011 and was subsequently refused on 14th December.

9. A further application was made by the applicant's solicitors on 3rd September, 2012, and was ultimately refused on 4th April, 2013, on the basis that the applicant failed to show that her granddaughters were financially dependent upon her. That refusal forms the basis for this judicial review challenge.

**The Applicant's Asylum History**

10. When applying for asylum, the applicant stated in her questionnaire that she had two children in Nigeria, a daughter B.B., and a son, D.B., and that she had an additional dependent; her granddaughter, E.L.. Her granddaughter was six years old at the time, having been born in 2000.

11. The applicant's last place of residence in Nigeria was in Ofor in Agun State where she lived with her husband and their two children. When asked about the whereabouts of her children, the applicant said that both were living in Northern Nigeria. When asked about her granddaughter, the applicant claimed that she had been living with her but had to be given to her husband's friend's wife. This granddaughter was her daughter's daughter, and came to live with her after the death of the child's father. By that time the applicant has lost contact with her daughter who wanted the child to live with her because she had since remarried.

12. The Office of the Refugee Appeals Commissioner rejected the initial application and on appeal to the Refugee Appeals Tribunal, the above facts were reiterated namely, that the child's father had died, the mother had remarried and moved to Northern Nigeria and her husband's friend was now taking care of the child, though she had looked after the child before she left Nigeria.

**The First Application**
13. The first application was made by letter and contained a significantly different account of her family history. The applicant claimed that her daughter died in December, 2005 and left behind two daughters and not one as previously stated in her asylum application. The two granddaughters were E.S. and E.L.. The death of her daughter and the existence of the second grandchild were never mentioned in the course of the asylum application. Discrepancies also arose concerning the personal history of the children's father. He had been described as married to the applicant's daughter. In this application the father was said never to have married the applicant's daughter, notwithstanding the previous claim that her daughter had remarried and moved to Northern Nigeria in the asylum application and had thereby abandoned the family. It had also been claimed that the father was dead. The applicant made fund transfers to Nigeria at this time. The grandchildren were left in the care of a family friend, Ms. O., while the children's uncle was paying for their upkeep and education.

14. ORAC replied by letter with a number of queries, and seeking an explanation as to why the applicant claimed to have only one granddaughter in her refugee application. By reply, the applicant explained that when she left Nigeria the elder granddaughter, E.S., was living with her father and the younger one was living with her. She explained that she had only referred to the younger granddaughter in the asylum application because she was living with her. The respondent wrote to the applicant refusing the application on 13th January, 2012.

**The Second Application**
15. The second application was made by the applicant's solicitors on 28th August, 2012. The applicant claimed that her daughter died on 19th December, 2005, and that her husband abandoned the two granddaughters, and had not been heard from since.

16. It was claimed that the younger granddaughter lived with the applicant until she left Nigeria for Ireland and was left in the care of a family friend in Lagos. The elder granddaughter, was living with her father until his disappearance, but was now also being cared for by the family friend in Lagos. The applicant also said that she only learned of her daughter's death when in Ireland and did not know about it prior to leaving Nigeria.

17. The applicant was asked to clarify a number of issues arising from the second application; namely the circumstances surrounding the alleged death of her daughter in 2005 and the why the death was only registered in 2011. The status of the children's father was also queried as it was originally claimed that he was dead.

18. The applicant, through her solicitors, stated that she learned of her daughter's death in 2006, and that she considered the children's father dead as he was a "constant pest and trouble rouser".

19. These responses caused a further request for clarification, as it was pointed out that the applicant told the Tribunal at her appeal in December, 2007 that her daughter was still alive. It was also indicated that the applicant had only ever mentioned having one granddaughter in her interactions with the authorities. Documentary evidence was also sought from the Deputy Registrar of Births and Deaths in Nigeria concerning the registration of her daughter's death.

20. The applicant's solicitors replied and claimed that the applicant found it hard to believe that her daughter was dead, and that the discrepancy in mentioning her other granddaughter was due to the applicant having a greater attachment to the younger granddaughter. The request for further information was contended to be outside the remit of the Commissioner and irrelevant and no evidence was furnished.

21. On 4th April, 2013, the applicant was informed by letter that her application for family reunification was refused.

**Applicant's visit to Benin**
22. In another development on 16th September, 2009, the applicant visited the Irish Embassy in Abuja, Nigeria. She stated that she left Ireland on 25th August and had been in Benin where she had lost her travel documents and return ticket. She claimed that Air France told her to present at the embassy in Abuja to rectify this. Though it is said that she went to Benin to visit her granddaughters, this was never mentioned in her embassy interview at the time.

**Financial Dependency**
23. Though the various discrepancies in the applicant's family history were recorded in the investigation file, the respondent proceeded on the basis that the two girls were members of the applicant's family, her granddaughters. The investigative report concluded that the €144.00 sent in support of the two girls did not represent a substantial and consistent amount for their financial support over a prolonged length of time. It was stated that documentary evidence submitted demonstrated only that the financial assistance given was of a supplemental and subsidiary nature and was not an amount upon which the subjects relied for subsistence. Neither of the girls had any mental or physical disabilities. The report was not satisfied that the girls were dependent on the applicant as required by s. 18. In that regard, the report noted that the amount should be viewed in the context of the Nigerian GNI per capita income for 2010, which was US$1,180.00 (approximately €894.00).

**The Challenge**
24. The applicant claims that the respondent acted unreasonably or irrationally in failing to take into consideration a number of matters relevant to the dependence of the children upon her. These include the proposed assistance of the Methodist Church in Waterford to the education of the two girls, the relative significance of the sums of money sent by the applicant and the fact that the applicant arranged for the children's continuing care, accommodation and maintenance in Nigeria.

25. The respondent contends that the financial assistance sent by the applicant could only be counted as supplemental and subsidiary and the sum of €144.00 sent to date was too low a contribution to be regarded as assistance upon which the children were dependent.

26. It is clear that the operative part of the decision is focused exclusively on the payments made by the applicant to Nigeria. It states:-

> "The applicant has submitted documentary evidence with her current application for family reunification to demonstrate that she is providing the subjects with some financial assistance, however, the financial assistance appears to be of a supplemental and subsidiary nature and whilst welcome, is not assistance upon which the subjects rely on for

subsistence…

> The applicant has failed to establish that E.S. and E.L. are dependent upon her as required by s. 18 of the Refugee Act 1996 (as amended), which outlines the criteria for family reunification."

The decision then highlights the definition of "dependent member of the family" as set out in s. 18(4)(b) emphasising that the "grandchild" must be "dependent on the refugee". The decision in respect of the dependency focuses upon the single issue of finance. The applicant's account of her relationship with her granddaughters since birth between the years 1998 and 2005 when she left Nigeria, is not addressed at all. Her contention that the children lived with her during that period was considered in the context of whether they were her granddaughters. Certain matters were highlighted, but the decision ultimately proceeded on the basis that the relationship was established subject to the caveat that DNA evidence would be required to prove the relationship at a later stage.

27. The account furnished by the applicant of the arrangements which she made for the care of the children before she left Nigeria and applied for refugee status in Ireland was not considered. The children's uncle (who had his own extensive family commitments), though of limited means, supported the grandchildren while they were living with a family friend to whom their primary care and custody had been entrusted. Following her arrival in Ireland, the applicant suffered serious illness requiring head surgery and chemotherapy, and the nature and consequences of which were fully documented. Notwithstanding that illness, she states that she transferred some funds to Nigeria. She is in very reduced circumstances and alone in Ireland and during the course of her illness was unable to function very well or offer much by way of financial support.

28. The nature of the dependence of the children upon their grandmother has changed since her departure. The uncle who was in a position to offer some support is now not in a financial position to do so. The friend to whom the children were entrusted, in the absence of this support from the uncle, has expressed an unwillingness to accommodate the girls in her home any further. The burden, therefore, if all of this is accepted, falls back upon the grandmother to whom they must now look for support as they did until her departure in 2005. These aspects of the dependency were not considered by the respondent.

29. The emotional bond between grandchildren and grandmother, given her primary care of the children between 1998 and 2005, was not addressed. She made a considerable effort to travel to Benin in October, 2009 to resume physical contact with them. This was only considered in the context of her failure to mention the purpose of her visit to Benin when visiting the Irish Embassy in Abuja to obtain necessary travel documents.

30. The potential consequences for the children of the withdrawal of support and accommodation in these circumstances were not considered.

31. It is noteworthy also that when carrying out the investigation into the circumstances of the children there was no evidence of the amount of financial support offered by the uncle or the value of the support given by the friend to the children, whether in respect of accommodation, food and clothing or educational expenses. There is no doubt that the maintenance of the two teenage girls must involve a significant financial burden in Nigeria. The respondent has not addressed any element of that reality or the value of the contribution made by the applicant other than to acknowledge that it was "welcome".

32. The applicant contends that the decision should have been considered in a wider context and that the respondent failed to have regard to issues of dependency outside financial dependence. In addition, it is claimed that the respondent failed to have proper regard to the family rights of the applicant and her granddaughters under Article 8 of the European Convention on Human Rights.

33. In *Hassan Sheikh Ali v. Minister for Justice, Equality and Law Reform* [2011] IEHC 115, Cooke J. held that the discretion exercisable under s. 18(4) only arose when the two pre-conditions set out in the subsection were met, namely that the required relationship was established and that the refugee relations were dependent in that they relied for subsistence or means of support upon the refugee. If the two conditions are satisfied, the Minister may then exercise a discretion under s. 18(4).

34. In that case Cooke J. considered the rejection of an application for family reunification of the applicant, a Somalian refugee who sought to bring his sister, two nephews and a niece to Ireland. It was claimed that these relatives were wholly reliant on contributions to pay for food and shelter. The Minister was not satisfied that they were dependent family members. Cooke J. considered the rejection by the Minister of the claim of financial dependence as follows:-

> "21. As regards the first of these conclusions, the Court considers that it is difficult to accept that it flows from the premise upon which it is based. The passage in question is preceded by a direct quotation from the submissions made to the effect that the subjects in question "are wholly reliant on the money to pay for food and shelter and are as such financially dependent upon him". Given that the applicant is sustained only by disability benefit in this country, it does not appear to be a rational conclusion that the frequency and amount of money transferred" fails to prove that the recipients of the transfers are financially dependent upon the refugee. In the absence of any other information as to the sister having any other source of income or any employment or occupation, it does not appear to the Court to be reasonable or justifiable to conclude that the quoted claim of reliance on the remittances for food and shelter is factually wrong. Given the meagre resources of the applicant in this country, is it rational to suppose that he would part with the sums in question if he did not feel that the recipients were depending upon him to do so?"

35. Cooke J. had earlier considered the purpose and intention of the reunification provisions under s. 18 in *Hamza v. the Minister for Justice, Equality and Law Reform* [2010] IEHC 427. He stated that s. 18 was intended to facilitate the reception of refugees and ensure their personal wellbeing whilst in the state. He noted that the UNHCR had in various instruments encouraged contracting states to recognise and respect the essential right of refugee families to unity and encouraged them to facilitate this in a series of advices set out in "UNHCR Resettlement Handbook" (Geneva November, 2004), the "UNHCR Guidelines on Reunification of Refugee Families 1983" and the conclusions of the "UNHCR Executive Committee on Family Reunification" of 21st October, 1981. Furthermore, though Ireland had opted out of Council Directive 2003/86 on the Right to Family Reunification, he concluded that s. 18 of the Act should be construed harmoniously with the Directive insofar as possible. He noted that Recital (4) to the Council Directive advised that family reunification was a necessary way of making family life possible and helped to create socio-cultural stability facilitating the integration of third country nationals in the Member State. Therefore, s. 18 should be construed and applied in a manner which is consistent with these policies and with the consensus apparent from the Member States of the Union on the objectives in the Directive.

36. This matter was also considered by Clark J. in *Ducale & Anor v. the Minister for Justice and Equality and the Attorney General* [2013] IEHC 25. In that case the refugee sought reunification with a niece and nephew who were orphaned as infants and had been part of the applicant's family ever since. It was submitted that the applicant made a number of money transfers to her niece and

nephew throughout 2009 to 2011. In addition, it was submitted that there was a close emotional dependence between the applicants and the niece and nephew given the family history. The applicant effectively acted in *loco parentis* to her niece and nephew following the death of their parents prior to her coming to Ireland and maintained close contact with them following her arrival. Clark J. held that in light of the age of the children in that case, "very light proof would have been required to establish their emotional and financial dependency on the applicants, their guardians". The learned judge considered that these were highly relevant matters which should have been considered in assessing whether the children were dependent upon the applicant. Clark J. added:-

> "47. …There is nothing in that definition (dependent member of the family) to suggest that dependency is measured by the size and frequency of financial contributions nor is it suggested that the dependency is confined merely to economic reliance on those financial contributions. The Court was not referred to any judgments which provide assistance with regard to the definition of dependency in the context of family reunification of refugees. It is noted that although the concept of dependency is central to the discretionary powers of Member States established under Directive 2003/86/EC on the right to family reunification (to which Ireland is not a party), the Directive contains no definition of the term.
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> 48. The UNHCR Resettlement Handbook (reissued in 2011) advocates a wide interpretation of the term "dependent" in the context of family reunification of refugees (and) states at pp 178-179:
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> > 'Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. For operational purposes, with regard to the active involvement of UNHCR offices in individual cases, the concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration. The relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration. Dependency does not require complete dependence, such as that of a parent and minor child, but can be mutual or partial dependence, as in the case of spouses or elderly parents. Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds...'"

37. The learned judge also cited and quoted from the Resettlement Handbook of UNHCR, a European Council on Refugees and Exiles Information Note on Directive 2003/86/EC (2003), a UNHCR Background Note Protecting the Family: Challenges in Implementing Policy in the Resettlement Context, Prepared for the Annual Tripartite Consultations on Resettlement 2001, a discussion paper entitled "Family Unity and Refugee Protection" commissioned by UNHCR and a UNHCR response to a green paper prepared by the European Commission on Directive 2003/86/EC in 2011. Having reviewed these materials the court concluded that:-

> "56. There is thus objective support for the contention that "dependency" is not confined to total financial dependence but involves a wider concept taking account of all relevant economic, social, personal, physical, familial, emotional and cultural bonds between the refugee and the family member who is the subject of the FRU application. Moreover there is support for the contention that financial dependency must be seen as a flexible state of affairs which is not necessarily determined by the size of a contribution but rather on its effect in the context of the specific country of residence and personal circumstances of the person in receipt of the contribution. Much must depend on what the contribution provides when received in the hands of the recipient. €50 a week may be pocket money for an eighteen year old in Dublin but may be a princely sum on which a young person in an illegal camp in Addis Ababa may live either wholly or substantially."

The court also noted that no discernable objective yardstick by which the measure of dependency was assessed was identified. The Commissioner did not carry out any investigation into the domestic circumstances of the niece and nephew in Addis Ababa before preparing the s. 18(2) report. The Irish Embassy did not conduct any investigation into the cost of living in an illegal camp in Addis Ababa. No country of origin information was consulted concerning the cost of living in such a camp or whether the residents received humanitarian food or clothing aid. In those circumstances the court was satisfied that the Minister's assessment was "no more than an arbitrary evaluation based on no identified criteria".

38. Clark J. returned to this topic in *A.A.M. (Somalia) v. the Minister for Justice and Equality* [2013] IEHC 68. The applicant in this case was also a Somalian refugee who sought reunification with his mother and four siblings who lived in a Somali refugee camp. He made monthly transfers of €200 which were deemed to be an insufficient amount and not to meet the requirements of s. 18(4) in respect of dependency. The respondent concluded that because the cost of living was cheaper in Somalia than Ireland, it was possible that family members would be better off staying in Somalia. Clark J. considered the absence of guidelines as to how the financial element of "dependency" will be assessed in family reunification cases. She noted:-

> "20. …Without guidelines or guidance, the refugee simply has no idea what the FRU Section will accept as being a sufficient sum to establish dependency on his / her remittances. In the meanwhile, years go by and the refugee visits a solicitor for advice, a dossier of receipts is built up; information is obtained on the conditions in which his / her extended family members are living; money is sent to buy mobile phones so contact can be maintained; money is sent to obtain photographic identification, to pay for trips to the capital cities of the countries in which they live to facilitate DNA testing or to acquire supporting documentation; to pay for medical reports on any relevant medical conditions, all in the hope of meeting the undefined, impalpable threshold of "dependency"."

The learned judge also considered that there was no adequate information before the Commissioner or the Minister nor was any information sought as to what other sums were sent by an uncle in Canada and whether remittances from the applicant met or exceeded those amounts. There was no investigation carried out into the actual living conditions in the camp or the capacity and prospects of the applicant's mother and siblings to earn money or barter within the camp as a means of survival. The respondent was held to be speculating in respect of these matters. There was no objective yardstick identified by which the determination that $200 per month was an insufficient amount to establish dependency or why it might not be sufficient and what sum might be. The learned judge concluded that the respondent's agents must have a benchmark or standards by which the determination on dependency is made. Otherwise the decision must be considered arbitrary. Dependency is always a matter of fact which differs according to circumstances and, Clark J., considered that it ought to be possible for the Minister to request the Commissioner to determine objectively and with a reasonable degree of precision how much is required to maintain a person in a named and well recognised IDP camp in a very poor part of Somalia. If such an investigation were conducted, the Minister would have an objective measurement. The court noted that it was not for the court to set down guidelines as to the exercise of ministerial discretion under s. 18(4):-

> "but a system must, sooner rather than later, stop the haemorrhage of scarce resources in defending flawed FRU decisions and instead ensure that vulnerable refugees do not endlessly pursue futile applications thus depleting their own

> financial and emotional reserves. If refugees were better informed on what constitutes dependency and what conditions are *de facto* applied to family reunification applications, their intentions might be better directed towards obtaining language skills, training, qualifications, work experience and ultimately employment in Ireland before applying again for family reunification".

39. In this case the only "yardstick" offered is that of the Nigerian GNI per capita income. There was no meaningful inquiry in respect of the costs of maintaining and educating children in Nigeria, nor was any meaningful inquiry carried out as to how much support had been provided by their uncle before its withdrawal. The abject circumstances in which the granddaughters may find themselves following its withdrawal and if they are without accommodation, must surely be relevant to whether the very low payments made by their poor grandmother are a valuable contribution to their subsistence. The non-financial aspect of dependency was not considered at all.

40. In *A.M.S. v. Minister for Justice and Equality* [2014] IEHC 57, MacEochaidh J. held that the "central and often exclusive focus placed on financial dependency in family reunification decisions is misplaced" because the purpose of s. 18(4) is to enable dependent relatives to come to Ireland to (*inter alia*) enable the refugee to fulfil moral obligations which could not be achieved without the physical presence in the state of the persons in question. The section exists to facilitate family reunification in Ireland where the sponsor proves the existence of a relationship of dependency requiring the physical proximity of the family.

41. The court is not satisfied that the respondent in this case applied the appropriate test in respect of "dependency" to the relationship between the applicant and her granddaughters, either in respect of the issue of financial dependency or the wider dependency based on their relationship with her since infancy.

42. Furthermore, there was no consideration of the rights of the applicant and her granddaughters as a family under Article 8 of the European Convention on Human Rights. The relationship between the guarantees of family life under Article 41 of the Constitution and Article 8 of the Convention was considered in *R.X. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446, in which Hogan J. stated in respect of an application for reunification in respect of grandchildren:-

> "42. …a household consisting solely of a grandparent who was rearing a dependent grandchild would have been generally regarded as a "family" in 1937. It would be unthinkable to suppose that the People would have assented to a state of affairs where, in circumstances where parents who had married and were deceased or otherwise absent from the child's life, the Oireachtas could have, for example, through legislation compelled a grandparent to yield up custody of the child to the State authorities, at least in the absence of some compelling justification for such a step. Yet unless the grandparent and grandchild were regarded as a "family" for this purpose, the Constitution would seem to have placed no impediment to the enactment of such legislation…there can be no *a priori* rule which automatically excludes grandparents and adult siblings from being within the scope of a "family" for the purposes of Article 41."

Hogan J. stated that it would be necessary to demonstrate that such persons have ties of dependence and interaction with other family members to enable them to come within the rubric of that family and to establish that the family itself was based on marriage. The extent of that dependence must turn on the facts of each case and amount to "something further than the ordinary interaction between a grandparent and a grandchild or other family member". The learned judge was satisfied that for the purposes of Article 41 the appropriate degree of dependence had been established in *R.X*. However, adverting to the possibility that he might be incorrect on that point, he noted that it was incontestable that the grandmother could form part of the family for the purposes of Article 8 (adopting and applying *G.O. & Ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190). In this case there may be an issue as to whether the relationship between the granddaughters and their grandmother was created on the basis of a family based upon marriage in that there is some confusion as to whether their father and mother married. However, Article 8 of the European Convention remains a relevant factor.

43. It is clear that in this case the respondent did not consider in any respect the application of Article 8 of the Convention to the circumstances of the applicant and the children. I am satisfied that this was an error of law and that the respondent was obliged to consider the matter in accordance with the principles considered and applied by MacEochaidh J. in *A.M.S.*.

**Conclusion**

44. I am, therefore, satisfied that the applicant is entitled to the relief claimed and that the decision should be quashed.