Neutral Citation Number: [2011] IEHC 93

THE HIGH COURT

JUDICIAL REVIEW

2011 174 JR

BETWEEN

C. U. H. AND J. H., JN. H. AND JE. H. (MINORS SUING BY THEIR MOTHER AND NEXT FRIEND C. U. H.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 10th day of March 2011

1. This is an application made *ex parte* for leave to bring an application for judicial review of a decision (the "Contested Decision",) made by the respondent under s. 3(11) of the Immigration Act 1999, refusing to revoke a deportation order made on the 9th July, 2008, in respect of the first named applicant.

2. As such a decision does not come within the scope of the requirement that substantial grounds be established for the grant of leave in accordance with s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, the test for the grant of leave is the normal criterion under O. 84 of the Rules of the Superior Courts namely that an arguable case be shown.

3. While the application might be said to have the benefit of that lower threshold, it faces the difficulty that this is the second decision on the part of the respondent refusing to revoke the deportation order.

4. The first named applicant is a national of Nigeria who arrived in the State in May 2006, and claimed asylum. Her claim to refugee status was based upon a claim to fear persecution if returned to Nigeria due the lack of medical care available to her there. The Refugee Applications Commissioner in a report under s. 13 of the Refugee Act 1996, dated the 30th August, 2006, recommended that she not be declared a refugee upon the basis that her claim did not amount to a fear of persecution for a recognised Convention reason. An appeal to the Refugee Appeals Tribunal was unsuccessful. The appeal decision dated the 21st May, 2007, found that she did not have any well founded fear for a Convention reason and that in any event medical treatment for people suffering from sickle cell anaemia is available in Nigeria and there was no evidence to suggest that she would be treated any differently from any other national of that country in her situation.

5. Applications were then made for subsidiary protection and for leave to remain in the State on humanitarian grounds. These applications were also unsuccessful and the deportation order of the 9th July, 2008, was made requiring her to report to the Garda National Immigration Bureau on the 11th August, 2008. She failed to do so. No challenge was raised to the validity of the deportation order.

6. In the grounding affidavit for this application the first named applicant said that she met the second named applicant in July 2006, in Galway where she was living at the time. The second named applicant is a plasterer by trade who is currently unemployed. Arising out of this relationship, the first named applicant gave birth to twins, the two minor applicants, on the 28th March, 2009. The second named applicant is the father of the two children. The father and the two children are Irish citizens. The first and second named applicants married in Galway on the 23rd April, 2009. On the 22nd May, 2009, the Refugee Legal Service was instructed to apply to the respondent under s. 3(11) of the above Act of 1999 to revoke the deportation order on the basis of these changes in the first named applicant's personal circumstances namely, the birth of the twins and her marriage to an Irish citizen. Simultaneously, an application was made to the respondent for permission to remain and reside in the State on the basis of that parentage. On the 27th August, 2009, the Minister refused to consider the application for permission to reside because of the existence of the deportation order. By letter of the 14th September, 2009, the Repatriation Unit of the Irish Naturalisation and Immigration Service (INIS) informed the first named applicant that the request for revocation had been considered but refused. The letter enclosed a memorandum setting out the consideration of the application for the purpose of s. 3(11) and containing, in effect, the Minister's reasons for the decision.

7. On the 21st September, 2009, judicial review proceedings (2009 No. 969 J.R.) were commenced by way of challenge to that refusal decision. The proceeding was subsequently unilaterally withdrawn, apparently in favour of making a new application for revocation. That new application to revoke was made to the respondent on the 20th December, 2010, and is the subject of the present Contested Decision. The initial application of the 20th December, 2010, was later supplemented by further representations forwarded to the respondent by letters of the 7th, 10th, , 21st January, and 2nd February 2011.

8. The difficulty faced by the present application for leave is essentially that the facility for revocation of a deportation order in s. 3(11) does not have as its legislative purpose the repeated review or reopening of an earlier decision to revoke or of the decision to deport itself. It is well settled that the grounds upon which the High Court can be required to intervene to review a revocation refusal are extremely limited. An application to revoke a deportation order is necessarily predicated upon the fact that a valid deportation order is in existence and an application under subs. (11) is not a means of challenging the reasons given for the original decision to deport or the grounds upon which it was based.

9. In *A.O.D. v. Minister for Justice, Equality and Law Reform* [2006] I.E.H.C. 140, O'Neill J. summarised the position in this regard:-

> "It is clear that the nature and extent of the inquiry which is appropriate in this later phase of the process, thus described, is significantly more restricted than for example in the asylum phase. Likewise the extent of review of the later phase is undoubtedly more restrictive than in the earlier phase."

10. In *Akujobi v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, MacMenamin J. 12th January, 2007) it was said:-

> ". . . an applicant making representations to the Minister for leave to remain on humanitarian grounds is obliged to actively put his or her best case forward in such representations. To address the second issue directly any such application under s. 3(11) to revoke a deportation order made having considered such representations, must advance matters which are truly materially different from those presented or capable of being presented in the earlier application. There must be, in the words of Clarke J. in *Kouyape* 'unusual, special, or changed circumstances'. Furthermore, the test in law must include one further test which is as to whether the material was capable of being presented earlier. To omit this latter aspect might have the effect of actually encouraging delay in the making of an application for humanitarian leave to remain . . . ."

11. In the view of this Court, the legislative objective in conferring on the respondent the power to revoke deportation order in s. 3(11) is effectively twofold. It enables the Minister to consider material changes in the personal circumstances of the person subject to the deportation order which have arisen since the order was made; secondly, it enables him to consider, and if necessary investigate, whether any political, social or other changes have occurred in the country of destination of the deportee which would now render implementation of the deportation order unlawful. This Court endeavoured to explain this objective in its judgment in *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 17th December, 2009) as follows:-

> "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 in circumstances 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 . . . in dealing with an application to revoke, the Minister is not obliged to embark on any new investigation or inquiry; 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."

12. Thus, in the view of the Court, where there has been no material change in the circumstances of the applicant or in the conditions prevailing in the country to which the deportation will take place, the respondent is under no obligation to reopen or re-examine any of the matters dealt with during the asylum process or at the time of the making of the order. In the present case, of course, material changes had occurred in the personal circumstances of the first named applicant as described above. Both the s. 13 report of the ORAC and the appeal decision of the RAT were made on the basis that the first named applicant was an unmarried woman with no personal ties or connections with the State and they were made prior to the point at which the relationship with the second named applicant is claimed to have commenced.

13. It is also the case that no mention was made of the existence of any relationship between the first and second named applicants when representations were made in response to the respondent's letter proposing to make a deportation order. The "Examination of File" memorandum supporting the deportation order was compiled on the basis that the first named applicant "is a single woman and has no children". The representations made by way of application for leave to remain on the 1st August, 2007, included a hand written letter written by the second named applicant in her support but merely said that the first named applicant was "friendly and trustworthy, gets on well with people and was ambitious to do well". He expressed the wish that she should be given the opportunity to remain in the country.

14. It is fair to say that the representations placed heavy emphasis on the first named applicant's health as a humanitarian consideration and particularly her sickle cell anaemia condition and subsequent diagnosis of tuberculosis. A number of medical reports were attached including one from University College Hospital, Galway confirming the diagnosis of tuberculosis and the fact that she had surgery to remove a tubercular lymph node from the neck. The letter said:-

> "In view of her ongoing health issues it is advisable that C. remains in Galway to ensure that she receives the necessary medical attention."

15. A major part of the analysis and assessment contained in the Examination of File memorandum supporting the deportation order is devoted to the medical issues and the first named applicant's two particular conditions are considered both in the context of the prohibition on *refoulement* in s. 5 of the Refugee Act 1996, and from the perspective of her entitlement to the protection of private life under Article 8 of the ECHR.

16. It was thus only on the 22nd May, 2009, when the first application to revoke was made that the Minister was informed for the first time of the two changes in the personal circumstances of the applicant. Apart from informing the Minister of these two events the representations set out submissions as to the rights of the parents and the children both individually and as a family unit; as to why the mother should not be deported; and as to the unlawful impact which a deportation would have on those rights. In subsequent correspondence further representations were made and supporting documentation forwarded to the Minister.

17. By letter dated the 14th September, 2009, the application for revocation was refused. Again, the letter was accompanied by a memorandum setting out the consideration that had been given to the application amounting in effect to the Minister's reasons for refusing. The basis of the consideration and the reasons for refusal can be summarised as follows.

18. The earlier decisions refusing subsidiary protection and making the deportation order are referred to, including the previous consideration of the representations relating to her sickle cell disease and tuberculosis condition and to her rights under Articles 3 and 8 of the ECHR. Consideration is then given to the new information as to the birth of the twins and her marriage to Mr. H. The refusal to grant permission to reside on foot of those events is also noted.

19. The file note supporting the decision then acknowledges that implementing the deportation order may well "engage" her rights under Article 8 of the ECHR to respect for private and family life, but it is pointed out that the right in question is not absolute. The final note runs to some fourteen pages of which eleven are devoted to considering the impact of the order on the rights of the applicant, her spouse and children under Article 8 of the ECHR and the rights of her spouse and children under the Constitution as well as setting out the basis upon which a proportionate balancing of all of those rights has been made against the interest which the State seeks to protect.

20. As regards to the interference with her right to protection of private life, the conclusion reached is that any interference will not have consequences "of such gravity as potentially to engage the operation of Article 8. As a result, the decision to deport Ms. U. does not constitute a breach of the right to respect for her private life under Article 8 ECHR".

21. In respect of her entitlement to protection of family life, the conclusion is that while it will be interfered with, she "entered into a relationship with Mr. J. H. at a time when the applicant had been served with a notice of intent to deport had been issued against her and she had no lawful entitlement to reside in the State". As against that, the proposed interference was considered to be in accordance with Irish law, to pursue a pressing need and a legitimate aim, namely, to prevent disorder and crime, to safeguard the economic wellbeing of the country and to maintain control of borders and operate a regulated system for control, processing and monitoring of non-nationals in the State. It was further stated to be necessary in a democratic society in pursuit of a pressing social need and proportionate to the legitimate aim being pursued that the deportation take place.

22. Under the heading "Proportionality" the file note considers the relevant case law as regards striking a balance between the pursuit of the objectives of the State and the encroachment upon the rights of the deportee and his or her family members. It is concluded that "where a person establishes his family ties in the State while fully aware that he/she has no lawful residency, or entitlement to such in the State, it will only be in exceptional circumstances, or for compelling reasons, that the enforcement of an existing deportation order will be contrary to or in breach of Article 8. In Ms. U's case, there are no exceptional circumstances of such gravity which would lead to a breach of Article 8".

23. The note then examines the feasibility for the other applicants of relocating to Nigeria in order to preserve family unity in the event that the first named applicant is deported. The representations made on this subject are set out, including the emphasis made on it being imperative that the first named applicant be enabled to remain in the State in order to provide for the infant children. Neither the husband nor the children are said to have any connection with Nigeria and it is stated that they would not be prepared to relocate there, as to do so would not be in the children's interests.

24. The constitutional rights of the second named applicant are then addressed. It is concluded "there appears to be no authority which supports the proposition that an Irish citizen may have an absolute right under Article 41 of the Constitution to have their non Irish national spouse reside with them in this jurisdiction".

25. Finally, the note considers the constitutional rights of the Irish citizen children and explains how the assessments of those rights are balanced against the rights which the State seeks to pursue or protect by the deportation decision. It is acknowledged that they have the right to be reared and educated with due regard to their welfare in the State and to have the society, care and company of their parents. However, these rights are not absolute and are then weighed against the rights of the State including the right of the State to control the entry, presence and exit of foreign nationals. It is noted that both mother and the twins are eligible for Nigerian citizenship and have the right to return there as a family unit. Mr. H. is said also to have the possibility of moving to Nigeria. Visa application guidelines for Nigeria are set out in support of that proposition. It is noted that while such a move might result in certain hardships for Mr. H., there is "nothing to suggest that there are any insurmountable obstacles to the family being able to establish a family life in Nigeria".

26. The ultimate conclusion reached is that having considered all of these factors "there is no less restrictive process available which would achieve the legitimate aim of the State to safeguard the economic and wellbeing of the country and maintain control of its borders and operate a regulated system for control, processing and monitoring of non national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of C. U.".

27. The Court has summarised the content of the file note giving the reasons for this first refusal to revoke the deportation order, not because its adequacy or validity is questioned, (it cannot be, the earlier judicial review having been abandoned), but because, as indicated above, the entitlement to challenge the lawfulness of the Contested Decision depends upon the question as to whether or not the Minister was under any obligation to consider new facts, information or circumstances which have not previously been put to him.

28. The Court would accept that when, as in this case, the events put forward as new events occurring since the making of the deportation order include the marriage of the deportee to an Irish citizen and the birth of Irish citizen children, the Minister must approach his decision on the application to revoke in the same manner as is required by the case law of the Supreme Court in cases such as *Dimbo* and *Oguekwe*. In the judgment of the Court this is what the respondent has carefully and adequately done in the analysis and assessment set out in the file note accompanying the letter of the 14th September, 2009.

29. In the judgment of the Court the combined effect of the files notes supporting the deportation order and the refusal of the first revocation request is that the Minister has carefully and adequately considered the matters he was obliged to consider under s. 3(6) of the Act of 1999 including the representations made to him and has properly balanced the rights and interests of the applicants on the basis of the facts made known to him against the interests and aims of the State in the manner required by the case law of the Supreme Court. This includes, obviously, the matters urged upon him in the representations made up to that point in relation to the medical condition of the first named applicant and the birth of the twins and the marriage to an Irish citizen.

30. It follows that the immediate issues for the Court on this application for leave are (a) which, if any, of the matters put to the Minister as reasons for the second application to revoke, constitute new matters which he was obliged to consider and (b) whether there is any arguable case that he has failed or erred in the discharge of that obligation to consider such matters?

31. The basis upon which the second application to revoke was made can be gleaned from the heading as set out in the letter of the 20th December, 2010, as follows:

> - Parent's decision in the best interests of their children: the Minister was requested to respect and support the parent's decision that it is in the best interests of the family to remain in Ireland.
>
> - Disproportionate weight to immigration control rather than children's rights: it was submitted that there had been no

analysis of the relationship between the first named applicant and the other applicants and that the Minister ought to have obtained a report from both the Children's Office of the Department of Social and Family Affairs. No regard had been given to the enormity of the interference in the lives of the children by the deportation.

- Discrimination in consideration of Irish-Nigerian children: it was submitted that because the children were Irish-Nigerian, the Minister had considered that they are "only nominal citizens of this State" and essentially inferior to other Irish children.

- Failure to consider the rights of the Irish citizen father: there was no real analysis of the position of the second named applicant and the two children if they were forced to live in Nigeria.

- Immigration policy v. family law and children rights: it was submitted that the Minister's analysis was inconsistent with the rights protected by the European Convention on Human Rights, the UN Convention on the Rights of the Child and that it violated the constitutional rights of the family. The fact that the first and second named applicants married when they knew that the first named applicant would be deported "has resulted in the Minister considering matters essentially from an immigration analysis rather than a family perspective".

- Prioritisation of immigration over family law violates constitutional protection: it was submitted that the Minister wrongfully prioritised immigration control policy over the family law considerations.

- Best interest of the child in immigration and family law context: it was submitted that the Minister abdicates responsibility for considering the individual rights of the citizen children in assuming that any "constructive deportation" arises solely because of the decisions of the family.

- Extreme and unavoidable hardship of the expulsion: the second named applicant would face exceptional difficulties in keeping his marriage intact if separated from his wife.

- Failure to consider full range of interests: it is submitted that no assessment had been given to the changes the family unit would have to endure in deciding that insurmountable obstacles do not arise.

- Deportation is not necessary in a democratic society: it was submitted that the first named applicant was not in any way unfit or ineligible to benefit from entitlement to afford her discretionary or temporary leave to remain.

32. It will be immediately apparent that none of the matters thus set forth contain anything by way of new facts, information or intervening events since the first application to revoke had been made. They amount entirely to a reiteration in various ways of the essential arguments that had already been put forward. They constitute, in effect, an attempt to reopen or require reconsideration of a decision already made in respect of which a judicial review challenge had been abandoned. In the judgment of the Court the content of the letter of the 20th December, 2010, contained no new material which the Minister was required in law to consider.

33. As already indicated, the application to revoke was subsequently supplemented by further submissions made by letter of the 7th January, 2011. This submission ran to some 22 pages and was accompanied by something in excess of 120 pages of documentation and country of origin information material. Again, the substance of the submission can be seen in the headings to the points made.

- Ms. U.'s background.

- Passage to the asylum process.

- Applicant's account of initial medical treatment in Ireland.

- Initial admission to hospital.

- Reasons for fleeing Nigeria.

- Applicant's account to the Commissioner for seeking asylum in Ireland.

- Misdiagnosis on admission to hospital in Nigeria.

- Experiences of limited access to medical care.

- Bribes and backhanders for medical care.

- Internal relocation in Nigeria.

- Support of family members.

- Support form Catholic church parishioners in Nigeria.

- Applicant's despair and depression.

- Perspective fear of return to Nigeria and lack of available medical treatment.

- Honesty and integrity of the applicant.

- Earlier representations to the Minister.

- Further information on the treatment of sickle cell disease in Nigeria.

- Further information on treatment of TB in Nigeria.

- Repatriation Unit's analysis of Ms. U.'s condition.

- Irish family situation.

- Earlier submissions by Refugee Legal Service.

- Minster's refusal to grant residency on basis of marriage to an Irish citizen.

- Development of couple's relationship.

- Social welfare assistance for Mr. H. and the children

- Ms. U.'s participation in religious, community and cultural life.

- Ms. U.'s links with Nigeria.

- Mr. H.'s background and family.

- [The children].

- Reason for the family's decision to remain in Ireland.

- Hardship for [the children]

- Insurmountable obstacle.

- Country of origin information re availability of healthcare for minor children in Nigeria.

- Country of origin information re access to healthcare in Nigeria.

- Department Travel warning re Nigeria.

34. It is again apparent that the information advanced in this supplementary submission raises no specific claim that some new event has occurred or some change of circumstance of the first named applicant has come about since the earlier application to revoke under section 3(11). For the most part, the supplementary submissions go over the same ground again including particularly the history of the applicant's medical condition adding more recent country of origin information in relation to the availability of treatment in Nigeria.

35. The next letter of the 10th January, 2011, contains no additional narrative submissions, but forwards a number of letters of support or reference and a series of family photographs of the first and second named applicants, the twins and members of the second named applicant's family.

36. Two further letters dated the 21st January, 2011, and the 8th February, 2011, submitted additional letters of support. Amongst the items submitted with the second of those letters is a medical report dated the 1st February, 2011, supplied by Dr. Amjad Hayat of the Department of Haematology at Galway University Hospital. The report in question contains the following:

> "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."

37. In the judgment of the Court this report is the only item in the submission made for this second application to revoke the order which could arguably be said to raise a new matter which required the Minister's consideration. Insofar as the first named applicant's medical condition had been put forward as a humanitarian consideration for not deporting her, it has largely been advanced on the basis that the medical treatment and healthcare available in Nigeria would be inferior to that available to her in this country. That was the basis upon which the Minister considered that her medical condition did not furnish a reason for not repatriating her to Nigeria either under s. 5 of the Refugee Act 1996, or by reference to her entitlement to protection under Articles 3 and 8 of the ECHR. The quoted paragraph in this medical report appears to be the first occasion upon which a medical opinion has been advanced to the effect that her expulsion from the country and forced discontinuance of her current treatment would place her at risk to her life. In this regard it can be contrasted with the less urgent advice given in the medical report quoted in paragraph 14 above.

38. This new report is considered and extensively quoted in the memorandum which accompanied the Minister's decision to refuse the present application to revoke. It is considered both in relation to Article 3 of the ECHR and Article 8 in the context of the entitlement to protection of private life. The Court notes that in each place in the memorandum, the author quotes the same two passages from the first, second and third paragraphs on the second page of the medical report of the 1st February, 2011, but there is no mention of the paragraph quoted above in para. 36 of this judgment.

39. Having considered the medical report and other supplementary items together with a review of case law and country of origin information relating to the treatment for this condition in Nigeria, the author of the memorandum concludes:

> "Having considered all of the above factors, including in particular the applicant's medical condition and country of origin relating to medical treatment available in Nigeria, it is not accepted that there are any exceptional circumstances in this case such that there is a sufficiently real risk that deporting C. U. to Nigeria 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 exist as exceptional circumstances."

40. Similarly, in relation to the impact of deportation for the purpose of Article 8, the author concludes:-

> "Having weighed and considered the facts of this case set out above, it is not however accepted that any such potential interference would have consequences of such gravity as potentially to engage the operation of Article 8. As a result, a decision to deport C. U. does not constitute a breach of the right to respect to private life under Article 8 of the ECHR."

41. In the judgment of the Court, having regard to the criteria to be applied to the Minister's obligation when considering an application for revocation, the only respect in which it might be argued that the Minster has failed in his obligation in this case is in relation to the possible significance of the final paragraph on the second page of the report of Dr. Hayat. 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.

42. Accordingly, leave will be granted to apply for an order of *certiorari* to quash the Contested Decision upon the following ground:

> "In concluding for the purpose of the refusal to revoke the deportation order that the first named applicant's medical condition did not give rise to any exceptional circumstance or real risk to her life such that an infringement of s. 5 of the Refugee Act 1996 or of Articles 3 and 8 of the ECHR would occur, the Minister erred in law in failing to consider or consider adequately the significance of the medical opinion contained in the report of Dr. Amjad Hayat dated the 1st February, 2011, to the effect that discontinuance of her comprehensive care and treatment regimen would place her at risk of death."