THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 529 J.R.]

BETWEEN

A.O. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 30th day of April, 2019

1. The applicant claims in his statement of grounds to have been born in 1965. One might perhaps be entitled to a certain scepticism about his assertions, if for no other reason than that five separate names for the applicant are given in the decision challenged, and a false name was used by him in previous proceedings before the Superior Courts. The Minister concluded that it wasn't possible to conclusively state the applicant's true date of birth and noted that while he had given a date of birth in 1973, his fingerprints matched those of other persons who had previously given a different date of birth in 1973 and in another instance a date in 1967.

2. The applicant gave a somewhat skeletal statement of facts in the statement of grounds; but that needs to be supplemented with other material that has come to the court's attention since. According to the findings of fact in previous proceedings taken by the applicant under a false name, he and his wife lived in Nigeria until she left that country in November, 2011 and came to Ireland. One daughter of the applicant with another mother remained in Nigeria. The applicant himself came to the State in July, 2002 and applied for asylum, a claim which he later withdrew on 23rd July, 2002 on the basis of parentage of an Irish born child. However, he subsequently failed to make a timely application under the Irish Born Child Scheme when that was introduced. The applicant and his wife apparently had two children born in the State in 2002 and 2003 who were Irish citizens under the *jus soli* rule that applied at that time. The applicant's presence in Ireland, however, was somewhat intermittent. He went to Spain in 2004 for a period and then went to England. He was apparently compulsorily returned by the U.K. to Ireland due to using false documentation but then immediately went to Northern Ireland until May, 2005 and then returned to the State, according to the facts as found in his previous High Court proceedings.

3. On or about 4th January, 2006, he belatedly applied for permission to remain under the IBC05 scheme, which was refused on the grounds that it was made after the 31st March, 2005 closing date. At a stage that is unclear, but appears to have been at some point since mid-2007, the applicant returned to Nigeria. A further child was born to the applicant's wife in June, 2008 and the applicant does not appear on the birth certificate. The Minister appears to have considered that there was some doubt as to the paternity of the latest child. The applicant has since sought to re-characterise and re-programme his date of leaving the State as being in 2008, presumably to explain how this child was conceived.

4. In any event, subsequent to the birth of the latest child, the applicant returned to the State and became the subject of a further proposal to deport issued on 29th January, 2009, in response to which he made submissions dated 13th February, 2009. He continued to engage in international travel, and was arrested following re-entry to the State from Northern Ireland on 15th February, 2009. He brought an Article 40 application, which was refused by the High Court, but his release was ordered by the Supreme Court on appeal (*O. v. Governor of Cloverhill Prison* [2009] IESC 42 (Unreported, Supreme Court, 20th May, 2009)). Those proceedings were brought in a false name.

5. He then made further submissions on 7th October, 2009 as to why a deportation order should not be made and on 9th December, 2009 the Minister, having considered those submissions, decided to make such an order. The applicant then (using a false name) sought leave to apply for judicial review to challenge that order. That was refused (*O. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 88 (Unreported, Cooke J., 12th February, 2010)).

6. The applicant failed to present to the GNIB as required and was classed as an evader. He claims that he voluntarily returned to Nigeria around that time. Since then he has demonstrated extensive travel to China, Saudi Arabia, Mauritius, the Maldives, Nigeria and Germany.

7. On 22nd August, 2017, he applied for revocation of the deportation order. That application was refused and the deportation order was affirmed. The applicant was so notified on 6th June, 2018. Leave to seek judicial review was granted on 31st July, 2018, the primary relief sought being an order of *certiorari* quashing the s. 3(11) decision pursuant to the Immigration Act 1999 and a declaration that the continued exclusion of the applicant from the State is disproportionate and unfair. I have received helpful submissions from Mr. Kieran Kelly B.L. for the applicant and from Mr. John P. Gallagher B.L. for the respondent.

Context

8. The context of the present proceedings is an application to quash a refusal to revoke a previous decision. As with any reiterated decision, that context involves a considerably higher hurdle for an applicant than a complaint against an original decision and necessarily involves a more limited scope for challenge than that which arises when the decision is being made in the first place: see *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 *per* MacMenamin J., G.*O. v. Justice, Equality and Law Reform* [2010] 2 I.R. 19 *per* Birmingham J., as he then was, *Sivsivadze v. Minister for Justice and Equality* [2016] 2 I.R. 403, *A.B. (Albania) v. Minister for Justice and Equality* [2017] IEHC 814 at para. 6, and the authorities there cited.

Ground 1: alleged perversity

9. Ground 1 of the statement of grounds contends that "*The Minister's imputation or determination that the Applicant's request for revocation is not materially different from those presented or capable of being presented in the earlier application is perverse. His initial request concerned his desire to prevent his removal from the State in 2009 whereas his request for revocation is directed at ensuring that he is in a position to secure a visa that might facilitate short-term entry and stay in the State*".

10. However, the decision is not perverse. It is not up to an applicant to decide on what basis he is going to be present in the State

or to demand that a ministerial decision be revisited on the basis of a different time period for presence in the State as dictated by an applicant. That follows from the upholding of the nature of the life-long duration of a deportation order by the Supreme Court in *Sivsivadze*. Furthermore, the notion that upon removal an applicant can assert that circumstances have changed and a different application is now being made to re-enter as opposed to prevent a removal, and can seek to quash a refusal to revoke on that basis, is totally misconceived. With his conspicuous gift for aphoristic concision and eloquence, Mr. Gallagher comments at para. 4 of his written submissions that "*if this circumstance were sufficient to negate the subsequent justifications for removal, then every deportation subject would be entitled to seek re-entry the moment they were removed from the State".*

Ground 2: alleged disproportionality
11. Ground 2 contends that "*the continued existence of the deportation order is disproportionate and punitive".* No basis for this contention was made out. To some extent this point is again a re-run of that rejected in *Sivsivadze*.

Ground 3: alleged requirement for fair consideration
12. Ground 3 of the statement of grounds asserts that *"the contention that the applicant has no right to re-enter the State without first seeking to revoke the deportation order and/or that the Minister has discretion is not disputed but it is contended that in such circumstances his application for revocation deserves fair consideration."*

13. The contention that the applicant's application for revocation deserves fair consideration is not a ground for judicial review as such. If that ground can be read as an implied contention that the application did not receive fair consideration, this has not been demonstrated.

Ground 4: failure to consider the applicant's situation
14. Ground 4 of the statement of grounds contends "*The Respondent Minister has failed adequately or at all to consider the Applicants' situation. The refusal to revoke the deportation order is predicated upon the Minister having the power or discretion to refuse to revoke rather than upon any rational reasoning for such refusal. In such circumstances the minister has conflated his power with his application of it."*

15. The problem for the applicant is that he has not demonstrated a failure to consider his situation (see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 *per* Hardiman J.). Insofar as the applicant contends that the Minister conflated the power to refuse to revoke a deportation order with the application of that power, that is a misconception of the process. Where a decision-maker is asked to reverse a previous decision, he or she is not obliged to consider everything from scratch but rather can ask himself or herself whether there is anything significantly new. The Minister did so here. By way of an example, a court would not start from scratch if a party asked it to vary or discharge an existing order and it would be hypocritical and inappropriate for me to suggest that the Minister must do so.

Ground 5: lack of reasons
16. Ground 5 of the statement of grounds contends *"without prejudice to the foregoing, the impugned decision is void for want of reasons".* This ground involves a jurisprudential misconception. Want of reasons does not necessarily make a decision "*void*". The court can direct provision of reasons as an alternative. Anyway, the decision does not have an impermissible lack of reasons. Reasoning is set out. The applicant's submissions perpetuate the classic confusion between consideration and narrative discussion by claiming that "*there was no real engagement with [the applicant's] submissions*". The Minister is not obliged to "*engage with*" an applicant's submissions in the sense contended for. The Minister considered the submissions fairly and gave reasons for the finding that he was not minded to revoke the order. That is sufficient.

Ground 6: alleged illusionary consideration
17. Ground 6 contends that "*the Minister's purported consideration of the revocation application is illusionary and is directed at grounding and substantiating a pre-ordained refusal to revoke and it lacks objectivity".*

18. There is a somewhat scandalous flavour to this allegation. There is no evidence of a pre-ordained refusal to revoke. As regards the allegation that the decision lacks objectivity, that fundamentally misunderstands the nature of the process. The Minister is not an independent quasi-judicial decision-maker in this context. He is entitled to have his own policies and approaches. He is not required to have objectivity in the same sense that would apply to a quasi-judicial decision-maker. But in any event, adopting the approach of requiring a change of circumstances before an order would be revoked is not impermissible.

Ground 7: alleged failure to have regard to employment situation
19. Ground 7 contends that "*Without prejudice to the foregoing, the Applicant's perceived employment prospects in 2009 formed a significant basis for its issue and the Minister has failed to have any regard to the current employment situation*".

20. The onus is on the applicant to prove ministerial failure to have regard to relevant considerations, *per* Hardiman J. in *G.K. v. Minister for Justice, Equality and Law Reform,* and this applicant has not done so.

Ground 8: alleged lack of legitimate basis
21. Ground 8 contends that "*Without prejudice to the foregoing, the Applicant is now a successful businessman and he seeks the revocation of the deportation order so that he can seek a visa for lawful entry to the State and to facilitate his travels generally and the economic well-being of the country is not a legitimate basis for affirming the deportation order".*

22. As noted above, it is not for an applicant to dictate the basis on which he should be admitted to the State. The applicant is in any event not in a position to provide any meaningful guarantee that his presence will never impact on the economic wellbeing of the country, so the possibility of an adverse impact is something the Minister can validly consider. As validly put by Mr. Gallagher in his written submissions at para. 13, *"nor must the applicant's recent declarations of good intent be swallowed whole without any seasoning of sceptical doubt".*

Ground 9: alleged lack of legitimate counter-balancing factors
23. Ground 9 contends that "*the common good and the upholding of the integrity of asylum and immigration systems are not legitimate counter-balancing factors in circumstances where the applicant desires to apply for a visa*".

24. The same point applies. These are legitimate counter-balancing factors. An applicant cannot scratch his past immigration history from legal relevance simply by making a new application.

Ground 10: alleged lack of proper balancing exercise
25. Ground 10 alleges that "*The Minister failed to conduct a proper balancing exercise and it cannot credibly be contended that*

there is no less restrictive process available in the circumstances that pertain".

26. This ground is analytically misconceived. Making a decision not to revoke a deportation order is not a balancing exercise, unless the applicant's legal, constitutional or ECHR rights are involved. Insofar as it is a discretionary and *ad misericordiam* process, that is the exercise of a discretionary function, not a balancing exercise. In particular, there is absolutely no requirement that the continuing existence of a deportation order be proportionate in the sense that there is no less restrictive process available. That language comes from caselaw regarding the restriction of constitutional rights by legislation, which is not the context here. (I might add that the least restrictive means concept was notably imported from the controversial decision in *R. v. Oakes* [1986] 1 S.C.R. 103, and is probably an inappropriate judicial standard even in the constitutional context as it almost inevitably involves the courts in poorly-informed and blundering intervention in policy choices that are properly a matter for other branches of government - Dr Brian Foley B.L. commented that "*one struggles … to find a body of case-law with such comparable inconsistencies and differing trajectories as Irish proportionality jurisprudence"* ("The Proportionality Test: Present Problems (2008) 1 *J.S.I.L.* 67 at 71).) In any event, the contention in the ground is misconceived. It *can* credibly be contended that the decision is proportionate, if proportionality be called for.

Ground 11: alleged misconstruction of the law
27. Ground 11 contends somewhat cryptically that "*the Minister has misconstrued the law and perpetrated an error that goes to jurisdiction*". That complaint is unparticularised and undemonstrated. The written and oral submissions made on behalf of the applicant call into question the Minister's entitlement to "*affirm*" the deportation order but that complaint cannot succeed as it is not specifically pleaded. However, if I am wrong about that, affirmation of the order is simply an informal administrative term for a decision not to amend or revoke the deportation order; and the Minister clearly has jurisdiction to make such a decision. There is no significance in semantically using the word "*affirm*" rather than the long-winded alternative, "*decide not to amend or revoke the order*". The argument in submissions that the Minister "*has no jurisdiction to affirm*" (para. 5.3 of the applicant's written submissions) is therefore fundamentally misconceived and semantically confused. Simply because the approach adopted on behalf of the applicant might favour the Swiftian approach of using "*words multiplied for the purpose*" does not mean that the Minister must be compelled to engage in equal, or any, verbosity.

Ground 12: lack of substantial reasons
28. Ground 12 contends that "*there is no substantial reason associated with the common good that justifies the affirmation of the deportation order*". That is not a ground for judicial review as such. If it can be read as a contention that the decision is irrational, that complaint fails because the decision is not irrational.

Ground 13: other grounds
29. Ground 13 optimistically relies on "*such further or other grounds*" (although such as what is not specified). Order 84 of the Rules of the Superior Courts 1986 does not permit a judicial review applicant to include a catch-all ground of this type. Anyway no meritorious further or other grounds were advanced.

Discretion
30. Even if, counterfactually, there was some defect in the s. 3(11) decision, I would have refused relief on a discretionary basis, as contended for by Mr. Gallagher at para. 16 of his written legal submissions and at para. 12 of the statement of opposition, given the applicant's abuses of the very system the outcome of which he now seeks to challenge (see *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 98 [2018] 1 JIC 1607 (Unreported, High Court, 16th January, 2018)). I also note that, contemptuously of the courts, the applicant previously misled not only the High Court but more importantly the Supreme Court by bringing two previous sets of proceedings in a false name, and while acknowledging this deceit has not seen fit to address that matter with the level of conspicuous contrition for which such an unacceptable situation calls.

Order
31. The proceedings are dismissed.