

**THE HIGH COURT  
JUDICIAL REVIEW**

[2002 No. 396 J.R.]

**BETWEEN****OLASUPO OLORUNYOMI****APPLICANT****AND****MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****Judgment of Gilligan J. delivered on the 30th day of July, 2004.****Background**

1. The applicant is a Nigerian national who arrived in Ireland on 7th February, 2000 when he was just over eighteen years old. He applied for asylum based on a fear of persecution due to his father's membership of the Ogboni Fraternity, a secret cult. He alleged that his father intended to carry out his promise to the cult to give him, as he was the eldest son, in human sacrifice. However, his application for asylum failed at first instance and on appeal to the Refugee Appeals Tribunal. The Tribunal member had sympathy for the applicant, was impressed by his character references but stated that the humanitarian aspects of the case were not within his jurisdiction.
2. The applicant's solicitor wrote to the first named respondent regarding the exercise of his discretion to allow the applicant to remain in the State on humanitarian grounds and outlining why a deportation order should not be made against the applicant having regard to the provisions of s. 3 of the Immigration Act, 1999. Notwithstanding this letter, dated the 5th December, 2001, the applicant was made the subject of a deportation order on 27th May, 2002 which order was served upon the applicant accompanied by a letter as dated the 21st June, 2002. The applicant's solicitor again wrote to the first named respondent by way of a letter dated 4th July, 2002 advising that the applicant had presented himself at the Immigration Bureau as requested on Friday 28th June, 2002 and that since that time the applicant's solicitors had become aware as a result of contact made with the Institute of Psycho Social Medicine in Dun Laoghaire, Co. Dublin, that following a preliminary discussion with one of the practitioners there were good grounds to believe that the applicant "may well attempt to take his own life before the repatriation takes place". His therapist indicated that a report would be available to this effect by the following day. The applicant's solicitor in these circumstances called on the first named respondent to revoke the deportation order but sought a notification of the decision to be taken by the close of business on Friday 5th July, 2002 on the basis that if the first named respondent was not inclined to revoke the order, legal proceedings had to be instituted within a time limit which expired on the following Monday the 8th July, 2002.
3. I am satisfied on the evidence that the report of the psychotherapist (hereinafter referred to as the report) was not available to the applicant's solicitor to be enclosed with the letter of 4th July, 2002. On 4th July, 2002 the Private Secretary to the first named respondent wrote to the applicant's solicitor advising him that his letter of 4th July, 2002 was acknowledged and was receiving attention.
4. On 5th July, 2002 a representative of the first named respondent wrote to the applicant's solicitor referring to the correspondence of the 4th July, 2002 and indicating that the first named respondent did not intend to revoke the deportation order in respect of the applicant and as the arrangements for the removal of the applicant from the State was a Garda operational matter it was suggested that the applicant's solicitor contact the Garda National Immigration Bureau if there were any further queries.
5. It is particularly unfortunate that the report was not available prior to the deadline as imposed by the applicant's solicitor in his letter of 4th July, 2002, especially as it was set out in the letter that the therapist had indicated that he would have a report in relation to the matter by "tomorrow" which would have been 5th July.
6. In his affidavit grounding this application as sworn on 8th July, 2002 the applicant avers that if he is returned to Nigeria he believes that he will be sacrificed as a part of a cult ritual and that the fear of return to Nigeria is so strong that he would rather die than return. He cannot express the way in which this threat impacts upon him and he refers to the fact of having attended with a consultant psycho-therapist in respect of his fears and symptoms arising from the threat of return to Nigeria and he refers to a copy of the report as dated the 3rd July, 2002 upon which and pinned together and marked with the letters "006" he has signed his name prior to the swearing of the affidavit.
7. Accordingly it is clear that prior to the application being made on the 8th July, 2002 for leave to apply for judicial review the relevant report was available and was exhibited with the applicant's grounding affidavit.
8. The content of the report clearly makes for significant reading and concluded that the applicant's fragile sense of identity and security painstakingly rebuilt over his years in Ireland is dangerously undermined by the threat of deportation and in the view of Tony Walsh Consultant Psycho-Therapist who prepared the report, the applicant is deeply depressed and at times quite actively suicidal and will continue to be so until the risk of a return to his homeland is rescinded. Even then, Mr. Walsh envisages the applicant needing a significant period of intensive psychotherapy in order to rebuild his sense of security.
9. It is in my view further unfortunate that both parties did not step backwards from the situation that was patently apparent as of Monday 8th July, 2002 when the report was available and exhibited on the application for leave although I accept it was not actually furnished to the respondents until some short time thereafter.

**Issue**

10. The central issue before the court is whether the first named respondent observed fair procedures in dealing with the applicant's request between the making of the deportation order and the institution of these proceedings on 8th July, 2002.

**Relief sought**

11. An application was made pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 for leave to proceed by way of judicial review to seek to quash the decision to refuse refugee status by Notice of Motion dated 8th July, 2002.
12. The applicant was granted leave by McKechnie J. to apply for an order of *certiorari* quashing the first named respondent's alleged decision, contained in the fax of the 5th July, 2002, that he would not revoke the deportation order made against the applicant. The

grounds on which the applicant was granted leave to claim this relief are set out in the amended statement of grounds dated the 30th May, 2003.

13. It is alleged that the fax sent by the first named respondent on 5th July, 2002 was sent before the report of 3rd July, 2002 could have been furnished to the first named respondent. It is further alleged that the decision to refuse to revoke the deportation order was *ultra vires* the powers of the first named respondent as it was made without any or any due consideration of the applicant's personal and/or constitutional rights or any or any due consideration of the issue which had arisen and to the new evidence available and to be furnished and/or the requirements of s.3 of the Immigration, Act.

14. A Statement of Opposition was lodged on 13th November, 2003. It was denied that the fax sent by the first named respondent represented a decision to refuse to revoke the deportation order made against the applicant. The first named respondent denied any duty to exercise his discretion regarding the revocation of a deportation order in accordance with the State's obligations under international law. It was also contended that if the decision contained in the said fax in fact constituted a decision, that it was made with due consideration of the applicant's constitutional and personal rights.

#### **Immigration Act, 1999**

15. Section 3(6) of the Immigration Act, 1999 details the matters the first named respondent must take into account in deciding whether to make a deportation order or not. It reads:-

The Minister shall have regard to—

- (a) the age of the person;
- (b) the duration of residence in the State of the person;
- (c) the family and domestic circumstances of the person;
- (d) the nature of the person's connection with the State, if any;
- (e) the employment (including self-employment) record of the person;
- (f) the employment (including self-employment) prospects of the person;
- (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
- (h) humanitarian considerations;
- (i) any representations duly made by or on behalf of the person;
- (j) the common good; and
- (k) considerations of national security and public policy,

"(6) In determining whether to make a deportation order in relation to a person, so far as they appear or are known to the Minister."

16. Section 3(11) states:

"The Minister may by order amend or revoke an order made under this section including an order under this subsection."

#### **Submissions on behalf of the Applicant**

17. It is contended, on behalf of the applicant, that the first named respondent's decision to propose to make a deportation order against the applicant and to refuse to revoke it was fundamentally flawed for the following reasons:-

I The decision to refuse to revoke the deportation order was made in the absence of any consideration of an expert report setting out the basis of the Opinion of the Applicant's Psychotherapist that he was at risk of suicide if returned to Nigeria in that the decision was made before the said report could be furnished to the first named respondent.

II The decision to refuse to revoke the said order herein without consideration of the content of the medical report to the effect that the Applicant was a suicide risk is unreasonable for failure to have due regard to the protection needs of the Applicant given the facts of the case and the applicable law which requires that the Applicant should not be exposed to a real risk of possible or likely breach of human rights, including a threat to his right to life.

III The decision to refuse to revoke the said deportation order without consideration of the contents of a medical report to the effect that the Applicant was a suicide risk was taken in breach of the requirements of constitutional justice in that it was taken without due or any regard to medical evidence concerning interference with the Applicant's constitutional and fundamental human rights should he be removed to Nigeria."

18. It is further submitted on the applicant's behalf that any decision of the Minister in respect of the revocation of a deportation order must be exercised within the powers creating the discretion in conformity with constitutional justice. Section 3(11) of the Immigration Act 1999 empowers the first named respondent to revoke a decision to make a deportation order. It is submitted by counsel for the applicant that if humanitarian considerations are relevant when deciding whether to make a deportation order then they must also be relevant when deciding whether or not to revoke the same order.

#### **Submissions on behalf of the Respondent**

19. In response, counsel for the first named respondent argues that the requirements of fair procedures can only be examined in the full context of the sending of the fax dated 5th July, 2002 firstly, counsel submits that there was no intention on the part of the applicant's solicitor to forward the medical report before the commencement of proceedings on 8th July, 2002. It is clear that the

applicant's solicitor did not have the medical report in his possession on 5th July, 2002 the same day the decision not to revoke the applicant's deportation was made. Therefore, counsel contends that the first named respondent could not be blamed for not taking into consideration a medical report which even the applicant's solicitor did not have at the time of expiry of the deadline which the applicant's solicitor himself purported to impose on the first named respondent. The requirements of fair procedures cannot result in a situation where the first named respondent is criticised in proceedings for failing to consider a report which could not possibly have been before him prior to the institution of proceedings.

### Conclusion

20. The issue of the risk to the life of the applicant was brought to the attention of the first named respondent by the applicant's solicitor's letter of 4th July, 2002. In the circumstances that arose, the first named respondent proceeded to make a decision not to revoke the deportation order relating to the applicant prior to being furnished with the report and without an opportunity of considering that report or of any independent assessment of that report by or on behalf of the first named respondent.

21. All procedures and discretions provided for under statute, including the discretion to revoke a deportation order pursuant to s. 3 (11) of the Immigration Act, 1999, must be exercised in accordance with the requirements of constitutional justice which involves a duty to consider the evidence before making a decision. This duty was construed as follows by Costello P. in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R.489 at 499-500:-

"It is now established as part of our constitutional and administrative law that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures discretions and adjudications permitted, provided for, or prescribed by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice (see *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317). It follows therefore that an administrative decision taken in breach of the principles of constitutional justice will be an *ultra vires* one and may be the subject of an order of *certiorari*. Constitutional justice imposes a constitutional duty on a decision-making authority to *apply fair procedures in the exercise of its statutory powers and functions* [emphasis added]."

22. A decision taken in accordance with the requirements of constitutional justice which potentially affects the right to life should only be taken after a thorough examination of the evidence with respect to the obligation on the State to protect the right to life if the decision is to be taken compatibly with the requirements of constitutional justice.

23. The Constitution prohibits acts or omissions which expose a person to a real and substantial risk to their right to life or to a breach of their human rights (including their right to freedom from torture, inhuman and degrading treatment). The risks to life include the real and substantial risk that a person may commit suicide, as established in *Attorney General v. X.* [1992] 1 IR 1.

24. I take the view that there was at issue here a bona fide risk to the life of the applicant which was brought to the attention of the first named respondent by the applicant's solicitor. Accepting that the applicant's solicitor placed a deadline of the 5th July, 2002 for a decision as to whether or not to revoke the deportation order I am satisfied that the first named respondent could not come to a conclusion not to revoke the deportation order against a background where there was a bona fide concern about the risk to the life of the applicant so that the decision could be exercised in accordance with the requirements of constitutional justice which involves a duty to consider the evidence before making a decision. It was indicated that a report from a psychotherapist would be available on 5th July. In my view a decision should not have been taken until this report of the psychotherapist was made available for consideration. Quite simply the first named respondent could have asked for the report and the applicant's solicitor should have made the report available prior to the self-imposed deadline or alternatively prior to the commencement of proceedings. I do fully accept that the first named respondent was placed in a difficult situation because of the attitude as adopted by the applicant's solicitor and further I have difficulty in understanding why the issue could not have been resolved as between the parties once the report of 3rd July, 2002 was to hand so as to obviate the necessity for this litigation.

25. The decision which is the subject matter of this application affects the right to life of the applicant and necessitated a thorough examination of the evidence. There was reference to a report from the therapist being immediately available and a final decision on the application clearly warranted sight of the report. In my view the decision should not have been taken in the absence of sight of the report notwithstanding the applicant's solicitor's self-imposed deadline.

26. In these circumstances, I will grant an order of *certiorari* quashing the decision of the first named respondent communicated by fax dated 5th July, 2002 advising that the first named respondent was refusing to revoke the deportation order made herein.