Neutral Citation: [2014] IEHC 506

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 14 J.R.]

BETWEEN

H. K., R. K. (A MINOR, SUING MY HIS MOTHER AND NEXT FRIEND, H. K.), R. K. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, H.K.), N.K. (A MINOR SUING BY HIS STEP-MOTHER AND NEXT FRIEND, H.K.), N.K. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, H.K.) AND A.K.

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered the 1st day of October, 2014

1. The first named applicant is 40 years of age. She is the mother of the second, third, fifth and sixth named applicants and is the stepmother of the fourth named applicant. The applicant's youngest child, A.K. was born in Ireland on 2nd May, 2006.

2. In these proceedings, the applicants seek to quash the decisions of the respondent dated 26th October, 2010, refusing to revoke deportation orders made against the applicants.

Background

3. The first named applicant is a Nigerian woman and married her husband on 26th February, 1994. She and her husband lived in Kaduna in northern Nigeria. Due to rising tensions and riots between Muslims and Christians in the area, they relocated to Lagos in December 2001. On 2nd February, 2003, there was a large bomb explosion in Lagos that destroyed a number of buildings, including the first named applicant's home. In the ensuing panic and confusion she became separated from her husband. The first named applicant states that she has had no contact from her husband since that day and has no information as to his whereabouts.

4. Following the bombing, the first named applicant and her children moved to temporary accommodation. The first named applicant states that a number of thieves entered the accommodation wanting to rob her and they tried to rape her on that occasion; however, she managed to escape. Following this incident she realised that she and her children were not safe in Nigeria. At the temporary accommodation she met a man who arranged a passage for the first named applicant and her children onboard a ship bound for Ireland. She states that she arrived in the State on 24th February, 2003.

Procedural Background

5. The first named applicant applied for asylum in the State on her own behalf and on behalf of her children. She failed in her application for asylum on her own behalf and on behalf of four of her children. Her credibility was doubted both by the Refugee Applications Commissioner and the Refugee Appeals Tribunal.

6. On 23rd November, 2004, the Ministerial Decisions Unit of the Department of Justice informed the applicant and her then four children, that the Minister proposed to make a deportation order in their cases and invited representations under s. 3 of the Immigration Act 2003. Representations were made on behalf of the first to fifth named applicants by the Refugee Legal Service on 14th December, 2004.

7. The applicant subsequently applied for subsidiary protection and for permission to remain in the State on an IBC application form on 28th February, 2005.

8. On 25th August, 2005, the IBC Unit responded to the first named applicant, informing her that "*given you are not in fact a parent of an Irish born child you do not meet the criteria for consideration ...accordingly your application is hereby refused*".

9. On 8th August, 2006, further representations were lodged by the Refugee Legal Service in support of the applicant's claim for humanitarian leave to remain and included therewith was a birth certificate attesting to the birth of the first named applicant's fifth child, the sixth named applicant, A.K., who was born in Ireland on 2nd May, 2006.

10. On 22nd August, 2006, the applicant completed an application form for a Residence Card on the basis that she was a non-EEA family member and wrongly listed her child, A.K. as Irish. On 25th August, 2006, the EU Treaty Rights Unit of the Department informed the first named applicant that she did not fulfil the criteria for such a Residence Card as she did not have any evidence that she had been granted residence in another Member State.

11. On 25th August, 2006, the Department again wrote to the first named applicant and, having referred to the refusal under the IBC 05 Scheme, issued a further letter under s. 3 of the Immigration Act 1999. On 14th September, 2006, the Refugee Legal Service made further s. 3 representations on behalf of the applicants. There were further representations made on 25th April, 2008, by the Refugee Legal Service.

12. On 25th April, 2008, an application was made for subsidiary protection and included therein were representations to the Department that the first named applicant had met the father of the sixth named applicant in this State.

13. On 20th November, 2008, the EU Treaty Rights Unit wrote to the first named applicant and informed her that her case had been reviewed under the "*Metock judgment*" and this application was refused. On 17th March, 2009, the first named applicant made s. 3 representations on her own behalf and on 23rd July, 2009, Colgan & Co., Solicitors, wrote to the Department informing it that there

was some confusion as their client had never submitted an EU Treaty Rights application.

14. On 18th August, 2010, the first named applicant and her solicitors were informed that the applicant was not eligible for subsidiary protection. Submissions were thereafter prepared for a file examination under s. 5 of the Refugee Act 1996 and s. 3 of the Immigration Act 1999. These submissions were dated 9th August, 2010.

15. The submission was prepared by Ms. Aoife Bushby and considered, *inter alia*, the issue of Female Genital Mutilation (FGM). Ms. Bushby noted that while the first named applicant claimed to have a doctor's report which confirmed that one of her children had been subjected to FGM, the medical report was not submitted and that the first named applicant had not mentioned to which child this was alleged to have occurred.

16. In the course of her report, Ms. Bushby stated as follows in relation to this aspect:-

> *"The applicant claims that she has a doctor's report about one of her children who was subject to circumcision. No doctor's report was submitted and Ms. K does not mention which of her children she is referring to. Female Genital Mutilation (FGM)*
>
> *The OMCT report for 38th Session of the United Nations Committee on the Rights of the Child in 2005, stated:-*
>
> > *'The age of [female genital} mutilation varies from 3 months to 17 years or just about the first pregnancy. Any state interference into the practice of FGM is considered as a violation of the right to privacy.*
> >
> > *Yet, many girls face several health risks through this, including of HIV infection due to unhygienic methods that accompany the practice.*
> >
> > *The State Report [second periodic report by Nigeria to the CRC] mentions that the Bill on Female Genital Mutilation has gone through the lower house, and will go through the upper house before the President can sign it into law. But to date, the law has not been adopted....*
> >
> > *However, some states passed laws prohibiting female circumcision and genital mutilation. In the report of the Nigerian government to the CRC, the ongoing existence of FGM and other harmful traditional practices is recognised and efforts to combat it are reportedly undertaken. Due to public enlightenment and mobilization efforts by groups of civil society, as well as increased enrolment of girls in schools, reported cases of FGM are diminishing. Nonetheless, the practice remains widespread in Nigeria and the proportion of the female population having undergone genital mutilation [is] high. '"*

17. Deportation orders were signed by the Minister on 1st September, 2010, in relation to the first five applicants.

18. On 21st October, 2010, Messrs. Colgan & Co. submitted a request for revocation of the deportation orders in respect of the applicants. This application was said to be based, *inter alia*, upon evidence of the circumcision of N.K.

19. Enclosed with the request for revocation was confirmation from a GP and a Dr. Reeba, Consultant Obstetrician/Gynaecologist at Our Lady of Lourdes Hospital, Drogheda that there was evidence of Grade 1 circumcision of N.K.

20. On 22nd October, 2010, Ms. Bushby prepared a document entitled "*Consideration of Application for Revocation of Deportation Order pursuant to section 3(11) of the Immigration Act, 1999*". Having referred to further correspondence received, including the medical evidence submitted, it was noted that all documents submitted had been read and referred to and given due consideration. Ms. Bushby specifically referred to the fact that country of origin information in relation to FGM had already been considered in September 2010, despite not knowing which of the children had allegedly undergone FGM, the documents were fully taken into account in the course of considering the revocation application. Ms. Bushby recommended that the existing deportation orders be affirmed.

21. Ms. Bushby's submission was in due course confirmed by more senior officers in the Department and on 26th October, 2010, the respondent said that he had considered the content of the submissions and of the report and that he agreed with the recommendation. The same, in modified form, was done in relation to the application for revocation of the deportation order in respect of the sixth named applicant. By letter dated 28th October, 2010, the applicants were informed that the revocation application had been refused.

The Applicant's Claim

22. The essence of the claim made by the first named applicant on her own behalf and on behalf of the other applicants, is that in considering the question of revocation of the deportation order under s. 3(11) of the Immigration Act 1999, the respondent failed to consider the application in the light of the specific documentation which had been presented in relation to the FGM carried out to the first named applicant's daughter, N.

23. The applicant submits that at no stage during the process has the fact that one of the children has been subjected to FGM been considered in a meaningful sense by the respondent. They maintain that the respondent has noted that the incidents of FGM happening has gone down generally in Nigeria, but they state that this is not an answer to a situation where there is actual evidence of FGM occurring.

24. It is submitted that it not rational to disregard evidence of FGM actually taking place merely by reason of country of origin information (COI) which states that it is decreasing. This is particularly so when the COI also notes that the proportion of females being subjected to the procedure is high.

25. In circumstances where the respondent was given actual evidence that one of the applicants had previously been subjected to FGM, it was submitted that it cannot rationally be said that the fact that numbers were decreasing, and that Nigeria was a signatory to the UN Convention on the Rights of the Child, was a sufficient basis to determine that there was no serious risk of harm to the applicants if returned to Nigeria.

26. The applicant submitted that the following dicta of Murray C.J. in *Meadows v. Minister for Justice and Equality* [2010] 2 I.R. 701, sets out the correct way to approach this issue:-

"... before making a deportation order the Minister is required to consider in the circumstances of each particular case whether there are grounds under s.5 which prevent him making a deportation order. In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self evident.

On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion. "

27. The applicant submitted that although there is a different test in as. 3(11) application, i.e. the respondent is only obliged to consider new material, they submitted that the evidence of FGM actually occurring which was given to the respondent was sufficient to invoke the requirement that the respondent must specifically address that issue and form an opinion, as opposed to relying on a mere generalised assertion that FGM was decreasing in Nigeria.

28. The applicants also submitted that it was important to note that where a decision maker makes a decision, it is important that he sets out in clear language the basis of that finding. It is not clear from this case whether the respondent determined that Female Genital Mutilation was not sufficiently widespread such as not to be a serious risk for the applicants, or possibly that by becoming a signatory to the UN Convention on the Rights of the Child Nigeria was now in a position to provide effective State protection, or for entirely different reasons.

29. The applicants submitted that it was not for this Court to infer what those reasons might be. In *EMI (Ireland) Limited v. Data Protection Commissioner* [2013] IESC 34, Clarke J. held that there must be certainty as to what the decision actually is. While that case was concerned with a suggestion that the decision can be understood by reference to documents not referred to in the decision, it is submitted that in the absence of clear words to suggest that having been in a position to conclude that FGM was not widespread, or that there was State protection etc., the respondent did not in fact come to any clear conclusion on those issues, relying instead on the bald averment that having regard to the foregoing matters non-refoulement did not arise.

30. The applicants further submitted that there was positive evidence of one of the daughters having already undergone FGM, there was a positive duty on the respondent to consider the risk that the other daughters may be subjected to same. The finding that this evidence was not a change in circumstances was irrational, having regard to the fact that at least one of the factors relied on by the respondent in concluding that non-refoulement did not arise, was the absence of a medical report.

31. Thus, where the respondent had not stated which exact reason was behind the determination that non-refoulement did not arise, one of the possible reasons was the absence of a medical report, the finding in the s. 3(11) decision that the medical report then available, did not amount to a change of circumstances, that the decision on non refoulement still applied, cannot be said to logically flow from the premises. The applicant submitted that given that this case concerned a matter of fundamental rights and had the potential to result in serious harm being to some of the applicant's children (serious harm having already been done to one of them), it was submitted that the decisions together with the absence of clear reasons for same were disproportionate.

32. The respondents argue that the applicants are out of time to challenge the deportation order itself. Pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, the applicants were acquired to bring a challenge to the deportation orders within fourteen days of having been notified of same. They noted that from the affidavit of the first named applicant, it was accepted that the deportation orders were communicated to them on 8th September, 2010. They were, therefore, almost four months out of time in bringing their challenges to the deportation orders.

33. The respondents point out that in her affidavits sworn in these proceedings on ih January, 2011, the first named applicant makes no reference to this delay in seeking to challenge the deportation orders. In an affidavit sworn by Mr. Brian Trayers, dated 7th January, 2011, it was stated by him that he was instructed that the applicant had formed the intention to challenge the deportation order "*on or about 29th October, 2010*". Not only was there no direct evidence from the applicant herself, that she formed such an intention, but this intention itself (even if accepted) was outside the fourteen day period.

34. It was noted that no explanation whatsoever was offered in any affidavit in this case for the delay between that date, 29th October, 2010 and the date upon which these proceedings were instituted in January 2011.

35. In these circumstances, the respondents submitted that the applicants should not be permitted to challenge the deportation orders themselves as these challenges were bought well outside the fourteen day time limit and no good or sufficient reason had been advanced by the first named applicant (who acts on behalf of her children) for the delay in instituting these proceedings.

36. The respondent further submitted that the applicants are estopped from changing their position at this point. In this regard, the respondent relied on the decisions in *Odulana & Ors v. Minister for Justice, Equality and Law Reform* (Unreported, Clark J. 25th June, 2009), where Clark J. noted:-

"42. Counsel for the respondents, I believe very properly, objected to any extension of time on the basis that the applicants had elected to treat the deportation as valid and had sought to revoke the order on the basis of what they proposed to be new evidence on their medical position which had not previously been considered. While Ms. Moorehead, S.C., did not conceded that the two medical reports from Dr. McMahon or Dr. Hayden relied on for the applicant to revoke the deportation order constituted new material, she argued that the applicants were in effect bound by their choice. It was a matter of concern that an applicant should choose to revoke an order and then when that application failed, seek to challenge the validity of the order itself

43. It is my view that the application to extend time to challenge the deportation order must fail as the proceedings in respect of which an extension of time is sought were commenced after a failed application to revoke. It is legally inconsistent to first treat an order to deport as valid and, relying on its validity to seek revocation of that order and then, only after consideration by the Minister of the information relied on to revoke and on receipt of an unfavourable decision, to seek to challenge the original order. Such a step appears to me to suggest abuse of process and is akin to a guilty plea in a criminal trial which, following consideration by the court and the imposition of sentence, is met with the retort of an objection to the charge. Such procedural gambling is not permitted and unless a genuine and extraordinary reason exists to explain the exercise of the revocation option in lieu of commencing proceedings challenging the deportation order, a party seeking to challenge the validity of the deportation order will not be permitted an extension of time to do so. Those genuine and extraordinary reasons do not exist in this case. The extension of time application is, I believe, misconceived. "

37. In the circumstances, it was submitted that the applicants should not be granted leave where they had pursued an alternative course of action and arising out of which they now sought leave to apply for judicial review in these proceedings.

38. In relation to the refusal to revoke the deportation orders, the respondent points to the decision in *Irfan v. Minister for Justice* [2010] IEHC 422, and *Akujobi v. Minister for Justice* [2007] IEHC 19, which discussed the power of the High Court to intervene where an applicant is challenging a decision of the Minister not to revoke an already lawfully made deportation order. At para. 7 of his judgment in *Irfan*, Cooke J. stated that it was settled law that the "*grounds upon which a failed asylum seeker can challenge a refusal to revoke an extant and valid deportation order are extremely limited*". He made the point that the power of the Minister under s. 3(11) to revoke exists in order to permit the Minister to accommodate circumstances that have arisen since the making of the order which gave rise to a material change such that it becomes illegal or inappropriate on humanitarian grounds to implement the order.

39. The respondent submitted that the obligations of the Minister in dealing with a revocation application were also considered in that (and in a number of other cases cited in the judgment of Cooke J.) at the said paragraph 7, Cooke J. referred to his previous decision in *M.A. v. Minister for Justice*, where he stated:-

> *"When an application to revoke is made to the Minister under s. 3(11) of the Act, the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation; and he must also verify that since the deportation order was made, no change of circumstance has occurred, either so far as concerns the applicant or the situation in the country of origin, which would bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin. ... Otherwise... in dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or enquiry; nor is he obliged to enter into any exchange of observations and replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive narrative statement of his reasons for refusal. Once it is clear to the court that the Minister has properly discharged those two functions, a decision to refuse to revoke a valid order of deportation will not be interfered with. "*

40. At para. 8, Cooke J. went on to say that the Minister, absent any material change of circumstances of the applicant or in the conditions in the country of origin of the applicant, is under no obligation to re-open or re-examine any of the matters dealt with, *inter alia*, at the time of making the order.

41. The respondents submitted that this is a case where the high threshold has not been met by the applicants. The applicants in this case alleged that the respondent failed to take into account, properly, or at all, the medical evidence which the applicants had failed to submit in relation to the alleged FGM of the fifth named applicant prior to making the deportation orders. As was pointed out in the submission prepared for the purposes of revocation in this case, however, the possibility of exposure to FGM was in fact originally addressed prior to the making of the deportation orders in this case. Furthermore, this was expressly referred to in the submissions for the purposes of revocation and it was stated by the person who prepared that submission that, in her view, this should not affect the conclusions previously reached in this regard. It is therefore, clear that these matters were taken into account by the respondent and reasons were given for his decision not to change his mind and revoke the deportation orders.

Conclusions

42. I am of opinion that the submissions of the respondent in relation to the purported challenge to the making of the deportation orders are well founded. The applicants are out of time in relation to that application. The deportation orders were communicated to the applicants on 8th September, 2010. The Notice of Motion issued on 7th January, 2011. They have not averred to any explanation as to why the challenge was not made in time. On this ground, I hold that they cannot now challenge the making of the deportation orders.

43. In addition, I am of opinion that the submission of the respondent that the applicants are estopped by their conduct from challenging the deportation orders is also well founded. The applicants treated the deportation orders as valid when they sought revocation of the order under s. 3(11) of the 1999 Act. They cannot now turn around, having been unsuccessful in their revocation application, and seek to make the case that the deportation orders were defective, or invalid.

44. In fairness to the applicants this was not a claim that they pursued at the hearing. At the commencement of the hearing they indicated that they were only proceedings under grounds 2 and 5 of their statement of grounds. These were in the following terms:-

> "2. The Respondent was *ultra vires*, irrational and failed to take into account all relevant factors in that he failed to consider the impact of the evidence submitted by the applicants to the effect that the fifth named applicant has suffered Female Genital Mutilation and by reason therefore, the other applicants, in particular the third named applicant, may be exposed to similar harm if returned to Nigeria.
>
> 5. The decision of the respondent that the evidence of circumcision does not amount to a change in fact or circumstance which would require revocation that the deportation orders for the family is irrational."

45. I now turn to the essence of the applicant's claim herein which is the challenge to the refusal to revoke the deportation orders. In the report pursuant to s. 3(11), the author states that the question of FGM was considered in the decision of September, 2010. Therefore, it was argued that while the Minister was not aware of the specific details of the FGM, or which child had undergone it, this did not amount to a change in fact or circumstance which would require revocation of the deportation orders for the family.

46. In the earlier decision, the decision maker referred on five separate occasions to the fact that while the applicant had stated that she had a medical report relating to the circumcision of one of her daughters, no such medical report had been forwarded by the first named applicant nor had she specified to which of her daughters the report related. On the basis of country of origin information in relation to the practice of FGM generally in Nigeria, the decision maker had come to the conclusion that repatriating the applicants was not contrary to s. 5 of the Refugee Act 1996 (as amended).

47. I am of opinion that the arguments on behalf of the applicants in this regard are well founded. In this case, very significant documents relating to the circumcision of the fifth named applicant, had been produced. These were documents which were not before the decision maker when considering the making of the deportation order. They establish as a fact that the fifth named applicant had been subjected to FGM. In the face of specific documents showing that FGM had been practiced in relation to one daughter, the relevance of general country of origin information on FGM is lessened considerably.

48. The decision maker had to reach a decision on the basis of the actual evidence before him/her. It was not sufficient to simply say

that in considering this further documentation, one could look back at the original decision, where the absence of the medical report had been highlighted on five separate occasions. When this documentation was submitted, it was incumbent on the respondent to consider the effect of this particular evidence on the overall application of the applicants to seek revocation of the deportation orders.

49. Once the respondent was given actual evidence that one of the applicants had previously been subjected to FGM, it cannot rationally be said that the fact that the numbers undergoing FGM were decreasing and that Nigeria had become a signatory to the EU Convention on the Rights of the Child, was a sufficient basis to determine that there was no serious risk of harm to the applicants if returned to Nigeria.

50. I am satisfied that the medical reports constituted new and specific evidence which needed to be considered in its own right in the context of the revocation application. It was not sufficient to refer back to the original decision under s. 3(6) which was clearly based on an absence of any such medical evidence. In the circumstances, I will quash the decision of the respondent dated 26th October, 2010, which is the date when the examination of the file was signed off on by the assistant principle on behalf of the Minister. I direct that the matter be referred back to the respondent for reconsideration.

51. A separate decision was given by Ms. Bushby on 20th October, 2010, in respect of the sixth named applicant. This was signed off on by a principal officer on 26th October, 2010. As the decision pursuant to s. 3(11) in respect of the other applicants has been struck down, it is appropriate that for the same reasons this decision of the respondent should also be quashed. Accordingly, I will quash the decision of the respondent dated 26th October, 2010, in respect of the sixth named applicant and direct that his application be referred back to the respondent for reconsideration.