

**THE HIGH COURT
JUDICIAL REVIEW**

[2010 No. 956 J.R.]

BETWEEN

M. E. O. [Nigeria]

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 2nd day of November 2012

1. Following the judgment of the Court in this case delivered on the 5th of September 2012, the applicant now applies under s.5 (3) (a) of the Illegal Immigrants (Trafficking) Act 2000 for leave to appeal to the Supreme Court against that decision. Under that provision leave cannot be granted unless the Court certifies that the decision involves "a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court".

2. The points of law proposed by the applicant for this purpose are as follows:

Constitutional issue:

(i) In respect of the proposed deportation of a non-national with multiple significant health difficulties including HIV and facing risk of discrimination and stigma arising therefrom but who is not facing imminent risk of death, is the Court correct to hold that the State's obligation pursuant to the Constitution to protect the right to life, human dignity, bodily integrity and freedom from inhuman and degrading treatment of that person is limited to:

(a) protecting the life and person from unjust attack in the sense of wrongful conduct at the hands of third parties and/or

(b) circumstances such as those pertaining in *D v. U.K.* [1997] 24 E.H.R.R. 423 where the very act or necessary consequence of expulsion and transfer to that country will be likely to bring about the inevitable or accelerated and more distressful death of the person concerned?

Article 8 issue:

(ii) In respect of the proposed deportation of a non-national with multiple significant health difficulties including HIV and facing risk of discrimination and stigma arising therefrom but who is not facing imminent risk of death:

(a) is the Court correct to hold that the proposed expulsion may amount to a breach of the non-national's private life rights pursuant to article 8 of the ECHR notwithstanding that the proposed expulsion was deemed not to reach the threshold of severity required to establish a breach of article 3 of the European Convention in accordance with the exceptional circumstances test set out by the Strasbourg Court in the case of *D v. UK*?

If the answer to the above is yes, where the Ministerial deportation decision under challenge by way of judicial review has applied in considering article 8 private life protection an incorrect test and has wrongly conflated (as in this case) the threshold of severity required in respect of article 8 ECHR rights with that required to establish a breach of article 3, is the reviewing Court correct to conduct a merits-based assessment as to whether deportation would breach the Convention right or is the role of the reviewing Court in this jurisdiction confined to an examination of the impugned decision as it stands?

(b) Is the Court correct in holding that the private life for which protection is afforded by article 8 ECHR is that led in the Contracting State or does the article 8 protection in respect of private life extend to a consideration of the private life facing the deportee in their country of origin?

3. The criteria to be applied by the Court in addressing the application for leave have not been in dispute between the parties. They have been identified in relation to the similar section in the Planning Acts in a number of judgments including *Glancre Teo v. An Bord Pleanala* [2006] IEHC 250, and that of Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanala & Ors* [2007] 4 I.R. 112. This Court endeavoured to summarise the relevant principles for the purpose of the present section in its judgment in *IR. v. Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 510.

4. Dealing first with the proposed point of law in relation to the constitutional issue, as will appear from the Court's judgment of the 5th September, 2012, the Court has held that the reliance placed upon the protection afforded by Article 40.3.2 of the Constitution in the particular circumstances of the applicant was unfounded. The applicant undoubtedly suffers serious difficulties of health including HIV infection for which she relies on anti-retroviral treatment but her condition is not critical nor is she in imminent danger of serious deterioration of her health. She has further health difficulties including cognitive impairment, peripheral neuropathy and ocular complications which were summarised under the heading of "Humanitarian Considerations" in the Examination of File memorandum. In those circumstances the Court held that the protection afforded by the Constitution did not impose any positive obligation on the State to provide or to continue to provide any particular type of medical treatment because any harm that might befall an individual in

the applicant's position was the natural consequence of her condition of ill health and not an "unjust attack". (See paras. 28 to 33 of the judgment.) Secondly, the Court held that if such was the position in respect of citizens under Article 40.3.2, it must necessarily also be the case when the provision is sought to be invoked by a non citizen such as the applicant. (See paras. 34 to 36 of the judgment.)

5. The judgment of the Court was, of course, the ruling on the substantive hearing of the application for judicial review for which leave had been granted by Hogan J. who had given a detailed judgment on the application on the 9th September, 2011. In the course of that judgment, Hogan J. had pointed out that the question as to whether the State had a positive obligation to protect the life and person of a seriously ill individual by making necessary care and treatment available was one which had not yet been "explored" in any judgments of the Superior Courts. While the cases in which the issue arises as an acute question are thankfully infrequent, the Court is nevertheless aware from its own experience of the asylum list that cases in which failed asylum seekers suffering from serious conditions of physical or mental ill health are by no means rare in this jurisdiction and invariably pose issues of considerable difficulty and delicacy.

6. Having regard to the inherent importance of the decisions taken to the individuals concerned such as the present applicant and to the absence of definitive authority on the point of law in this jurisdiction, the Court is satisfied that the threshold for the grant of the necessary certificate has been met in respect of this issue. It is obviously a matter of importance to the State and thus to the public whether or not an obligation arises under the Constitution to afford continuing and potentially expensive medical treatment to individuals whose dependence upon treatment has come about through having been diagnosed as needing the treatment while temporarily or tentatively present in the State as asylum seekers. The issue can also, in the view of the Court, be characterised as exceptional in that it cannot be said to be one which arises in the ordinary course having regard to the coincidence of circumstances, namely the fact that the applicant suffers from an infection which is not one to which the ordinary population is routinely exposed and the tenuous basis of her presence in the State when first treated.

7. The Court considers, however, that the important point of law upon which it is desirable that clarification be obtained can be expressed more succinctly than in the suggested wording as follows:-

"Does the guarantee of the State under Article 40.3 of the Constitution to defend and vindicate the personal rights of the citizen and particularly its duty under para. 2 of that Article "to protect from unjust attack and to vindicate in the case of injustice done the life and person of an individual," impose upon the State a positive duty to safeguard an individual from the consequences of a life threatening medical condition and a duty to refrain from acts which would interrupt or terminate medical treatment currently made available by the State which prevents the condition deteriorating to a critical state?"

If the obligation of the State under the Article does so extend, is it also applicable to a non-citizen of the State or of the EU who is present in the State without lawful permission?"

8. The Court is not satisfied, however, that the threshold for the grant of the certificate has been met in relation to the proposed point or points of law directed at article 8 European Convention on Human Rights (ECHR).

9. It is argued on behalf of the applicant that the respondent, in the contested determination, approached the question as to the right of the applicant to respect for private life upon the basis of a mistaken view of the law by citing the observation of Feeney J. in *Agbonlahor v. Minister for Justice* [2007] 4 I.R. 309, quoted at para. 96 of this Court's judgment. In the view of this Court this submission exaggerates the significance to be attached to the citation of that passage in the Memorandum and does not give rise to any exceptionally important point of law.

10. It must be noted first that the case before Feeney J. was concerned exclusively with the reliance of the applicants in question on the right to respect for private life under article 8 ECHR. It was not concerned with any reliance on the right to life or not to be subjected to torture or inhuman or degrading treatment under article 3 ECHR. Nor was it concerned with the right to respect for family life under article 8 ECHR. (See para. 2.4 of that judgment.) It is also important to bear in mind the factual context of that case. The applicants were a Nigerian mother and two small children who had arrived in the State and claimed asylum in March 2005 on the ground of alleged threats and violence to the mother by other Nigerians in Italy in 2003. The mother had lived with her husband, a journalist, in Italy since 1996 and had left him in that country because he refused to leave his employment there. A deportation order had been made by the Minister in September 2005. The Minister subsequently refused an application to revoke the order made to him on the ground that the second applicant suffered from Attention Deficit Hyperactivity Disorder (A.D.H.D.) and an intellectual disability for which no adequate treatment or educational facilities would be available in Nigeria. It was that decision to refuse revocation that was the subject of the judicial review application.

11. The respondents in the case accepted that in those circumstances the deportation of the child would constitute an interference with private life in that article 8 encompassed the physical and moral integrity of the person; but it was contended that the consequence would not be of such gravity as to involve a breach of the article. (See paras. 2.5 and 3.6 of the judgment.) It was in that context that Feeney J. proceeded to consider the case-law which is examined between paras. 3.1 and 3.14 of the judgment on the basis that the judgments in question of the United Kingdom courts afforded some guidance to the principles and approach to be adopted in "foreign health care cases" in the application of article 8 ECHR. In essence, the application by Feeney J. of the principles in question can, in the view of this Court, be paraphrased as finding that, if a claim based on the alleged consequence of repatriation for the health of an applicant does not reach the level of gravity which attracts the protection of article 3, it is unlikely to be incapable of being justified as a lawful interference with private life under article 8(2). In other words, if a third country national liable to be deported is not entitled under article 3 to remain in a Contracting State in order to continue medical treatment or other forms of assistance other than when the exceptional circumstances of the *D. v. United Kingdom* case are present, the same position must logically obtain under article 8. Feeney J. pointedly cited the remark of Baroness Hale in her dissenting judgment in *R. (Razgar) v. Home Secretary* [2004] 2 A.C. 368; "Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8." It seems to this Court that the scenario there contemplated is one in which exactly the same health care ground alone is invoked under each article. It is possible to conceive of a case in which the deportation is proposed of, say, the 20 year old son or daughter of a non-national parent who has temporary permission to reside, where the deportee has a serious medical condition but one which is not so critical as to reach the level of gravity required for the protection of article 3. If it were established for example, that apart from the medical treatment, the deportee had become dependent of the day-to-day aid and support of the resident parent or siblings, the significance of interfering with that aspect of private life would fall to be assessed under article 8(2) in conjunction with the implications of the interference with medical treatment. Thus, the fact that the interruption of medical treatment did not by itself amount to a threat to life or to inhuman or degrading treatment would not preclude the interference with private life by deportation involving a possible infringement of article 8 when considered in all its aspects.

12. What this Court endeavoured to point out in its judgment is that the existence of that possibility requires the decision-maker when addressing a claim based on article 8 to consider whether any additional factors over and above the "foreign health care" factor have been put forward in reliance on the right to respect for private life under article 8 which when they are taken together, weigh sufficiently on the balance to be struck under article 8(2) as to involve an infringement. (See paras. 103 to 105 of the judgment.) The Court drew attention to the distinction made in the Strasbourg case law between the instances of applicants illegally present in a Contracting State and those of settled migrants because it is in the latter cases where more extensive facets of private life are likely to be encountered.

13. In the *Agbonlahor* case the only issue which Feeney J. was asked to consider under the ground for which leave had been granted turned on the alleged interference with private life brought about by the health condition of the second named applicant and the evidence as to the limited availability of facilities in Nigeria. (See paras. 1.3 to 1.6 and 3.5 of that judgment.) It does not appear to the Court from the judgment that any additional aspects of private life were relied upon as unlawfully interfered with. In the opinion of this Court, the case in question cannot be read as holding as a matter of law that in a "foreign health care case", a removal which does not reach the level of gravity to attract the protection of article 3 ECHR can never constitute the basis of a possible infringement of the right to respect for private life under article 8.

14. This Court in its judgment of 5th September, 2012 cited at para. 97 the passage in the respondent's memorandum in which the conclusion on the article 8 issue was given. There, the respondent addressed the facts relevant to the applicant's private life and concluded that the consequences of a deportation in the particular circumstances would not be of "such gravity as potentially to engage the operation of article 8". It is also clear from the earlier passages in the memorandum cited elsewhere in the judgment that the writer of the memorandum was also bearing in mind other non-medical aspects of the applicant's situation both in this country and in Nigeria. In addressing the article 8 representations, the writer had acknowledged that the reliance on the respect for private life related "to her work, educational and other ties she has formed in the State as well as matters relating to her personal development since her arrival in the State." Such non-medical considerations as were mentioned in representations of the respondent were cited in the earlier headings of the memorandum. The reality of this case was that the repeated and overwhelming case made on behalf of the applicant was based upon the medical considerations and no significant factors relevant to any non-medical aspects of private life were put forward in the representations.

15. In the view of the Court insofar as article 8 was relied upon, the respondent's decision was made on the basis of the specific facts of the case and no point of law of importance arises which transcends the circumstances of the case such as might warrant the grant of leave to appeal.

16. A further submission was made that an issue of law of exceptional importance arises as to whether this Court was correct to proceed to "conduct a merits based assessment of the applicant's rights under article 8" having identified what is said to be the correct legal test in approaching the relationship between articles 3 and 8 of the Convention. First, as pointed out above, the Court did not in its judgment hold or suggest that there was any application of an incorrect test as to the relationship between articles 3 and 8 in the *Agbonlahor* case. Secondly, insofar as the expression "merits based assessment" appears to be employed to suggest that the Court has gone beyond the judicial review function in order to determine whether the respondent had made the correct decision upon the original application, the Court cannot accept the assertion thus made. The Court has approached the issue in the manner it believes to be appropriate and correct in the light of the claims made that the decision was both vitiated by error of fact and deficient in reasoning, namely, by asking itself whether the conclusion reached in the contested decision was rational and reasonable having regard to the material available to and relied upon by the decision-maker. It is well settled law that the Court in exercising its judicial review function is not obliged to quash an administrative decision even where it is shown to have been tainted by some procedural error if no useful purpose would be served by doing so. (See for example *State (Polymark) v. Labour Court* [1987] 1 I.L.R.M. 357.) The quashing of the respondent's refusal of humanitarian leave and the decision to make the deportation order would have the consequence of requiring the respondent to make a fresh decision on the representations. In para. 105 of the judgment at which this submission is directed, the Court was merely pointing out that the conclusion reached by the respondent was obviously sound in the particular circumstances of the private life put before the Minister and that it was clearly open to the Minister to so conclude whether or not a distinction as to the threshold of gravity fell to be made between article 8 and article 3 ECHR.

17. Accordingly, insofar as an interference with private life under article 8 of the Convention was relied upon in this judicial review application the Court is satisfied that the contested decision turned essentially upon the facts of the case and there is no element in relation to the consideration of article 8 which transcends the circumstances of the case or gives rise to a point of law of exceptional importance.

18. Finally, the Court is also satisfied that no point of law of importance arises on the basis of the submission made that the Court's approach to the interference with private life being private life in the State was inconsistent with the approach of the Strasbourg court in the cited case law. Again, this submission ignores the factual context of the contested decision. The only immediate facet of private life argued to be interfered with by the deportation was the continuing anti-retroviral treatment the applicant was receiving and to the extent that this had any bearing on her private life in Nigeria, it was clearly taken into consideration in the conclusion reached in relation to her prospects of access to treatment there.

19. Leave to appeal will be granted, but the certificate will be confined to the point of law raised by reference to the constitutional issue as set out above.