

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 950 J.R.]

BETWEEN

F.A.F. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of April, 2019

1. The applicant was born in 1955 in Nigeria and is now 63. She has four children. One child lives in Ireland and is now an Irish citizen, as are that child's husband and children. In her original asylum application, the applicant claimed that the whereabouts of her other three children was unknown, though by the stage of the tribunal hearing she said they were living with her mother and sister in Nigeria (see s. 3 of the tribunal decision), which suggests that she may not have been altogether forthcoming at all times about her knowledge of where they are. She currently lives with her Irish citizen daughter and the latter's family in the State.

2. On 4th December, 2008, the applicant arrived in the State and applied for asylum, which was rejected by the Refugee Applications Commissioner on 22nd December, 2008. That decision was appealed to the Refugee Appeals Tribunal, which rejected the appeal on 3rd April, 2009, raising not only an internal relocation issue but also some questions over the applicant's credibility.

3. On 29th May, 2009, the Minister for Justice and Equality proposed making a deportation order against the applicant. On 19th June, 2009, in response to that proposal, the applicant sought subsidiary protection and leave to remain.

4. On 20th July, 2009, the subsidiary protection application was refused and a deportation order was made on 21st July, 2009. The applicant was required to present for deportation on 10th August, 2009. None of the adverse decisions were challenged at that point, or at any point, and the applicant failed to present as required. Accordingly she was classed as an evader.

5. The next legally significant thing that happened in this case was that the applicant's solicitors applied for revocation of the deportation order under s. 3(11) of the Immigration Act 1999 on 25th October, 2016. The application, which Ms. Grace Mulherin B.L. for the respondents describes as "*legalistic*" and which bears only limited resemblance to the submissions made to me, breaks down into three headings:

(i). An allegation of a flawed original assessment process that sought to revisit previous unchallenged decisions. Seeking leave to remain on this basis does not amount to a correct procedure. The Minister at the s. 3(11) stage is not undertaking a parallel judicial review-type examination of previous unchallenged decisions.

(ii). Family life was relied on, but on a much more legalistic basis than that actually pleaded or argued. The submission sought to make an analogy with EU treaty rights.

(iii). Reliance was placed on the applicant's length of residence in the State and reference was made obliquely to the McMahon report and consequent permissions given to certain applicants who had been resident for a five-year period. The McMahon report of course does not apply to this applicant due to her evasion and, while pleaded, that ground was not pursued.

6. A further submission was made on 13th February, 2017 in connection with the McMahon report point and on 17th February, 2017 evidence was provided of the applicant's son-in-law being in paid employment, again to advance the EUTR analogy point. Ms. Mulherin's comment is a fair one when she says at para. C4 of the written legal submissions that the applicant's submissions to the Minister can be said to have only given "*the barest of details regarding her family in Ireland*".

7. Also submitted to the Minister was a letter dated 23rd July, 2018 from the applicant personally pleading for mercy on an *ad misericordiam* basis. The applicant's file was examined on 24th September, 2018 and a proposal made to refuse the application under s. 3(11). The applicant was so notified on 12th October, 2018.

8. The present proceedings were filed on 14th November, 2018, possibly very slightly out of time, the primary relief being an order of *certiorari* quashing the decision to affirm the deportation order, which was said to have been notified to the applicant on or about 15th October, 2018. I granted leave on 19th November, 2018. The applicant was evading at that point. I am informed by Mr. Garry O'Halloran B.L., who appears for her, that she attended at the GNIB on 10th December, 2018 but was not seen for some hours due to a queue and left without being seen, and she then presented again in January, 2019. The respondent's statement of opposition was filed on 14th February, 2019. I have now received helpful written and oral submissions from Mr. O'Halloran and Ms. Mulherin, and I am grateful to them both.

Section 3(11) context

9. The context of revisiting previous decisions which have either been unchallenged or unsuccessfully challenged necessarily involves a more restrictive procedure and a more restricted scope for judicial review. It is not open to an applicant to succeed in a challenge to a reiterated decision on grounds that applied to an unchallenged or unsuccessfully challenged original decision. Ms. Mulherin's thoroughly researched written legal submission sets out the extensive body of caselaw that affirms this principle, most notably the Supreme Court decision in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 [2015] 3 I.R. 164 *per* MacMenamin J. and Charleton J. and the Court of Appeal decisions in *R.B. v. Minister for Justice and Equality* [2017] IECA 26 (Unreported, Court of Appeal, 10th February, 2017) *per* Peart J. and *C.I. v. Minister for Justice and Equality* [2015] IECA 192 [2015] 3 I.R. 385 *per* Finlay Geoghegan J. In addition to those headline decisions there are a number of other decisions of the High Court to the same effect: see *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 289 [2016] 5 JIC 1214 (Unreported, High Court, 12th May, 2016), *O.O.A. v. Minister for Justice and Equality* [2016] IEHC 468 [2016] 7 JIC 2924 (Unreported, High Court, 20th July, 2016), *Mun v. Minister for Justice and*

Equality [2018] IEHC 369 [2018] 5 JIC 1011 (Unreported, High Court, 10th May, 2018), *H.A. (Chad) v. Minister for Justice and Equality* [2019] IEHC 57 [2019] 1 JIC 2909 (Unreported, High Court, 29th January, 2019), *J.A. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 343 [2018] 5 JIC 0102 (Unreported, High Court, 1st May, 2018), *O.A.B. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 142 (Unreported, High Court, 27th February, 2018), *C.O. (Nigeria) v. Minister for Justice and Equality* [2017] IEHC 725 [2017] 11 JIC 2406 (Unreported, High Court, 24th November, 2017), *J.M.N. v. Refugee Appeals Tribunal* [2017] IEHC 115 [2017] 2 JIC 2710 (Unreported, High Court, 27th February, 2017), *C.M. v. Minister for Justice and Equality* [2018] IEHC 217 [2018] 4 JIC 2501 (Unreported, High Court, 25th April, 2018), *A.B. (Albania) v. Minister for Justice and Equality* [2017] IEHC 814 [2017] 12 JIC 2113 (Unreported, High Court, 21st December, 2017), *Onyemaechi v. Minister for Justice and Equality* [2017] IEHC 682 [2017] 10 JIC 1705 (Unreported, High Court, 17th October, 2017), *B.S.S. v. Minister for Justice and Equality* [2017] IEHC 463 (Unreported, O'Regan J., 17th July, 2017), *Nagra v. Minister for Justice and Equality* [2018] IEHC 398 [2018] 6 JIC 0507 (Unreported, High Court, 5th June, 2018), *V.D. (Zimbabwe) v. Minister for Justice and Equality* [2018] IEHC 56 (Unreported, High Court, 30th January, 2018), *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 98 [2018] 1 JIC 1607 (Unreported, High Court, 16th January, 2018).

10. I turn now to the grounds as pleaded, noting that grounds 3, 5 and 6 have been withdrawn on behalf of the applicant.

Ground 1 - alleged disproportionality

11. Ground 1 alleges that "*the decision of the Minister to affirm the deportation order is disproportionate due to the failure to strike a fair balance when assessing the relative weight of the competing factors, and including the constitutional rights of the Irish citizen family members of the applicant*".

12. Insofar as this ground pleads the rights of persons who are not parties to the proceedings, that procedure is not open to the applicant who cannot rely a *jus tertii*. The decision is not disproportionate in any event. It does not strike a favourable balance from the applicant's point of view but that is lawful and not the same as striking a disproportionate balance. The applicant's family life built up at a time when her status was either precarious, unsettled or unlawful. Almost ten years of it built up during a period of active evasion of the system. It would be disproportionate interference in the functions and powers of a Minister for Justice and Equality for the judicial branch of government to condemn a decision to enforce an unchallenged order made against such an applicant. A somewhat legalistic argument was made that the decision was flawed because it relies on the judgment of the Strasbourg court in *Ezzoudhi v. France* (Application No. 47160/99, European Court of Human Rights, 13th February, 2001) which states that relationships between adult relatives do not necessarily attract the protection of art. 8 without dependency involving more than normal ties. However, the Minister can hardly be criticised for failing to consider the ECHR as applied by the European Convention on Human Rights Act 2003 where he has relied specifically on a judgment of the Strasbourg court.

13. Mr. O'Halloran also complains that the "*original deportation consideration*" (para 19 of applicant's written legal submissions) quoted from *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ. 31, which was glossed somewhat at a later date in *P.T. (Sri Lanka) v. Entry Clearance Officer, Chennai* [2016] EWCA Civ. 612. Of course this is a classic collateral attack. It is not open to an applicant to complain about an "*original deportation consideration*" which was unchallenged simply because he or she gets the idea of making a revocation application.

14. A second argument is made that the applicants sent an *ad misericordiam* letter stating "*I would like you to have mercy on me Sir*", a letter which is noted and indeed quoted verbatim in the impugned decision. Mr. O'Halloran says in written legal submissions that "*the Minister simply failed to consider exercise of his discretion*" as referred to in *D.E. v. Minister for Justice and Equality* [2018] IESC 16 [2018] 2 I.L.R.M. 324 per O'Donnell J. (para. 11). He even at one point suggested the Minister did not have regard to the Preamble to the Constitution, but of course a decision of this nature does not have to quote any particular legislation or constitutional provisions, still less caselaw, unless perhaps a specific submission is made that deportation is unlawful by reference to such a specific provision which is not the case here.

15. First of all, the complaint that the Minister failed to consider the exercise of his discretion is not pleaded, so the applicant cannot succeed under that heading. But in any event, the complaint is simply a misreading of the decision. Sure, the Minister does not say while the applicant has not shown legal entitlement to have the decision revoked, I am now going to go on to consider whether as a purely discretionary matter it should be revoked. But that is inherent in the whole nature of the process. An applicant is entitled to make *ad misericordiam* submissions as this applicant did, and the decision states that the submissions were considered. It is up to an applicant to prove that this was not done and that onus has not been discharged here (see *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 [2002] 1 I.L.R.M. 401 per Hardiman J.). There is no obligation on the Minister to use any particular form of words.

Ground 2 - alleged disproportionate interference with private and family life

16. Ground 2 contends that "*the affirmation decision is disproportionate interference with the private and family lives of the applicant, her daughter, son-in-law and grandchildren*".

17. Again, the applicant cannot plead or rely on the rights of third parties who are not applicants. It is hard to discern any particular point under this heading that is not encompassed in ground 1, but in any event no disproportionate interference with the rights of either the applicant or, for what it's worth, others, has been demonstrated for the reasons stated above.

Ground 4 - alleged failure to properly consider interference with family life

18. Ground 4 contends that "*the Minister erred in law in considering interference with family life as simply a matter of 'normal family life' and also in failing to consider the question of family life by reference to Nigerian cultural norms*".

19. The ground as pleaded is fairly obscure but is not a basis for holding that the Minister's decision is unlawful. The issue of whether the ties involved go beyond normal family life was one the Minister was entitled to consider, as referred to in the Strasbourg judgment quoted in the decision and referred to above. Any questions of Nigerian cultural norms were not made to the Minister in submissions so cannot be a ground for judicial review. That sort of gas-lighting of a decision-maker by challenging a decision in the High Court on a point that was not put before the decision-maker in the first place has been repeatedly condemned (see e.g. *Mun v. Minister for Justice and Equality* [2018] IEHC 369 [2018] 5 JIC 1011 (Unreported, High Court, 10th May, 2018) para. 17, *B.D. (Bhutan and Nepal) v. Minister for Justice and Equality* [2018] IEHC 461 [2018] 7 JIC 1709 (Unreported, High Court, 17th July, 2018) para. 10, *T.M. v. Refugee Appeals Tribunal* [2016] IEHC 469 [2016] 7 JIC 2925 (Unreported, High Court, 29th July, 2016), *Jahangir v. Minister for Justice* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018) at para. 7, *J.M.N. (a minor) v. Refugee Appeals Tribunal* [2017] IEHC 115 [2017] 2 JIC 2710 (Unreported, High Court, 27th February, 2017), *Igbosonu v. Minister for Justice and Equality (No. 2)* [2017] IEHC 748 [2017] 12 JIC 0503 (Unreported, High Court, 5th December, 2017), *H.E. (Egypt) v. Minister for Justice and Equality (No. 3)* [2017] IEHC 810 [2017] 12 JIC 1304 (Unreported, High Court, 13th December, 2017)). In any event, any such points were there all along and did not come into existence because the applicant decided to make a s. 3(11) application challenging the upholding of the original deportation order and then emerge from hiding. Differences in the applicant's situation then

and now are really a matter of degree due to the passing of time but the point itself was there all along. Even if it could be regarded as a new point it is not one of substance.

Discretion

20. Although classically discretion arises in an “*applying the proviso*” sense, that is if a purely legalistic flaw is uncovered or one that would not have made a difference to the outcome, that is not the sole basis for discretion. It has broader application in equitable and discretionary remedies, such as judicial review. It also arises in a context where a person intentionally and unlawfully frustrates and undermines a particular process and then reserves the right to himself or herself to challenge the outcome of that process if unfavourable. As put by Lord Carnwath in *Youssef v. Secretary of State for the Home Department* [2016] UKSC 3 (para. 61): “*Judicial review is a discretionary remedy. The court is not required to ignore the appellant’s own conduct, or the extent to which he is the author of his own misfortunes.*”

21. This applies here. This applicant successfully and unlawfully frustrated the enforcement of the deportation order for an almost ten-year period and I do not think it would be appropriate to give her the benefit of a discretionary remedy in the context of seeking to challenge the outcome of the deportation process. Thus I would have refused the relief on discretionary grounds even if, counterfactually, she had established any legal flaw in the process.

Order

22. In a way it is shame from the applicant’s point of view that she is going to be deported because had she played by the rules, continued to report and sought judicial review of the original deportation order she might well have been given permission under the informal process triggered by the McMahon report. Instead she cocked a snook at the system and went underground, thereby disqualifying herself from the benefit of McMahon. Responsibility for the resulting situation rests firmly with her. Perhaps that will be a cautionary tale for others.

23. The order therefore will be as follows:

- (i). I note that the time objection has not been pressed by the respondents.
- (ii). The proceedings are dismissed.
- (iii). The respondents are released from their undertaking not to deport the applicant.