Neutral Citation Number: [2012] IEHC 100

THE HIGH COURT

JUDICIAL REVIEW

2011 637 JR

BETWEEN

D. O. E. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A. K. E.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Kevin Cross delivered the 1st day of March, 2012

1. This is an application for leave to take up and quash by way of certiorari a deportation order made by the respondent on or about the 1st July, 20112, and received by the applicant on the 7th July, 2011. In order to succeed in this application the applicant must show there are "substantial grounds".

Background

2. The applicant is a minor child of Nigerian parents and was born in this State on the 26th March, 2009. The applicant suffers from sickle cell anaemia. It is the contention of the applicant that the respondent failed to conduct an adequate inquiry as to whether the deportation of the applicant would amount to a breach of Article 3 of the European Convention on Human Rights and in particular failed to properly consider whether deporting the applicant to Nigeria would expose the applicant to a risk of death and further, in particular, failed in his determination to consider a medical report/letter from Dr. Corrina McMahon, Consultant Paediatric Haematologist dated the 9th September, 2009. In the said letter, Dr. McMahon stated:-

> "I would therefore urge you to consider this family's application for residency sympathetically as if this child is returned to Africa he would probably die."

3. The applicant submits that whereas a further medical report from the said Dr. McMahon dated the 7th May, 2010, was discussed and considered by the respondent that the failure to consider the earlier report amounts to failure to properly engage with Article 3 issues.

4. The respondent submits that there was a full analysis of the applicant's claim that the earlier medial report was superseded by the subsequent one, that in any event the respondent clearly did consider the submission that if returned to Nigeria that the applicant would "probably die" and further that in any event even if the respondent is at fault for this failure to consider, he has not demonstrated substantial or any grounds to take the applicant within the category of "exceptional circumstances" recognised in the leading case of *D. v. United Kingdom* 30240 96 [1997] ECHR 25.

5. Counsel on behalf of the applicant Mr. Stephen Dixon BL and counsel on behalf of the respondent Ms. Sinead McGrath BL are both to be congratulated on the succinct and economical yet thorough manner in which they argued this troubling case.

The Legal Position

6. The general Convention law is unequivocal in holding that superior medical treatment the deporting country cannot be a ground for preventing the expulsion of a foreign national back to his home state. The case of *D. v. the United Kingdom* (above) established that it is only where exceptional circumstances exist that a state is required to permit an individual to remain in its territory for the purposes of obtaining medical treatment. This statement of the law was accepted by both parties.

7. In *O.D. Odulana and F.A, Odulana (a minor suing by her mother and next friend O.D. Odulana v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J. 25th June, 2009) stated:-

> "The law is, that unless a case is exceptional as in D. where the applicant was dying and it was deemed to be inhuman to return him to a country where he could not be guaranteed a hospital bed for his last days, the Minister is entitled to sign deportation orders relating to failed asylum seekers even if they are receiving medical treatment here, which either is not available at all or is unavailable in their country of origin."

8. The applicant relied upon the decision of Cooke J. in *C.U.H. and J.H., J.N.H and E. and J.E.H. (minors suing by their mother and next friend C.U.H.) v MJELR* [2011] I.E.H.C. 93 (Unreported, High Court, 10th March, 2011) when he examined the failure of the Minister to consider a letter from a medical doctor at Galway University Hospital which stated:-

> "Was she to be expelled from Ireland and forced to discontinue her comprehensive care and treatment regime her condition would certainly deteriorate and she would be at risk of death. I have grave concerns that, Covenant will not receive the complex treatment she requires, in a public hospital in Nigeria. Without appropriate care her prognosis is poor with a reduced life expectancy."

Cooke J. concluded:-

> "It is arguable that the appraisal made by the Minister for the purposes of s. 5 of the Act of 1996, and Article 8 of the ECHR was based upon an understanding that what was at issue was a discrepancy in the standard of available medical treatment for these conditions as between this country and Nigeria. It is *inter alia* arguable for the purpose of the present application for leave, that the medical opinion in question has greater significance and required

> consideration of the issue as to whether discontinuance of the current treatment regimen would in itself expose the first named applicant to a risk involving a potential infringement of s. 5 of the 1996 Act, or of Articles 3 and 8 of the ECHR."

9. In the above leave application, Cooke J. was deciding the matter in accordance with the standard of "arguable" rather than "substantial" grounds.

The Analysis in this Case

10. The complaint in this case is that the Minister gave consideration to the medical report of the 7th May, 2010, but did not give consideration to the earlier one of the 9th September, 2009. When one analyses the earlier "report", it is clear that this "report" in its first paragraph, analyses sickle cell disease. In its second paragraph it furnishes the statistics of a number of children in Africa who will die from it. In its third paragraph this report deals with the management of sickle cell disease, which requires "aggressive intervention during a crisis". In its fourth paragraph the letter indicates the level of care and management in place in Ireland and indicates that the same level of care would not be available to children in Africa and the final paragraph upon which the applicant rests urges the person to whom it is addressed "To whom it may concern" to consider the family's application for residency sympathetically "as if this child returns to Africa he will probably die". I believe that rather than a formal medical report on the applicant, the letter of 9th September, 2009, is more in the form of a letter of support for the application such as a number of other letters on the file.

11. The May 2010 report is addressed to the applicant's solicitor and is in the form of a more conventional medical report and is specific to the applicant. It indicates that the applicant has not had any Sickle Cell events in the first year of his life which is to be expected, though he did have an admission at the start of his second year and concluded:-

> "it is not possible for me to say definitely how severe Daniel's Sickle cell disease will be, whether he will have frequent crisis or not, whether he will live to be 80 or die at 10. I can only state the facts which are that Sickle Cell treatment in Africa is basic. If you have mild Sickle Cell disease it is likely that you will survive until you are 20 but not beyond that for most people and if you have severe Sickle Cell disease you will die before the age of 20.
>
> I can only reiterate that our health care programme for Sickle Cell disease is on a par with any in the European Union or the US and that irrespective of what type of disease Daniel has, we are in a far better position to manage his disease and to allow him to fulfil his true potential and to lead a long happy and hopefully relatively damage free life than if her returns to Africa."

12. It is not disputed by the applicant that this report points to a better regime in Ireland and a lower standard of care in Africa and that this analysis would not take the applicant into the area of "exceptional" as defined in (D) above.

13. Under the heading "representations made by or on behalf of the person" the Minister in his decision lists four letters attesting to the applicant's good character including a letter from Dr. McMahon and in the Minister's consideration of the medical issues, the report of 2010, is commented upon and analysed. The Minister also states "it is submitted that without proper medical attention he would die of his illness were he to return to Nigeria". This account may be taken from the applicant's permission to remain under s. 3 in which it is stated "it is submitted that it would not be reasonable to deport (the applicant) to Nigeria as he is likely to die of his disease within five to ten years" or it may also, of course, be taken from the medical report of the 9th December, 2009, ". . . as if this child returns to Africa he will probably die".

14. The Minister indulged in a lengthy consideration of the treatment for Sickle Cell Anaemia available in Nigeria and concluding, as was not unreasonable:-

> "there is a functioning health system in Nigeria with the Federal Minister of Health responsible for healthcare delivery. Despite some limitations a large number of diseases and conditions, including Sickle Cell Anaemia can be treated and managed effectively. Blood transfusion services are available in most hospitals for patients with Sickle Cell disease. A new national health insurance system was launched in February 2007 which helps alleviate the healthcare expenses for many people. Nigeria does not maintain restrictive healthcare control measures, therefore patients are entitled to go to any hospital in any state to avail of treatment."

15. The Minister then gave specific consideration under Article 3 of the ECHR and in this context, carefully considered the 7th May, 2010, report from Dr. Corrina McMahon.

16. The Minister then considered the case of *D. v. United Kingdom* and also the case of N*. (FC) (Appellant) v. Secretary of State for Home Development (Respondent)* [2005] U.K.H.L. 31 in which it was held that:-

> ". . . The Strasburg Court has constantly reiterated that in principle (an alien subject to expulsion) cannot claim any entitlement to remain in the territory of a contracting state in order to continue to benefit for medical, social and other forms of assistance provided by the expelling state. Article 3 imposes no such 'medical care, obligations on contracting states'. This was so even where, in the absence of medical treatment, the life of the would be immigrant would be significantly shortened."

and further:-

> "The expulsion of a failed immigrant to a country which could not provide medical treatment equivalent to that which he had received in the United Kingdom was not a breach of the obligation of ensure under Article 3 of the European Convention on Human Rights, that no one was subjected to inhuman or degrading treatment."

17. The Minister then proceeded to conclude:-

> "It is not accepted that there are any exceptional circumstances in this case that is such that there is a sufficiently real risk that the deporting (applicant) would be a breach of Article 3. The fact that the circumstances of the applicant in Nigeria may be less favourable than those enjoyed by the applicant in Ireland does not in itself constitute the existence of exceptional circumstances."

18. The court holds that the medical report of May 2010, was probably the only "medical report" in existence. The previous letter of 2009, addressed as it was "To whom it may concern" was more a plea against deportation. It certainly did not specify ailments

particular to the applicant or detail his particular symptoms etc. in the manner that was done in the subsequent report. I would distinguish this case from *H. and Others v. MJELR* (above) in which Cooke J. stated that the failure to consider additional medical report submitted on behalf of the applicant from the doctor in Galway is an arguable of potential infringement with s. 5 of the 1996 Act or of Article 3 of the ECHR. In the case of *H.* (above) the additional medical report raised a potentially new issue that arguably might take the case into the exceptional circumstances as outlined in "*D.*" (above).

19. The Minister was in his decision aware of the submission on behalf of the applicant whether through his solicitor or through the doctor that it being was contended that there was a possibility of the applicant dying earlier, should he be returned to Nigeria. The Minister also gave full consideration to the later medical report. I do not see any deficiency in the Minister's consideration of potential violation of Article 3.

20. Furthermore, the court holds that even if the Minister did not properly consider the letter of the 9th October 2009, (and I do not so hold) that no consideration of that letter could place the applicant (when taken together with the other matters considered including especially the later medical report of May 2010), in a position of the exceptional circumstances as outlined in *D.*

21. *D.* was at the time of the impugned decision on his deathbed, he had developed a relationship with his carers and were he returned to his home country, the likelihood is that he would have had no medical care at all.

22. This applicant has not yet had any Sickle events in the first year of his life and Dr. McMahon cannot say whether he will live to 80 or die at 10 and the most that he can say is that care would be better in Ireland than it would be in Nigeria.

23. As Clark J. stated in *Odulana* (above):-

> "While obviously the Minister retains a degree of discretion in granting humanitarian leave to remain in order to reflect the differences in particular case, the court should be slow to annul a ministerial decision taken which complies with the clearly accepted law with respect to the right to deport. That law is, that unless a case is exceptional as in *D* where the applicant was dying and it was deemed to be inhuman to return him to a country where he could not be guaranteed a hospital bed in his last days, the Minister is entitled to sign a deportation orders relating to failed asylum seekers even if they are receiving medical treatment here which either (is) not available as all or less available in their country of origin. It may appear harsh on an individual basis, but it is the application of the law equally and where the concept of legal certainty has a value."

24. I am not satisfied that the applicant has made out substantial grounds on the application for leave to challenge the deportation order, and therefore must fail.