

## THE HIGH COURT

## JUDICIAL REVIEW

[2016 No. 764 J.R.]

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED BY SECTION 34 OF THE EMPLOYMENT PERMITS (AMENDMENT) ACT 2014)**

BETWEEN

ADEJIDE DAVAD ALAWIYE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of November, 2016**

1. The applicant was born in Nigeria in 1995. He came to Ireland at the age of twelve in 2007 with his parents, one of whom was a doctor working in the Irish health service. He had obtained a permission to remain in the State from 28th August, 2007 to 28th September, 2009.

2. Between 2009 and 2011 he does not appear to have had any personal permission to remain in the State, but says he was in the company of his parents who themselves had permission.

3. In 2011 his parents left the State, leaving him in the custody and care of a doctor and his wife who are naturalised Irish citizens, originally from Nigeria.

4. In 2011 he obtained a student permission, stamp 2A. That permission expired in 2013. He then applied for a renewal of the permission under s. 4 (7) of the Immigration Act 2004. That application was refused.

5. The Minister made a proposal to deport the applicant on 11th of February, 2015, and a deportation order on 2nd September, 2016, which was received by the applicant on 12th September, 2016. The statement of grounds was filed on 6th October, 2016 and the application was brought within time.

6. The applicant has two sisters currently in the State with permission, Blessing, currently aged seventeen, who lives with a Mr. and Mrs. Sanni in Letterkenny, and who has permission to remain in the State until aged eighteen in 2017. She has been given a stamp 4 visa.

7. The applicant's younger sister Precious is now eleven, and also lives with the Sannis. She has been given a permission until her sixteenth birthday in 2020.

8. The applicant also lived for a number of years with a Mr. Oluwafemi Babalola, although it has been clarified that he is not the brother of the applicant and in fact has different parents.

9. The applicant's carers have since left the State and he is now apparently living with his girlfriend.

10. The substantial grounds test applies to this leave application by virtue of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and I have had regard to the law in relation to that test including *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 as approved in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 395.

**Are there substantial grounds for contending that the decision to deport the applicant fails to conduct a weighing exercise?**

11. Mr. Ian Whelan B.L. for the applicant submits that the decision incorrectly categorises the applicant as someone who is not a settled migrant and fails to undertake a weighing exercise.

12. However the applicant is not a settled migrant. He had a two year temporary permission, then a questionable status without any explicit permission until 2011, and then a student permission, which is inherently precarious. He has been unlawfully in the State for the past three years. As he is not a settled migrant, there is no substantial ground for contending that the Minister was in error in her analysis of the applicant's private life.

**Are there substantial grounds for contending that the decision was disproportionate?**

13. Given that the applicant's art. 8 rights are limited at best, due to his not being a settled migrant, there are no substantial grounds for contending that the decision was disproportionate. A weighing of the relevant factors is primarily for the Minister.

**Are there substantial grounds for contending that the decision is invalid by reason of a failure to give reasons?**

14. Given the applicant's limited status in the State no elaborate reasons for the Minister's conclusions are necessary. There are no substantial grounds for contending that the decision is invalid under this heading.

**Are there substantial grounds for contending that the decision is invalid because it fails to state that there is no less restrictive process available to the Minister?**

15. Mr. Whelan suggests that the Minister was obliged to use the language of "no less restrictive process" being available to her, on the basis of the Supreme Court decision in *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701. However it is a matter for the decision-maker to shape the form of the decision and not for the applicant to dictate any particular wording that must be used. There are no substantial grounds for contending that the decision is disproportionate, and accordingly there are no substantial grounds for contending that it should be condemned for a failure to express that conclusion in relation to proportionality in a way that the applicant would seek to demand. Put another way, a decision which is not actually disproportionate does not become invalid because the Minister does not use the legalistic language of a proportionality exercise.

16. In any event, the notion of “no less restrictive process” is fairly irrelevant to a yes-or-no decision such as removal from the State. The Minister having concluded that the applicant should be removed, there was no other alternative requiring consideration.

**Are there substantial grounds for contending that the conclusion that the humanitarian considerations are of insufficient weight is lacking in reasons?**

17. Again Mr. Whelan condemns the form of words used by the Minister that the humanitarian considerations in the case are not of sufficient weight to outweigh the proposal to deport. However again, the form of the decision is not one to be dictated by an applicant. An assessment of humanitarian considerations is essentially an *ad misericordiam* process and no detailed reasons can be required. The manner the decision is phrased conveys sufficient reasons having regard to the essentially discretionary nature of the process under discussion.

**Are there substantial grounds for contending that the decision is tainted by error in relation to the details of the applicant’s family situation?**

18. Mr. Whelan submits that the narrative discussion of the applicant’s family life (at pages 7 to 8 of the analysis) fails to make any reference, good bad or indifferent, to the fact that the applicant has two sisters currently living in the State with the permission of the Minister. I think under this heading that what is significant is that the Minister discusses expressly the position of the applicant’s parents, his girlfriend, and the person with whom the applicant spent some of his childhood, albeit that he is not a brother.

19. Admittedly, narrative discussion of an applicant’s representations is not normally required, and the Minister does state that she had regard to those representations. But where a narrative discussion is in fact embarked upon, and that discussion omits the most important element of the situation (in this case the fact that this applicant has two siblings who have the Minister’s permission to be present), it appears to me that substantial grounds can be said to exist to the effect that the decision is tainted by misunderstanding or error.

**Order.**

20. For the foregoing reasons I will order as follows:

- (i). that the applicant be granted leave to seek the relief sought in the statement of grounds on the following sole ground, namely that the decision is tainted by misunderstanding or error in that the respondent’s analysis of the applicant’s family life fails to have any or any due regard to the presence in the State of the applicant’s two sisters and the subsisting permissions granted to the applicant’s sisters to remain in the State;
- (ii). that the applicant serve an amended statement of grounds setting forth the foregoing sole relief together with an originating notice of motion within 7 days;
- (iii). that leave to pursue the remaining grounds be refused; and
- (iv). that the enforcement of the deportation order be stayed until the determination of the proceedings.