

THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 50 J.R.]

BETWEEN

F.M.O. (NIGERIA), M.O.O. AND A.I.O. (A MINOR SUING BY THEIR MOTHER AND NEXT FRIEND F.M.O.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 28th day of May, 2019

1. The first-named applicant's brother arrived in the State in 2002 and appears to have become a naturalised Irish citizen since then. The first-named applicant herself, who is a 36 year old national of Nigeria, entered the State on 3rd December, 2014 with the second-named applicant and pregnant with the third-named applicant. She arrived on a visitor's visa purportedly to visit the brother.

2. On the day her visa expired, 6th January, 2015, the first-named applicant applied for asylum on the basis of an alleged claim of fear of Boko Haram. She made the fairly unlikely-sounding claim, which was disbelieved by the tribunal, that she did not tell the brother about the alleged Boko Haram threats until after the end of the holiday. She also claims to have lost her passport on the way to or from Dublin airport. Possibly this scenario illustrates the point that using a permission for an ulterior purpose is not a victimless act; and abuses, if that is what happened here, such as obtaining a visitor's visa for the undeclared purpose of seeking asylum, can lead to pressure to view visitor visa applications more sceptically to the disbenefit of other applicants.

3. The third-named applicant was then born in the State on 5th April, 2015. The asylum applications were refused by the Refugee Applications Commissioner on 15th March, 2016 and the applicants then appealed to the Refugee Appeals Tribunal. Following the commencement of the International Protection Act 2015, the applicants sought subsidiary protection.

4. The first-named applicant was interviewed under s. 35 of the 2015 Act on 4th May, 2017. The subsidiary protection applications were refused on 27th July, 2017, and on 6th September, 2017 the International Protection Office also made a negative recommendation regarding permission to remain. The refusal of protection was then appealed to the International Protection Appeals Tribunal on 19th September, 2017.

5. At the appeal hearing, as noted at para. 4.4 of the tribunal decision, the first-named applicant "*changed her evidence*" and "*was unable to give any explanation of same*", which was held to undermine her credibility. Her account of holidaying with the brother without telling him of the alleged threat to her life in Nigeria was also held to undermine her claim. The appeals were rejected on 7th August, 2018, and thus, by the end of the protection process, each decision-maker had found that the applicants' claims for international protection were inconsistent, unlikely or incredible.

6. The first-named applicant then sought review of the permission to remain decision on 16th August, 2018; and on 26th September, 2018 the International Protection Office rejected that review application under s. 49(9) of the 2015 Act. The review decision does not appear to have been notified to the applicants until 28th December, 2018 or shortly thereafter.

7. The applicants' solicitors were written to on 3rd January, 2019 to the effect that if the applicants did not return voluntarily, a deportation order would be made; and deportation orders were indeed made in respect of the applicants on 1st February, 2019. Almost immediately, on 21st February, 2019, the applicants requested revocation of the deportation orders under s. 3(11) of the Immigration Act 1999. One is struck by the almost indecent haste of the attempt to revoke the orders before the ink was dry. Any orderly system would disintegrate if the response to negative decisions is to immediately make an application to revoke backed up by the inevitability of judicial review if that is not acceded to. The message appears to be that negative decisions do not take a feather out of the applicants. In effect the message is "bring it on"; the applicants will simply knock the ball straight back with a revocation application (quite independently of whether anything has changed in the meantime or not), while of course simultaneously judicially reviewing the refusal. That cycle can of course repeat indefinitely. It could be viewed as somewhat abusive to seek to immediately revoke a decision that is based on information that could have been made available originally. If so, that could be suggestive of an endeavour to keep the mills of the legal system grinding on in order to avoid any deportation being actually carried out. It is a matter for the Minister of course to consider whether the application involves any material warranting the revocation of the order; but certainly it is not the law that as long as you keep making applications and keep litigating you cannot be deported.

8. The present proceedings were filed on 25th January, 2019, the primary relief sought being *certiorari* of the review decision and of the deportation orders. I have received helpful submissions from Mr. Eamonn Dorman B.L. for the applicants and from Ms. Sarah K.M. Cooney B.L. for the respondent. The grounds upon which the relief is sought are somewhat turgidly expressed in the statement of grounds but Mr. Dorman has helpfully boiled them down to two net legal issues in the written submissions.

Alleged failure to have regard to family rights

9. The first issue as identified in the applicants' legal submissions is "*Did the Minister breach ... s. 49(3) of the International Protection ... Act 2015, Articles 40 and 41 of Bunreacht na hÉireann, and/or Article 8(1) ECHR in failing to have regard to the Applicant's family rights including (a) her relationship with her brother, an Irish citizen who is resident in the State and (b) to the best interests of the children ? Grounds (e)(2) and (e)(3)*".

10. That complaint is founded on an erroneous premise. The Minister did not fail to have regard to the applicants' family rights. The s. 49 factors are cited expressly on p. 2 of the decision. That amounts to consideration. They are not perhaps narratively discussed in the sort of detail the applicants now want; but that does not make the decision invalid. Nor does failure to engage in narrative discussion equate to a lack of consideration, as pointed out in many previous cases with, at this stage, tedious regularity; not that that has had much impact in reducing the even more tedious regularity with which the conflation of narrative discussion with consideration continues to be attempted. It might certainly be of assistance if the next time counsel is minded to do so that the written submissions might contain a complete list of the (by now extensive) caselaw to the contrary as that might save time for all

concerned.

11. Nor did the Minister conflate s. 49 with art. 8 of the ECHR, as impliedly applied by the European Convention on Human Rights Act 2003, as suggested. It is clear that the Minister considered both.

12. To further contextualise the matter, no submissions were made under this heading; so the applicants cannot seek to quash the decision on that basis (see *e.g. Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018)). As pointed out by Ms. Cooney at para. 12 of her written legal submissions "*At no time did the applicant submit information or make representation concerning her family life in the State or her relationships with her brother*". The process is that the applicant triggers a review by making submissions under s. 49(9) so it is natural that, as eloquently put by Ms. Cooney at para. 7 of her written submissions, "*the information submitted takes front and centre stage at the review*". Sure, the Minister is not confined to that; but it is inevitable that narrative discussion (as opposed to consideration) is likely to focus on what is submitted. Even if there was an error here, which there wasn't, that could not be a basis for an order of *certiorari* given that the complaint now made was not raised in any satisfactory manner or at all by the applicants before the decision-maker.

13. The second contextual matter is that this is a review decision so it must be read in tandem with the original s. 49 decision, which *does* at p. 2 refer to the various elements of the applicants' family life. It is not necessary for the review decision to repeat that discussion. The Minister is not obliged to write a legal essay on art. 8, nor to spell out that it includes the question of best interests. Nor indeed does the best interests principle mean that, for example, the third-named applicant as a three-year-old child who has no experience of life elsewhere must be entitled to stay in Ireland. That would be a complete distortion of the principle. The best interests of the child in this sort of context generally militate in favour of children staying with their parents, and in the present case that means going to Nigeria as a family. There is no analogy whatsoever with *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 [2016] 6 JIC 2410 (Unreported, High Court, 24th June, 2016) which is relied on in the applicants' written submissions. That was a case where one parent was being deported and the other one was not. Sure, the applicants will be separated from a non-nuclear family member; but deportation to Nigeria, as insightfully put by Ms. Cooney at para. 29 of her written submissions, "*is more likely to reunite the family than break it up*" (that is, re-unite it with the father in Nigeria).

14. Furthermore, the claim in submissions of there being a *de facto* family involving the brother appears to be a mischaracterisation insofar as the brother lives in Dundalk, whereas the applicants live in Sligo.

15. Finally, insofar as art. 8 is concerned, in accordance with well-established Strasbourg caselaw, deportation of the applicants as unsettled migrants only breaches that provision in exceptional circumstances. The fact that the first-named applicant benefited from a five-week visitor visa which she used to make an unfounded asylum claim does not make her a settled migrant for any purposes, and certainly not for deportation purposes.

Alleged failure to give adequate consideration to representations and documents

16. The next question raised by the applicants is "*Did the Minister otherwise err in law and/or fetter his discretion in failing to give adequate consideration to the representations and documentation furnished by the Applicant in support of her s.49(9) application for review of permission to remain? Ground e(1)*".

17. Again, the premise of this point is incorrect. The Minister did not fail to give the applicants' material adequate consideration. Perhaps it was not all narratively discussed, but that does not amount to inadequate consideration. Yes, the Minister considered art. 8 of the ECHR, but he did not stop there. Section 49 was also considered.

18. Complaint was made in written submissions that the Minister relied on there being no obstacles preventing return to Nigeria and it is said that that is not the test. The unstated premise of that submission is that if the Minister says anything, he must thereby be claiming that that is the test. That is not the case. It is perfectly legitimate for the Minister to point out that there are no obstacles to return and nothing has been suggested as to why that is not so.

Order

19. For the sake of completeness I have considered all of the grounds pleaded and all the matters raised in written and oral submissions on behalf of the applicants, but in the absence of any grounds warranting relief appearing therefrom, and having regard to the foregoing, the order will be:

- (i). that the proceedings be dismissed; and
- (ii). that the respondent be released from his undertaking not to deport the applicants.