THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 891 J.R.]

BETWEEN

C.O. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

THE ATTORNEY GENERAL AND

IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of November, 2017

1. The applicant was given a visitor's visa to come to the State in November, 2005. That visa expired but she stayed on unlawfully. She stated that she had a partner, three children and two siblings in Nigeria. She was refused a further visa in 2006, but again remained in the jurisdiction. She applied for asylum on 15th January, 2008 and provided an address in Ballyjamesduff. That application was refused. She applied for subsidiary protection and claimed to be living in Ballyjamesduff with a particular pastor and his wife. That application was also rejected. She then made submissions under s. 3 of the Immigration Act, 1999, providing an address in Tramore. A deportation order was made in respect of the applicant on 12th February, 2009. She failed to present to the Garda National Immigration Bureau (GNIB) on the 12th March, 2009 and thereafter was an evader for almost eight years.

2. In late 2014, the Report of the Working Group on Improvements to the Protection Process (the McMahon report) was presented to government. That report was published on 30th June, 2015, containing recommendations about circumstances in which certain illegal immigrants could have their status regularised. The approach of the Department of Justice and Equality has been to attempt to identify individual cases where the recommendations might be applied. The applicant then engaged in some limited presentation to the GNIB between May and November, 2017. She failed to notify her address to the GNIB prior to February, 2017. On 4th August, 2017 the applicant, through solicitors, made submissions relying on the McMahon report and stating that she has always resided in the State with her sister. It is not possible to square that statement with previous information submitted on behalf of the applicant. On 9th November, 2017 the applicant was notified that the deportation order had been affirmed under s. 3(11) of the 1999 Act. She was arrested on 15th November, 2017. She now applies by way of judicial review seeking an order of *certiorari* challenging the decision under s. 3(11). In that regard I have received evidence in relation to her conduct from D/ Garda Derek Thompson and Mr. James Boyle, which in the absence of cross-examination must be accepted. That includes evidence of significant misconduct including the giving of false information (see in particular paras. 42 and 43 of Mr. Boyle's affidavit).

3. I have heard submissions from Mr. Mark de Blacam S.C. (with Mr. Garry O'Halloran B.L.) for the applicant and from Ms. Sara Moorhead S.C. (with Ms. Sinead McGrath B.L.) for the respondent.

4. At the level of first approximation, statements of grounds in asylum cases can be viewed as falling into three broad categories. First of all, the Focused Application containing a case-specific complaint or a genuinely new net point; a type which is not as predominant as one might necessarily like. Secondly, the Type Baroque, an approach in defiance of the stipulations of the Supreme Court in *Babington v. Minister for Justice Equality and Law Reform* [2012] IESC 65; a product of the scissors and paste pot, generating intricate legal candyfloss for page after tediously generalised page with every attempt made to obscure any good point that might be in the case. The third type is the Beaten Docket, which consists of points that have already been rejected. This case is a melancholy illustration of the third type.

5. Mr. de Blacam limited his case to a complaint arising from the alleged ministerial policy regarding regularising certain illegal immigrants, a point I have rejected on multiple occasions: *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 where the point is rejected at paras. 32 to 34, *da Silva v. Minister for Justice and Equality* [2016] IEHC 649 at paras. 10 and 11, *D.E. v. Minister for Justice and Equality* [2016] IEHC 650 (under appeal), *Onyemaechi v. Minister for Justice and Equality* [2017] IEHC 682, para. 9). The point is now launched for a fifth time.

6. I accept there is a difficulty where an applicant wishes to raise a point already rejected by the High Court which the applicant wants to have overturned in an appellate court. It seems to me there are essentially three options in that regard. Firstly, to formally move the point, without delaying the court, for the purpose of preserving the point for an appeal. That is a perfectly legitimate approach. Secondly, there is the option of coming up with something significantly new. That is also perfectly legitimate (as long as the new element is indeed significant and not just a superficial adjustment of previously failed material). For example in the recent case of *M.A. v. International Protection Appeals Tribunal* [2017] IEHC 677 the applicants came up with new and better arguments than those rejected in the previous decision of *U. v. Refugee Appeals Tribunal* [2017] IEHC 490, and made some headway as a result. The third and least acceptable option is to waste the court's time by rehashing *in extenso* arguments that have already been made and rejected. To adopt the last method is to turn the court process into a theatre of the absurd; a circus with the same stale custard pie being stumblingly thrown again and again.

7. Of course an applicant is perfectly free to argue in an appellate court that I am, or any High Court judge is, wrong in any particular matter, but should not waste the time of the court by presenting a Beaten Docket to the High Court again and again. If an applicant can get airtime for arguing a point at length in the High Court in a second, or a fifth, case, there is no limit to the amount of scarce court time that can be wasted by such an approach.

8. In rejecting the present application I do not propose to provide inappropriate airtime to such a process by rehashing *in extenso* the reasons already gone into. Suffice to say as follows:

(i). *Lumba v. Secretary of State for the Home Department* [2011] UKSC 12 has no direct relevance to the McMahon

report. It relates to an unpublished blanket policy with no exceptions, which was inconsistent with a published policy. These factors do not apply here. There is no question of a blanket policy being applied. That very point was made by Charleton J. in the Supreme Court in *P.O. v. Minister for Justice* [2015] 3 I.R. 164 [2015] IESC 64 at para. 29 of his judgment.

(ii). While I appreciate that the Supreme Court has granted leave to appeal in *D.E.*, I do not consider that an obligation of the type contended for in the present case to publish criteria arises in the deportation context. Multiple authorities, including Supreme Court authority, establishes that deportation (apart from *refoulement* and art. 3 of the ECHR) is very much a discretionary process (see the decision of the Supreme Court in *P.O. v. Minister for Justice* [2015] 3 I.R. 164 [2015] IESC 64, Kearns P. *in Sivsivadze v. Minister for Justice Equality and Law Reform* [2012] IEHC 244 (cited with approval by Charleton J. in the Supreme Court in P.O. at para. 29), Hardiman J. in *F.P. v. Minister for Justice Equality and Law Reform* [2002] 1 I.R. 164, Charleton J. in the Supreme Court in *O. (O.) v. Minister for Justice and Equality* [2015] IESC 26 at para. 27, *A.B. v. Minister for Justice and Equality* [2016] IECA 48 *per* Ryan P.).

(iii). The scope of challenge to the s. 3(11) process is significantly more circumscribed than to a deportation order (see *Sivsivadze, K.R.A.* and *B.M.A v. Minister for Justice and Equality* [2017] IECA 284 *per* Ryan P. at paras. 38 to 40 (relying on *P.O.,* and on *Smith v. Minister for Justice and Equality* [2013] IESC 4), Clarke J. in *Kouaype v. Minister for Justice and Equality* [2005] IEHC 380 [2011] 2 I.R. 1, *Dada v. Minister for Justice Equality and Law Reform* [2006] IEHC 166 (Unreported, MacMenamin J., 31st January, 2006), *C.R.A. v. Minister for Justice Equality and Law Reform* [2007] 3 I.R. 603 [2007] IEHC 19, *per* MacMenamin J., and *L.C. v. Minister for Justice and Equality* [2007] 2 I.R. 133 [2006] IESC 44, *per* McCracken J.).

(iv). Even if such an obligation to set out criteria arises, it has been satisfied. The McMahon report sets out broad criteria in this regard.

(v). On the facts, this applicant has been an evader and therefore does not comply with those criteria. Therefore she does not have standing to make the case that she now makes.

(vi). On the facts this applicant was well aware of the criteria being taken into account, as appears from the submission made on her behalf in August, 2017, which refers to the criteria in the working group report.

(vii). Even if some evaders have been given leave to remain, this does not confer any rights on this applicant. The circumstances in which this generally occurs are described at para. 36 of Mr. Boyle's affidavit, where such applicants were residing in direct provision so their whereabouts were known. Even if some people not in direct provision were given leave to remain that does not confer any right on any other individual illegal immigrant to remain.

(viii). If I am wrong about any of the foregoing I would reject the application in the exercise of the court's discretion on the grounds of the applicant's conduct. She has not only evaded, but has provided contradictory and materially false information and has failed to supply addresses or regularise her position. It is well established that judicial review is a discretionary remedy (see *Li and Wang v. Minister for Justice and Equality* [2015] IEHC 638).

(ix). The question of conditional release therefore does not arise, but if it had arisen there are clearly substantial grounds to consider the applicant as a flight risk having regard to the foregoing matters.

Order

9. For those reasons the order that I will make is:

(i). that the application be dismissed; and

(ii). that the injunction restraining deportation be discharged.